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ANNUAL REVIEW

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ANTI-SLAPP LITIGATION

California Supreme Court Clarifies Scope of Anti-SLAPP Statute and Rules for Deciding Church Property Disputes. *Episcopal Church Cases* (2009) 45 Cal.4th 467.

In *Episcopal Church Cases*, the California Supreme Court decided fundamental questions regarding how civil courts should resolve intra-church property disputes, and whether the anti-SLAPP statute applies to such cases.

In 2004, as a result of a dispute over the ordination of gay clergy, St. James Parish disaffiliated itself from the Episcopal Diocese of Los Angeles and affiliated itself with the Anglican Church of Uganda. A dispute then arose over who owned the parish building and the property on which it stood. The trial court granted St. James' anti-SLAPP motion, dismissing the Episcopal Diocese's lawsuit seeking to reclaim the property on the basis that the lawsuit was subject to the anti-SLAPP statute and the parish would prevail on the merits because it owned the property. The Court of Appeal reversed and the Supreme Court granted review.

The Supreme Court first held that the trial court erred in applying the anti-SLAPP statute because, regardless of the motivation for the defendants' disaffiliation from the Episcopal Diocese, the plaintiffs' lawsuit addresses only the defendants' "asserti[on of] *control over the local parish property* to the exclusion of a *right to control asserted by plaintiffs*." Thus, while the complaint referred to conduct related to petitioning for redress of grievances within the scope of the anti-SLAPP statute (i.e., the doctrinal dispute), the gravamen of the complaint was a dispute over property. Thus, the court concluded the complaint did not arise from protected conduct and the anti-SLAPP statute does not apply.

The court then held that the "general church, not the local church, owns the property." To reach this conclusion, the court initially had to choose between two competing tests for resolving church property dispute—the "principle of government approach," which requires civil

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courts to accept as binding the decisions made by the highest church judicial authority to have decided the matter, and the "neutral principles of law approach," which requires courts to apply to church property disputes the same general neutral principles followed in all property disputes. The Supreme Court decided that California courts should apply the neutral principles test. In applying neutral principles to resolve this case, the court noted that while St. James Parish holds record title to the property, other neutral principles compel the conclusion that the Episcopal Church owned the property. In particular, the court found that "from the beginning of its existence, St. James Parish promised to be bound by the constitution and canons of the Episcopal Church." The court further found that Canon 1.7.4 of the church expressly provides that all property held by a local parish "is held in trust" for the general church and the diocese. The court also noted that Corporations Code section 9142 expressly provides that a general church can amend its bylaws to create such a trust.

Horvitz & Levy LLP represented the Episcopal Diocese of Los Angeles in the Supreme Court.

ARBITRATION

United States Supreme Court Strengthens Arbitration. *14 Penn Plaza LLC v. Pyett* (2009) U.S. 556 ___ [129 S.Ct. 1456].

The United States Supreme Court continued to embrace the virtues of arbitration in a 5 to 4 decision approving labor contracts that require the arbitration of age-discrimination claims. The ruling in *14 Penn Plaza* overturned the decision by the Second Circuit that an arbitration clause in an agreement between a local union and a coalition of employers could not be enforced. The Supreme Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [age-discrimination] claims is enforceable as a matter of federal law." In other words, a union can waive an individual employee's right to sue in court for discrimination. The ruling may invite an increase in arbitration, beyond age-discrimination cases, as presaged by the Supreme Court's admission that its prior skepticism about the

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merits of arbitration "rested on a misconceived view of arbitration that this Court has since abandoned."

California Court of Appeal Affirms Order Vacating Arbitration Award Based on Arbitrator's Refusal to Hear Material Evidence. *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524.

Code of Civil Procedure section 1286.2(a)(5) requires an arbitration award to be vacated if the "rights of [a] party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy." In this case, the Court of Appeal invoked this statutory provision where an arbitrator refused to let the defendant put on its side of the case on damages, excluding evidence that the plaintiff's claim for hypothetical future damages was groundless because the allegedly tortious conduct—failure by a home seller to disclose a lot line encroachment—had been rendered entirely harmless because the seller's title insurer had paid to purchase adjacent land for the home buyer, thus curing any encroachment issue. In affirming the trial court's determination that the exclusion of evidence establishing an "absolute defense" had substantially prejudiced the defendant (resulting in an award of approximately $1.5 million in compensatory and punitive damages for nonexistent diminution in property value and for the unnecessary cost of moving a previously encroaching pool and fence), the Court of Appeal asked, "What could be more material than evidence that the problem was 'fixed' and there are no damages?" The court further noted that "tolerance for fallibility has its limits," and that "should the [arbitration] award be affirmed, arbitration itself would be suspect."

ATTORNEY-CLIENT PRIVILEGE

California Supreme Court Confirms that Attorney-Client Privilege Protects Entire Documents. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.

During litigation, the trial court directed a referee to conduct an in camera review of a legal opinion letter written by outside counsel to the defendant, redact portions of the letter the referee believed to be privileged, and disclose the remainder to the plaintiff. The defendant filed

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a writ petition challenging the ruling. The Court of Appeal denied writ relief, concluding the defendant had not demonstrated that disclosure of the unredacted portions would cause it irreparable harm.

The Supreme Court reversed with directions to issue a writ of mandate vacating the order compelling discovery. The court explained that "the attorney-client privilege attaches to [the lawyer's] opinion letter in its entirety, irrespective of the letter's content." The court also held that the referee's in camera review of the letter was improper because "Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client 'in order to rule on the claim of privilege.'" The Supreme Court held the Court of Appeal erred in denying writ relief because "a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not also establish that its case will be harmed by disclosure of the evidence."

CALIFORNIA APPELLATE PROCEDURE

California Supreme Court Extends "Prison Mailbox Rule" to Civil Appeals. *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106.

In this opinion, the California Supreme Court extended to civil cases the "prison mailbox rule," which that court had previously applied only in criminal cases. The prison mailbox rule provides that "a self-represented prisoner's notice of appeal in a criminal case is deemed timely filed . . . if the notice is delivered to prison authorities pursuant to the procedures established for prisoner mail." (Fn. omitted.)

Peter Silverbrand, a state-prison inmate, wanted to appeal from an adverse judgment against him in a medical malpractice case. Representing himself, he delivered a notice of appeal to the prison mail system within the time to appeal, but the notice was not received by the court until two days after the deadline had passed. The appeal was dismissed by the Court of Appeal, but the Supreme Court reversed and sent the case back to the Court of Appeal to resolve Silverbrand's matter on its merits. The court concluded that "[s]elf-represented prisoners—who can file a notice of appeal only by delivering it to prison authorities for

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mailing—should be allowed the same opportunity as nonprisoners and prisoners with counsel to pursue their appellate rights, regardless of the nature of the appeal pursued."

CERCLA LIABILITY

United States Supreme Court Holds that Only Those Who Intend to Arrange for a Disposal of a Substance May be Liable as "Arrangers" Under CERCLA. *Burlington North. and Santa Fe R. Co. v. U.S.* (2009) 556 U.S. ___ [129 S.Ct. 1870].

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal government and the states can recover costs incurred for the remediation of a hazardous waste site from those who have "arranged" for disposal of waste at the site. In *Burlington Northern*, the United States Supreme Court narrowed the scope of CERCLA "arranger" liability by holding that a seller of a new and useful product cannot be liable merely because the purchaser later-and unbeknownst to the seller-disposes of the product in a way that leads to contamination. The Supreme Court further held that a company cannot be held liable as an arranger unless it takes intentional steps to dispose of a hazardous substance.

In *Burlington Northern*, defendant Shell Oil Company had sold a pesticide and arranged for its delivery by common carrier. At the purchaser's facility, the pesticide was transferred to trucks and tanks, as a result of which process some spilled onto the ground. The Supreme Court held Shell did not qualify as an arranger because, while aware of incidental spills, it did not sell the pesticide intending that any be disposed of during the transfer process. The court explained that, while a defendant's knowledge of leaks, spills, dumping or other disposal of its product might sometimes provide evidence of an intent to dispose of hazardous wastes, such knowledge alone is insufficient to prove the defendant "arranged" for the disposal, especially when it occurs only as the incidental result of the sale of an unused, useful product.

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Additionally, the Supreme Court held apportionment of CERCLA liability is proper when there is a reasonable basis for determining each defendant's contribution to a single harm.

Horvitz & Levy LLP filed amicus briefs on behalf of the International Association of Defense Counsel in support of Shell, both at the certiorari stage and on the merits.

CLASS ACTIONS

In a Class Action Under The Unfair Competition Law, a Trial Court has Discretion to Allow a Class Representative Who Lacks Standing to Take Precertification Discovery to Locate a Replacement Class Representative Who Might Have Standing. *Safeco Ins. Co. of America v. Superior Court (Karnan)* (2009) 173 Cal.App.4th 814.

In 2002, the Proposition 103 Enforcement Project filed an action alleging claims under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) (UCL), against a group of insurance companies alleging they improperly charged higher premiums to drivers with no previous insurance coverage or a lack of continuous coverage. In November 2004, California voters adopted Proposition 64, which requires that the named UCL class representative must have standing—in the form of money or property lost "as a result of" the challenged business practice—to pursue claims on behalf of a UCL class. In 2007, plaintiffs' counsel filed an amended complaint naming Lisa Karnan as the class representative. In 2008, the trial court granted the defendants' summary judgment motion on the ground that Karnan had not suffered an injury in fact or lost money or property as a result of any act alleged in the complaint. However, the trial court granted Karnan's motion to take precertification discovery for the purpose of identifying a new class member with UCL standing who could serve as class representative.

The Court of Appeal upheld the trial court's order. The court held that whether to allow a UCL class representative without standing to seek discovery to find a replacement representative is a discretionary decision for the trial court, and that in making such a determination the

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court should weigh the potential for abuse of the class action procedure against the parties' rights under the circumstances. The court acknowledged that, particularly in light of the voters' expressed intention in Proposition 64 to put an end to abusive lawyer-initiated UCL actions, "the absence of a reasonable, good faith belief that the plaintiff had standing under the law in effect at the time the plaintiff was first named as a plaintiff ordinarily should compel the denial of a motion for precertification discovery." But the court nonetheless held such discovery was allowed in this case, leaving the decision "to the sound discretion of the trial court to determine whether the potential for abuse outweighs the rights of the parties in the particular circumstances of each case."

A Trial Court Abuses its Discretion When it Approves a Proposed Class Action Settlement Without Independently Assessing the Strength of the Plaintiffs' Claims in Light of the Governing Legal Principles. *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.

Two employees asserted a putative class action against their employer for unpaid minimum and overtime wages, failure to provide meal and rest periods, and other alleged Labor Code violations and unfair business practices. After 18 months of litigation, the parties mediated and reached a proposed settlement. Under the terms of the settlement, the employer would pay a total of $2 million, from which the two class representatives would receive $25,000 each and the absent class members each would receive an average payment of $561.44. Twenty class members objected to the proposed settlement, arguing they worked two hours of overtime each day and, therefore, the proposed settlement would not properly compensate them for the value of their claims. The trial court nonetheless approved the proposed settlement based on class counsel's representation that the overtime claims had "absolutely no" value, and despite the fact that the objectors' counsel claimed that class counsel's analysis was based on a mistake of law.

The Court of Appeal reversed, explaining that "[t]he most important factor" when determining the reasonableness of a proposed class action settlement "is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." Thus, "[w]hile the court need not determine the ultimate legal merit of a claim,"

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it is required to independently determine, "at a minimum, whether a legitimate controversy exists on a legal point, so that it has some basis for assessing whether the parties' evaluation of the case is within the 'ballpark' of reasonableness." Here, the Court of Appeal concluded the trial court abused its discretion in approving the class action settlement because, by simply accepting class counsel's representations regarding the value of the class's overtime claims, the trial court "lacked sufficient information to make an informed evaluation of the fairness of the settlement."

COLLATERAL SOURCE RULE

California Court of Appeal Allows Plaintiffs to Recover Medical Expenses in Excess of Actual Cost. *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686, petition for review pending, petition filed December 31, 2009, S179115.

In this personal injury action, the plaintiff invoked the collateral source rule to argue that the trial court unfairly reduced the damages she was entitled to recover as compensation for her medical expenses. Under *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the trial court ruled that the plaintiff could recover all that her insurance company paid for her medical expenses, but rejected her attempts to also recover the higher amounts that her healthcare providers had billed. It did not allow recovery of the higher amounts because no one had paid or ever will pay them; the healthcare providers agreed to accept the insurance company payments as payment in full for plaintiff's medical services.

The Court of Appeal reversed, holding that the collateral source rule applied to the difference between the amount listed on the bills prepared by the plaintiff's healthcare providers and the amount accepted by those providers as payment in full for their services. As a result, the court concluded the plaintiff could recover as the reasonable value of the needed medical services the amount stated on bills for those services even though that amount was never paid and will never be paid by anyone. The *Howell* court explained that *Hanif* did not apply because it concerned Medi-Cal payments, instead of private insurance payments, for

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healthcare services. *Howell* expressly disagreed with both *Nishihama* and *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, because they applied the *Hanif* rule to cases involving private healthcare insurance. However, *Howell* failed to cite or distinguish its own recent decision in *People v. Millard* (2009) 175 Cal.App.4th 7, which followed *Hanif* in limiting crime victims' restitution for medical expenses to the amount actually paid for medical services, not the higher "billed" amount that no one paid.

A petition for review is pending before the California Supreme Court.

CONSUMER REMEDIES

California Supreme Court Rules Plaintiffs Must Suffer Some Damage Before Asserting Claims Under the Consumer Legal Remedies Act. *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634.

The California Supreme Court has decided that a plaintiff has no standing to pursue a claim under the Consumer Legal Remedies Act, Civil Code section 1750 et seq. (CLRA), without first having suffered some form of damage within the meaning of the statute. The plaintiffs had filed a class action alleging various aspects of the defendant Sprint's customer service agreement (e.g., a waiver of class action arbitrations) were unconscionable and illegal even though there was no present dispute between the parties that implicated the challenged provisions. The Supreme Court affirmed the decision of the Court of Appeal, which had sustained the trial court's order dismissing the plaintiffs' complaint.

The court explained the CLRA protects consumers who suffer "any damage" as a result of a challenged practice, but does not protect those whose rights only have been technically infringed without damage. While the CLRA's definition of "damage" is broad enough to include transaction costs, it is not so broad as to encompass the plaintiffs' purely preemptive expenditure of fees in prosecuting their lawsuit. The court further explained: "If we were to so conclude, then the mere employment of an unlawful practice would be sufficient to authorize a CLRA suit, a meaning which, as discussed above, the language of the statute does not support." The court also rejected the plaintiffs' position that they had

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standing to obtain injunctive relief under the CLRA, ruling that only those who have suffered damage can seek injunctive relief under the CLRA.

California Supreme Court Holds that Consumers Legal Remedies Act Does Not Apply to Life Insurance. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56.

The California Supreme Court held unanimously that life insurance is not subject to the Consumers Legal Remedies Act, Civil Code section 1750 et seq. (CLRA). The CLRA prohibits certain unfair or deceptive acts and practices in a "transaction intended to result or which results in the sale or lease of goods or services to any consumer." The Supreme Court held that life insurance is not a "good" or "service" and thus not subject to the CLRA's remedies.

Plaintiffs argued that insurance is a service because an insurer may provide ancillary services in connection with the sale of insurance, such as advice to an insured in selecting a policy. Employing logic that extends beyond the insurance context, the Supreme Court rejected that argument. It explained that "ancillary services are provided by the sellers of virtually all intangible goods—investment securities, bank deposit accounts and loans, and so forth. The sellers of virtually all these intangible items assist prospective customers in selecting products that suit their needs, and they often provide additional customer services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item. Using the existence of these ancillary services to bring intangible goods within the coverage of the Consumers Legal Remedies Act would defeat the apparent legislative intent in limiting the definition of 'goods' to include only 'tangible chattels.'"

Horvitz & Levy LLP filed an amici curiae brief in support of defendants Farmers New World Life Insurance Company and Farmers Group, Inc. on behalf of American Council of Life Insurers, American Insurance Association, Association of California Insurance Companies, Association of California Life and Health Insurance Companies, Pacific Association of Domestic Insurance Companies, and Personal Insurance Federation of California.

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COURSE AND SCOPE OF EMPLOYMENT

California Court of Appeal Decides Employee's Attendance at Out-Of-Town Business Conference is "Special Errand" Within Course and Scope of Employment. *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal.App.4th 427.

An employee attended an out-of-town business conference. When he returned, he retrieved his car from the airport, drove by his office en route home, but did not stop, and was then involved in an accident. The injured plaintiff sued the employer, and the employer obtained summary judgment based upon the "going and coming rule," under which an employee is not within the course and scope of employment during a commute to or from work.

The Court of Appeal reversed. The court held that the out-of-town business conference was a "special errand" for the employer, bringing the employee's commute home within the course and scope of employment. The court held that the special errand "continues for the entirety of the trip," at least where there were "no intervening personal deviations," and therefore the employer may be vicariously liable for the tortious conduct of the employee during the trip.

DISABILITY DISCRIMINATION

California Supreme Court Decides Plaintiffs Who Establish a Violation of the Americans With Disabilities Act Need Not Prove Intentional Discrimination to Obtain Damages for an Unruh Act Claim. *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661.

California's Unruh Act provides that all persons within California's jurisdiction "are free and equal" and that, "no matter what their" disability, they "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Under California Civil Code section 52, plaintiffs can recover damages from those who violate the Unruh Act.

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The Ninth Circuit responded to a conflict between the federal and state appellate courts by asking the California Supreme Court to decide whether a plaintiff must prove intentional discrimination where he seeks damages for an Unruh Act claim based upon a violation of the Americans with Disabilities Act (ADA). The California Supreme Court held that a plaintiff who establishes a violation of the ADA need not prove intentional discrimination in order to obtain damages for an Unruh Act claim.

Ninth Circuit Holds that Compensatory and Punitive Damages are not Available for ADA Retaliation Claims. *Alvarado v. Cajun Operating Co.* (9th Cir. 2009) 588 F.3d 1261.

An employee sued his former employer under the Americans with Disabilities Act (ADA), alleging retaliation for his complaint that a manager discriminated against him because of his disability. Prior to trial, the federal district court barred the plaintiff from seeking compensatory and punitive damages for his ADA retaliation claim on the grounds that only equitable relief was available for such claims.

The Ninth Circuit agreed to hear an interlocutory appeal on this issue and affirmed the trial court's determination. On reviewing title 42 United States Code section 1981a—the statute governing the availability of compensatory and punitive damages for certain types of ADA claims—the Ninth Circuit concluded that the "plain and unambiguous provisions" of this statute "limit the availability of compensatory and punitive damages to" specific claims that did not include ADA retaliation claims. Accordingly, the Ninth Circuit held that "ADA retaliation claims are redressable only by equitable relief . . . ."

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EMPLOYMENT DISCRIMINATION

United States Supreme Court Decides Information Provided During an Employer-Initiated Investigation may Constitute Opposition to Workplace Sexual Harassment Under Title VII. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) 555 U.S. ___ [129 S.Ct. 846].

The United States Supreme Court resolved a conflict within the circuits by holding that title VII's anti-retaliation protection extended to an employee who spoke out about discrimination in response to questions posed during her employer's internal investigation into rumors of sexual harassment. In *Crawford*, the court held that to state a cause of action for retaliation when she was subsequently fired, the employee did not have to show she took the initiative to report what she knew concerning a fellow employee's inappropriate behavior.

Title VII prohibits discrimination against an employee who has "opposed" an employment practice made unlawful by the statute. (42 U.S.C.A. § 2000e-3(a).) The court interpreted the word "opposed" according to its ordinary dictionary meaning. The court decided the statement the employee gave her employer met that standard because it was an "ostensibly disapproving account of [a fellow employee's] sexually obnoxious behavior."

U.S. Supreme Court Allows "Reverse Discrimination" Lawsuit to Proceed. *Ricci v. DeStefano* (June 29, 2009, Nos. 07-1428, 08-328) 557 U.S. ___ [129 S.Ct. 2658].

A group of white and hispanic firefighters sued the City of New Haven, Connecticut for race discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.) when they were passed over for promotions. The basis of the firefighters' claim was that the city disregarded the results of examinations used in the process of determining promotions because white candidates outperformed minorities. The city's defense was that the test results needed to be disregarded because the city would otherwise be liable to the minority

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candidates for using a test that had a "disparate impact" on them (also a violation of title VII).

In a 5-4 opinion by Justice Kennedy, the U.S. Supreme Court held in favor of the firefighters. The court recognized that avoiding disparate impact liability can justify rejecting test results. However, when the reason for rejecting an otherwise valid test is itself based on race, the employer must have a "strong basis in evidence" that it would face liability unless it did so. An employer is excused from liability if it can show a test causing a disparate impact is job related and necessary and the challenger cannot show alternatives that meet the employer's goal. Here, the court found the city could have shown its test was necessary and that it is unlikely there were alternatives. Thus, there was no "strong basis in evidence" for potential disparate impact liability to excuse the city's intentional discrimination against plaintiffs.

U.S. Supreme Court Rejects "Mixed-Motives" Theory in Age Discrimination Cases. *Gross v. FBL Financial Services, Inc.* (June 18, 2009, No. 08-441) 557 U.S. ___ [129 S.Ct. 2343].

In this case, the U. S. Supreme Court rejected the "mixed-motives" theory in Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C.A. § 621 et seq.) cases. In *Gross*, the 54-year old plaintiff was reassigned to a new job with diminished responsibilities. The employer defended against plaintiff's claim by asserting his new job was a better fit for his skills and was part of a corporate restructuring effort. Over the employer's objections, the jury was instructed it could find for plaintiff if "age was a motivating factor" and the employer could not prove it would have reassigned him anyway. According to the trial court, plaintiff need only prove age was a factor and then the burden shifts to the employer to prove it would have made the decision anyway.

In a 5-4 opinion by Justice Thomas, the court held the trial court erred in giving the more lenient "mixed-motives" instruction and that the appropriate test under the ADEA was that a plaintiff must prove that "but for" his age, the adverse employment action at issue would not have been taken. The court also rejected extending to the ADEA case law that established "mixed-motives" burden shifting in title VII cases.

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ERISA

United States Supreme Court Agrees to Hear ERISA Case Involving Important Issues of Benefit Plan Administration. *Conkright v. Frommert* (No. 07-0418, appeal pending, argued January 20, 2010).

Conkright arises from a decision of the Second Circuit that narrowed the discretion typically given to administrators of employee benefit plans. The Second Circuit held that the deference afforded to plan administrators' interpretation of their plans does not apply to certain plan interpretations outside the standard benefit claims process.

Plan administrators have traditionally asserted a right to exercise broad discretion to protect their implementation of employee benefit plans in the often unpredictable world of pension and welfare benefit administration. The Supreme Court's decision will go a long way in determining how much discretion, and therefore how much protection such plans, and their sponsoring employers, can expect in managing employee benefits.

The case has been briefed and argued and is awaiting decision.

EXPERT TESTIMONY

California Court of Appeal Confirms Trial Court's Ability to Exclude Unfounded Expert Testimony in Residential Mold Case. *Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390.

Darcee Dee lived in an apartment for slightly over four months. She sued her landlord and property management company for alleged physical injuries, as well as fear of cancer, from living in an apartment that purportedly had toxic mold in it. After hearing the plaintiff's experts testify over several days of a 402 hearing, the trial court granted the defendants' motions in limine to exclude most of the plaintiff's experts' testimony based on a lack of foundation under Evidence Code section 801. The plaintiff did not dispute that certain novel tests should be excluded

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under *People v. Kelly* (1976) 17 Cal.3d 24. The remaining portions of Dee's claims were tried to a jury, and the jury rejected her claims.

The Court of Appeal affirmed the judgment, concluding that the trial court did not abuse its discretion by excluding plaintiff's experts under Evidence Code section 801 for lack of an adequate foundation. The court relied on the decision in another mold case, *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, and distinguished its own decision in *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, the only published opinion to have rejected the trial court's authority under the California Evidence Code to thoroughly analyze the foundation for expert testimony in order to determine its admissibility. The court reasoned that, unlike *Roberti*, this case involved an emerging area of scientific analysis (adverse health effects from residential mold exposure) and experts who also purported to rely on novel scientific tests which the plaintiff conceded were inadmissible. The implication of the court's opinion is that, at least where a cutting edge scientific issue is involved or where experts purport to rely on unreliable tests, an analysis of the foundation of an expert's opinion is appropriate under section 801.

Horvitz & Levy LLP represented defendant PCS Property Management.

FEDERAL APPELLATE PROCEDURE

New "Plausibility" Pleading Standard Applies to All Claims Pleaded in any Federal Civil Action. *Ashcroft v. Iqbal* (May 18, 2009, No. 07-1015) 556 U.S. ___ [129 S.Ct. 1937].

In a recent antitrust case, *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544 [127 S.Ct. 1955, 167 L.Ed.2d 929] (*Twombly*), the United States Supreme Court stiffened the federal pleading standard. Earlier cases had held a complaint should not be dismissed unless it appeared beyond doubt that a plaintiff could prove no set of facts entitling him to relief. *Twombly* discarded that liberal pleading standard in favor of a stricter standard. Under *Twombly*, a plaintiff must state "plausible" factual allegations sufficient to raise a right to relief above the level of speculation—a formulaic recitation of the elements of a claim will not suffice, nor will labels and conclusory allegations masquerading as facts.

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Because *Twombly* arose in the context of a factually complicated antitrust case, lower courts and commentators debated whether the new pleading standard was limited to the antitrust context, or whether it applied more broadly to all types of civil claims.

The court answered this question in *Iqbal*, holding that the "decision in *Twombly* expounded the pleading standard for 'all civil actions,' [citation], and it applies to antitrust and discrimination suits alike." *Iqbal* involved *Bivens* claims (the federal analog to claims against state officials under section 1983 of title 42 of the United States Code) brought against the Attorney General and FBI director by a Pakistani man detained after the September 11, 2001 terrorist attacks. He alleged unconstitutionally harsh conditions of confinement on account of his race, religion, and national origin. Applying the *Twombly* pleading standard, the court held he had failed to plead a claim entitling him to relief because his complaint contained little "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." The court also outlined a two-step approach for lower courts considering a motion to dismiss: (1) courts should refuse to credit allegations that simply state legal conclusions, then (2) for any well-pleaded factual allegations, courts should assume their veracity and determine whether they plausibly give rise to an entitlement to relief.

United States Supreme Court Opinion Addressing Harmless Error Calls Into Question Existing Ninth Circuit Standards. *Shinseki v. Sanders* (2009) 556 U.S. ___ [129 S.Ct. 1696].

In *Shinseki*, the United States Supreme Court decided an important issue regarding harmless error review in civil appeals. The harmless error doctrine requires appellate courts to disregard errors made by trial judges that do not affect the parties' substantial rights. For example, a trial judge's erroneous decision to admit a particular item of evidence may be harmless if other items of similar evidence were properly admitted.

The court's opinion in *Shinseki* affects appellants who raise arguments about evidentiary errors, jury instructions, and many other rulings made by federal district courts. In particular, the opinion calls into question the Ninth Circuit's approach that once an appellant

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establishes an error was committed, the burden shifts to the appellee to show that the error was harmless. (E.g., *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691.) Under the Supreme Court's approach in *Shinseki*, an appellate court may not presume that an error was harmful, and an appellant bears the burden of showing how the error was harmful in the overall context of the proceedings.

Ninth Circuit Holds that Deadlines for Filing Certain Post-Trial Motions are no Longer Jurisdictional. *Art Attacks Ink, LLC v. MGA Entertainment Inc.* (9th Cir. 2009) 581 F.3d 1138.

Federal appellate courts have long held that the deadlines to file post-trial motions—including a new trial motion and a renewed motion for judgment as a matter of law (JMOL)—are jurisdictional deadlines. But in *Art Attacks*, in response to a series of United States Supreme Court cases narrowing the class of jurisdictional deadlines to those established in statutes by Congress (as opposed to court-made rules), the Ninth Circuit held that the deadline to file a renewed JMOL motion under rule 50(b) of the Federal Rules of Civil Procedure is no longer a jurisdictional deadline. The court's holding does not technically extend to new trial motions under rule 59(a), but the logic of the holding will very likely compel that result in the next case presenting that issue. Thus, the deadlines to file post-trial motions remain mandatory, but because they are no longer jurisdictional, federal courts may consider untimely post-trial motions if the non-moving party neglects to raise a timeliness objection.

Revised Federal Rules on Deadlines and Time-Computation Take Effect.

Numerous revisions to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure took effect on December 1, 2009. The revised Rules will apply in all pending cases, unless a court determines it would be infeasible or unjust to apply them in a particular case.

One significant change involves deadlines. Many of the deadlines in the Civil and Appellate Rules have been revised so they are multiples of 7 days. For example, a 5-day deadline will become a 7-day deadline,

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and a 10-day deadline will become a 14-day deadline. Some deadlines have also been extended. For example, the deadlines to file post-trial motions following the entry of judgment have been extended from 10 days to 28 days. This will be a great benefit to putative appellants, who now have much more time to prepare key post-trial motions that set up issues for appeal.

Another significant change concerns the rules for computing time periods. Under the revised Rules, "days are days." Parties may no longer exclude weekends and holidays from deadlines that are 10 days or less.

FEDERAL PREEMPTION

United States Supreme Court Holds that Federal Drug Labeling Requirements do not Preempt a State Law Failure-to-Warn Claim Brought Against Drug Manufacturer. *Wyeth v. Levine* (2009) 555 U.S. ___ [129 S.Ct. 1187].

In this opinion, the United States Supreme Court concluded that federal law did not preempt a failure-to-warn claim brought under state law against a drug manufacturer.

The plaintiff in *Wyeth* had part of her arm amputated after the drug Phenergan was injected directly into her vein, leading her to develop gangrene. Subsequently, plaintiff brought a failure-to-warn action in state court against the drug's manufacturer based on negligence and strict liability theories, alleging that the labeling for the drug was defective because it was inadequate. A jury concluded that the drug manufacturer was negligent because the drug was a defective product as a result of inadequate warnings and instructions.

State courts rejected the manufacturer's argument that a direct conflict existed between Food and Drug Administration (FDA) regulations governing drug labeling and plaintiff's state law failure-to-warn claims. The Supreme Court agreed to decide the preemption issue, granting the manufacturer's petition for a writ of certiorari.

The manufacturer made two conflict preemption arguments in *Wyeth*, each of which was rejected by the Supreme Court:

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First, the manufacturer argued that it would have been impossible for it to comply with a state law duty to modify the drug's labeling without violating federal drug labeling requirements. The Supreme Court disagreed, explaining that an FDA regulation permitted the manufacturer to make certain changes to its labels without waiting for the FDA's approval for a particular drug label. The Supreme Court refused to conclude it would have been impossible for a manufacturer to comply with both federal and state law unless there was clear evidence that the FDA would not have approved the labeling change (the court found no such evidence in *Wyeth*).

Second, the manufacturer argued that the state law failure-to-warn action would obstruct the purposes and objectives of federal drug labeling requirements because the failure-to-warn action would allow a lay jury to substitute its decision about drug labeling for the expert judgment of the FDA. The Supreme Court rejected this argument too. The manufacturer took the position that these requirements established both a floor and ceiling for drug regulation and thus, once the FDA had approved a drug's label, a state law verdict could not find the label inadequate. The Supreme Court disagreed, holding that "evidence of Congress' purposes is to the contrary. . . . [¶] If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [Food, Drug, and Cosmetic Act's] 70-year history. . . . Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."

HEALTHCARE

California Supreme Court Holds Physicians are Prohibited from "Balance Billing" HMO Members for Emergency Medical Services. *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497.

The California Supreme Court held that "doctors may not bill a patient for emergency services that the HMO is obligated to pay. Balance billing is not permitted." In other words, where an HMO member receives

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emergency medical care, and the HMO pays only the portion of the bill it considers to be the "reasonable value" of emergency medical services, the emergency physicians cannot then bill the patient directly for the unpaid amount of the original bill.

The Supreme Court unanimously held that the he Knox-Keene Act transfers the financial risk of health care from patients to providers. Emergency room doctors may sue HMOs directly to resolve billing disputes, but may not inject patients into the dispute.

California Supreme Court to Decide Whether Patient's Heirs are Bound by Arbitration Agreement Between Doctor and Patient. *Ruiz v. Podolsky*, review granted October 14, 2009, S175204.

Before she died, plaintiff signed an arbitration agreement with her physician that bound all parties whose claims arose out of the physician's treatment or services, including any spouse or heirs of the decedent. In a subsequent medical malpractice action brought by the deceased plaintiff's spouse and heirs, the trial court refused to enforce the arbitration agreement and denied their petition to compel arbitration.

The Court of Appeal affirmed, holding that a patient seeking medical treatment does not have the authority to bind his wife or adult children to the arbitration agreement if they are nonsignatories to the agreement. The court explained that a wrongful death claim is separate and distinct from the cause of action the deceased would have had for personal injuries if he had survived. Therefore, the heirs do not stand in the shoes of the party who signed the agreement. The Court of Appeal further found no contractual or statutory authority conferring on "medical patients" a special status of being able to waive the constitutional due process rights of family members.

The California Supreme Court granted review in *Ruiz* and the case is currently pending in that court.

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INSURANCE

California Supreme Court Issues Significant Opinion Regarding Insurance Coverage for Environmental Pollution. *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008.

The State of California sued its insurers, seeking coverage after it was held liable for soil and groundwater contamination caused by the escape of pollutants which the State had discharged into containment ponds. Its insurers claimed coverage was barred because, among other reasons: (1) the policies contained pollution exclusions and the "sudden and accidental" exceptions to the exclusions were inapplicable because the discharges into the ponds were neither sudden nor accidental; and (2) even if some of the damages were covered because they were caused by discharges that were sudden and accidental, the State was required prove how much of its liability was traceable to those discharges.

The trial court granted summary judgment for the insurers. The California Supreme Court reversed. The court's most significant holdings are:

(1) In determining whether the sudden and accidental exceptions to the pollution exclusions applied, the focus must be on the discharges that gave rise to property damage. Here, the State was not held liable for discharging pollutants into the containment ponds, but for polluting the land and groundwater outside the ponds. Thus, the relevant discharges for application of the pollution exclusions are those in which, due to the State's negligence, pollutants were released from the ponds into the surrounding soil and groundwater.

(2) The State was not required to prove how much of its liability is traceable to sudden and accidental discharges, as opposed to gradual leakage from the ponds, to obtain coverage. Where an indivisible amount of property damages is caused by both covered and excluded risks, the insured's inability to allocate the damages by cause does not excuse an insurer from its duty to indemnify because the entirety of the damages are sums which the insured is obligated to pay for damages because of nonexcluded property damage. The Supreme Court disapproved *Golden*

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Eagle Refinery Co. v. Associated Internat. Ins. Co. (2001) 85 Cal.App.4th 1300 and *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187 insofar as they hold that an insured must show not only a covered cause contributed substantially to the damages for which the insured was held liable, but must also show how much of an indivisible amount of damages resulted from covered causes.

California Supreme Court Decides Liability Policy Covering Trucking Company is Excess to Other Policies Under Insurance Code Section 11580.9. *Sentry Select Ins. Co. v. Fidelity & Guaranty Ins. Co.* (2009) 46 Cal.4th 204.

The California Supreme Court interpreted former Insurance Code section 11580.9, subdivision (b). Under the former statute, if a leased commercial vehicle was involved in an accident with one or more other vehicles, and its owner was "engaged in the business of renting or leasing motor vehicles without operators," then the owner's insurance policy was conclusively presumed to be excess to any other insurance covering the loss. The issue presented by the Ninth Circuit's certified question was whether the nature of the insured's *primary* business or the factual circumstances surrounding the lease of the *particular* commercial vehicle was determinative in construing the meaning of the "engaged in the business of" language of the statute.

One month after the Ninth Circuit certified its question to the California Supreme Court, the California Legislature amended the statute, deleting the specific language in question and replacing it with the phrase "who in the course of his or her business rents or leases motor vehicles without operators." (Ins. Code, § 11580.9, subd. (b), as amended by Stats. 2006, ch. 345, § 1.) The Supreme Court concluded that, as a result of this amendment, "Section 11580.9, subdivision (b), now clearly provides that the renting or leasing of commercial vehicles without operators in the course of *any business* can qualify for the conclusive presumption that the insured's coverage is excess, where all the statutory requirements are otherwise met."

The Supreme Court then held that it need not resolve an apparent split of authority regarding when to apply the former statute because the conclusive presumption applied as a matter of law under either test

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where the owner of the leased commercial truck involved in the accident "routinely leased nearly three quarters of its commercial fleet of trailers to independent truckers with whom it contracted for hauling jobs. . . . Such leasing activity cannot within reason be viewed as 'merely incidental' to [the owner's] hauling business."

California Supreme Court Decides Liability Insurer had no Duty to Defend Insured Under "Accident" Policy Against Allegations that Insured Committed Deliberate Assault and Battery in Self-Defense. *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302.

ACSC insured Craig Reid under a policy covering his liability for bodily injury caused by an "' occurrence,"' defined as "'*an accident* . . . which, during the policy period, results in bodily injury . . . ." (Emphasis added.) Jonathan Delgado sued Reid, alleging that Reid assaulted and battered Delgado in the mistaken and unreasonable belief that such conduct was required for Reid's self-defense. ACSC declined to defend Reid, asserting that his assaultive conduct could not be an "accident" within scope of the policy's coverage clause.

In a unanimous opinion, the California Supreme Court agreed. The opinion clarified the law of "accident" in several respects.

First, the court explained and distinguished prior opinions that had suggested an intentional act could be considered an "accident" if it was unexpected from the perspective of the injured party. The court explained that, in determining whether an "accident" occurred, the courts must focus on the *insured's conduct*, not on the perspective of the injured party

The court also explained that events preceding or precipitating the insured's conduct should not be considered in evaluating whether the insured's conduct was an "accident." The courts should consider only the events that begin with the insured's conduct. Where no unexpected events follow the insured's conduct, but rather the conduct and its consequences occur as intended by the insured, there is no "accident."

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Finally, the court explained that an insured's subjective beliefs or motives cannot transform deliberate, assaultive conduct into an "accident." Thus, it is irrelevant whether the insured believed, reasonably or unreasonably, that the conduct was necessary, justified or lawful, or that the injured party consented to the conduct.

California Supreme Court Holds Made-Whole Rule does not Allow Insured to Recoup Attorney Fees Before Reimbursing Insurer for Med-Pay Benefits. *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511.

21st Century Insurance Company sought reimbursement for medical benefits paid to its insured following the insured's settlement of her personal injury lawsuit. The insured, Silvia Quintana, claimed she should not have to pay any reimbursement at all because she had not been fully compensated by the settlement under the "made-whole" rule when the attorney fees and costs she had to pay are subtracted from her recovery.

The California Supreme Court unanimously agreed with 21st Century that "although the made-whole rule applies in the med-pay insurance context, and the insured must be made whole as to all damages proximately caused by the injury, liability for attorney fees is not included under the made-whole rule. Those fees instead are subject to a separate equitable apportionment rule (or pro rata sharing) that is analogous to the common fund doctrine." In so deciding, the court expressly disagreed with a federal district court opinion that had come to the opposite result – *Chong v. State Farm Mut. Auto Ins. Co.* (S.D.Cal. 2006) 428 F.Supp.2d 1136.

Horvitz & Levy LLP filed an amici curiae brief in support of 21st Century on behalf of the Association of California Insurance Companies, the National Association of Mutual Insurance Companies, the Personal Insurance Federation of California, Mercury Casualty Company, and Mercury Insurance Company.

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California Supreme Court to Decide the Extent to Which *Moradi-Shalal* Bars UCL Claims. *Zhang v. Superior Court*, review granted February 10, 2010, S178542.

Zhang sued her insurer for breach of contract, bad faith, and violation of the Unfair Competition Law (UCL). The trial court sustained the insurer's demurrer to the UCL claim on the ground the "unfair" conduct alleged in the complaint was prohibited by Insurance Code section 790.03, and under *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 and *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, the plaintiff could not state a private right of action based on such conduct.

The Court of Appeal reversed, holding that "if a plaintiff expressly alleges conduct expressly prohibited by the UCL, such as fraudulent conduct likely to deceive the public [citation] or false advertising, there is simply no reason to apply *Moradi-Shalal* to prohibit the cause of action." The court explained that the plaintiff's allegations that the insurer "solicited her business through false advertising and false promises clearly justifies a claim under the UCL."

The *Zhang* court disagreed with *Textron* on the ground it had misinterpreted the Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, and as a result "focused too narrowly on the 'unfair' prong of potential liability under the UCL." According to the *Zhang* court, "while *Cel-Tech* limited the scope of 'unfair' in *competitor* UCL actions—that is, to conduct that was essentially anticompetitive in a traditional sense—it did not deal with *consumer* UCL cases." Indeed, the *Zhang* court stated in dicta "that a strong case can be made for the proposition that the fact that specified acts—such as those involved in claims handling—might be prohibited by Insurance Code section 790.03 should not give an insurer a 'free pass' with respect to conduct that violates the UCL as well as that section."

The California Supreme Court has granted review and this case is now pending before that court.

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California Supreme Court to Examine Impact of Severability of Interest Clauses in Insurance Contracts. *Minkler v. Safeco Insurance*, request for certification granted August 12, 2009, S174016.

In this liability insurance coverage dispute, Scott Minkler sued Safeco's insured David Schwartz for sexual molestation. Minkler also sued David's mother Betty for negligent supervision. Safeco denied the insureds' tender of defense. Minkler obtained a $5 million default judgment against Betty, settled with her, and sued Safeco under an assignment of rights. Safeco successfully moved to dismiss on grounds that an exclusion for the intentional acts of "an insured" (i.e., David) barred Minkler's claims against Betty. The district court rejected Minkler's argument that a severability-of-interests clause (stating: "This insurance applies separately to each insured") excepted Betty's coverage from the exclusion.

The Ninth Circuit certified the following legal question to the California Supreme Court: "Where a contract of liability insurance covering multiple insureds contains a severability-of-interests clause in the 'Conditions' section of the policy, does an exclusion barring coverage for injuries arising out of the intentional acts of 'an insured' bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?"

The Supreme Court agreed to review the Ninth Circuit's certified question. Briefing in the Supreme Court is now completed, and the case awaits oral argument and decision.

California Supreme Court Grants Review in Case Concerning Insurance Coverage for Progressive Pollution Liability. *State of California v. Continental Ins. Co.*, review granted March 18, 2009, S170560.

In a prior proceeding in federal court, the State of California was ordered to pay for the cleanup of a hazardous waste site. In this action, the State sought to recover the cost of that cleanup from its insurers. Over several years, the insurers had issued the State excess general liability policies for two- or three-year policy periods, renewing the policies when they expired. The continuing loss the State suffered

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spanned multiple policy periods. The trial court ruled that every policy in effect for any period during which the loss was occurring covered the entire loss, subject to policy limits. It also ruled, however, that the State could not recover more than the total policy limit for any one policy period from each insurer.

The Court of Appeal affirmed in part and reversed in part. It affirmed the trial court's holding that every policy in effect for any period during which the loss was occurring covered the entire loss up to the policy limit. But it reversed the trial court's holding that the State could not recover more than the total policy limit for any one policy period from each insurer, explaining that "[i]f an occurrence happens entirely within one policy period, the insured has paid one premium and can recover up to one policy limit; however, if an occurrence is continuous across two policy periods, the insured has paid two premiums, and can recover up to the combined total of two policy limits."

The California Supreme Court granted review to address the following two issues:

1. Where gradual harm triggers several insurance policies, each of which covers property damage during the policy period, does it impermissibly rewrite the policies to hold that each insurer must pay for all property damage both during and outside the policy period?

2. Did the Court of Appeal improperly allow the insured to "stack" the limits of all policies triggered by a single occurrence, directly conflicting with the Sixth District's decision in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132.

The case is fully briefed, awaiting oral argument and decision.

California Court of Appeal Holds Insurer that Refuses Insured's Entreaties to Provide Defense is Bound in Later Coverage Litigation by Judgment Against Insured Regardless of Whether Insurer had a Duty to Defend. *Executive Risk Indemnity, Inc. v. Jones* (2009) 171 Cal.App.4th 319.

Beginning with *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, the California courts have held that where an insurer

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breaches its duty to defend its insured, the insurer is bound in a subsequent coverage action by all material findings of fact in the underlying action essential to the judgment of liability and damages. In *Executive Risk Indemnity,* the California Court of Appeal, held that if, despite the entreaties of its insured, an insurer denies a defense, it is bound by the material findings in the action against the insured even if the policy does not include a defense obligation, but only requires the insurer to indemnify the insured once judgment is entered.

The Court of Appeal stated: "[W]e conclude that when an insurer (1) is duly notified of the underlying claim against its insured; and (2) is given a full opportunity to protect its interests, the resulting judgment—if obtained without fraud or collusion—is binding against the insurer in any later coverage litigation on the claim involving its insured. This rule applies regardless of whether the insurer has a contractual duty to defend, or whether or not its refusal to participate in the underlying proceedings is legally justified."

The California Supreme Court denied review.

Ninth Circuit to Rehear Important Insurance Case. *Ojo v. Farmers Group, Inc.* (9th Cir. 2009) 586 F.3d 1108, rehearing granted *en banc* October 26, 2009, No. 06-55522.

The Ninth Circuit announced it will convene an eleven-member en banc court to reconsider the three-judge panel decision in *Ojo*, a closely watched case that holds significant implications for the insurance industry. Last May, the divided three-judge panel reinstated a putative class action alleging racial bias in the amount charged for homeowners' insurance based on insureds' credit scores in violation of the federal Fair Housing Act (FHA). In authorizing the case to go forward, the panel majority concluded that a Texas law allowing insurers' use of credit scoring to calculate premiums did not preempt the FHA because the Texas law was not intended to permit what the panel perceived as "discrimination" in credit scoring. The dissenting member of the panel, however, explained that the Texas law did preempt the FHA because "Texas insurance law, unlike the FHA, makes it perfectly legal to use credit scores to price insurance policies."

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The preemption issue arises under the McCarran-Ferguson Act, which gives states primary and preemptive responsibility for regulation of insurance. The United States Supreme Court has recognized that a claim based on federal law is preempted when it conflicts with a state law relating to the business of insurance and when the application of the federal law would frustrate the state's policy or administrative regime.

Further briefing is underway in this case, to be followed by reargument and decision.

INTELLECTUAL PROPERTY

California Supreme Court Applies Single-Publication Rule to Right of Publicity Claims. *Christoff v. Nestlé USA, Inc.* (2009) 47 Cal.4th 468.

The California Supreme Court held that the single publication rule applies to a right of publicity claim asserted under Civil Code section 3344.

The jury's $15.6 million verdict in this case in 2005 generated international media attention. Russell Christoff sued Nestlé USA, Inc. for unauthorized use of his image on the label of its Taster's Choice coffee jar, after Nestlé mistakenly believed it had permission to use the photo. The Court of Appeal reversed the entire $15.6 million judgment, holding that the "single publication rule" (codified by Civil Code section 3425.3) applies to a right of publicity claim such as that asserted by Christoff. The Supreme Court agreed, noting that "[t]he language of section 3425.3 is quite broad and applies by its terms to any action 'for libel or slander or invasion of privacy or *any other tort* founded upon any single publication or exhibition or utterance'. . . . 'When the Legislature inserted the clause "or any other tort" it is presumed to have meant exactly what it said.'"

This holding has been eagerly anticipated by the media and entertainment industries, as evidenced by the significant amici interest in this case.

Horvitz & Levy LLP is representing Nestlé on appeal in this case.

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OCCUPATIONAL SAFETY

California Supreme Court to Decide Whether Cal OSHA Requires Homeowners to Provide a Safe Workplace to Home Repair Laborers. *Cortez v. Abich*, review granted December 2, 2009, S177075.

A laborer, who was injured while helping an unlicensed contractor remodel a home, sued the homeowners for failing to make the work area safe. The trial court ruled the homeowners had no duty to comply with California Occupational Safety and Health Act (Cal OSHA) safe workplace requirements because they did not employ him. The California Court of Appeal affirmed because "the remodel at issue . . . was personal—to enhance the owners' enjoyment of their residence. We believe our conclusion tracks the goal of Cal OSHA in that it directs its regulatory effect toward the intended target—business employers."

The California Supreme Court granted review to decide the following issue: Does a homeowner owe a duty, pursuant to Cal OSHA, to provide a safe working environment to a laborer working on a noncommerical home repair project?

This case is currently being briefed in the Supreme Court.

PRIVETTE DOCTRINE

California Supreme Court to Decide Whether *Privette* Doctrine Bars Personal Injury Claims by Self-Employed Contractors. *Tverberg v. Fillner Construction, Inc.*, review granted February 25, 2009, S169753.

In a series of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689, the California Supreme Court has limited the circumstances in which homeowners and others may be held liable to employees of independent contractors for work-related injuries. Under the *Privette* doctrine, one who hires a contractor generally has no liability to contractors' employees for work-related injuries unless the hirer conceals a dangerous condition or otherwise affirmatively contributes to the employee's injuries. In *Tverberg v. Fillner Construction, Inc.* (2008) 168

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Cal.App.4th 1278, the Supreme Court has granted review to decide whether *Privette*'s limitations on liability should apply where the injured party is a self-employed contractor rather than a contractor's employee.

The Court of Appeal in *Tverberg* refused to extend the *Privette* doctrine to claims by self-employed contractors, holding that the primary rationale underlying *Privette* is that contractors' employees are eligible for workers' compensation. According to the Court of Appeal, self-employed contractors "[are] *not* eligible for workers' compensation benefits." In so holding, the Court of Appeal refused to follow *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, in which the Court of Appeal held that one who hires a contractor may reasonably delegate the responsibility to ensure workplace safety to the contractor, whether the work is performed by the contractor's employees or the contractor himself.

Horvitz & Levy LLP represents defendant and respondent Fillner Construction, Inc., in the California Supreme Court. The case is fully briefed, awaiting argument and decision.

PRODUCT LIABILITY AND TOXIC TORTS

California Court of Appeal Extends Sophisticated User Doctrine to Negligence Per Se Failure to Warn Claims. *Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549.

This decision follows the California Supreme Court's adoption in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, of the "sophisticated user" doctrine in both negligent and strict liability failure to warn cases. The doctrine negates a manufacturer's duty to warn of a potential danger posed by a product where the plaintiff has, or should have had, advance knowledge of a product's inherent hazards.

The plaintiff, an HVAC technician, alleged he sustained injuries when he was exposed to phosgene gas that was created when he brazed air conditioning lines containing defendants' refrigerants. He sued American Standard, which manufactured the air conditioning unit, as well as DuPont, Honeywell, and Grainger, which manufactured or distributed the refrigerants. American Standard obtained summary

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judgment on the ground that plaintiff's claims were barred by the sophisticated user defense. That judgment was affirmed by the Court of Appeal and the California Supreme Court in the *American Standard* case. On remand, plaintiff filed an amended complaint alleging negligence per se and strict liability design defect claims against the remaining defendants. The trial court sustained demurrers to the amended complaint, and plaintiff appealed.

In a published decision, the Court of Appeal affirmed in part and reversed in part. The court affirmed as to the negligence per se claim, concluding that the sophisticated user defense bars that claim, which was essentially a negligent failure to warn claim. Because plaintiff was a sophisticated user of the refrigerants, any failure to warn about the dangers of the refrigerants was not the legal cause of his injuries. However, the court reversed as to the risk-benefit design defect claim. The court concluded that the sparse evidentiary record on demurrer was insufficient to allow it to determine whether the benefits of the refrigerants' design outweighed the risks of danger associated with that design, or whether Restatement Second of Torts, section 402A, comment k (which confers design defect immunity on manufacturers of certain products), should apply to refrigerants.

Horvitz & Levy LLP represented the defendants on appeal.

PUNITIVE DAMAGES

California Supreme Court Rules that a Punitive Damages Award Cannot Exceed the Amount of a Substantial Compensatory Damages Award in the Absence of Highly Reprehensible Conduct. *Roby v. McKesson* (2009) 47 Cal.4th 686.

In this case, the California Supreme Court ruled that a $15 million punitive damages award was constitutionally excessive and that any amount of punitive damages in excess of the $1.9 million compensatory damages award would violate due process.

The plaintiff, Charlene Roby, sued her employer for disability discrimination and harassment. A jury awarded $3.5 million in compensatory damages and $15 million in punitive damages. The Court

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of Appeal reduced the compensatory damages to $1.4 million, and further concluded that the punitive damages were excessive under the federal Due Process Clause. The court determined that the maximum permissible punitive damages award, based on the facts of the case and the size of the compensatory damages award, was $2 million (1.4 times the amount of compensatory damages).

The California Supreme Court granted review. With respect to the compensatory damages, the court reinstated part of the verdict, bringing the total compensatory damages back up to $1.9 million.

Turning to the punitive damages, the court concluded that certain corporate managers had participated in misconduct justifying punitive damages against the defendant company. But the court also held that a supervisor, who had authority over four employees at a local distribution center, was not a "managing agent" within the meaning of Civil Code section 3294 because the supervisor lacked authority to set company-wide policy, i.e., "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." This clarification is significant because some recent Court of Appeal decisions have held employees were managing agents even if they lacked such broad authority.

Addressing the amount of the punitive damages, the court concluded that the reprehensibility of the managing agent's conduct "was at the low end of the range of wrongdoing that can support an award of punitive damages under California law." Accordingly, nothing in the defendant's conduct justified a departure from the directive in *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 [155 L.Ed.2d 585, 123 S.Ct. 1513] that the ratio between punitive and compensatory damages should be low, perhaps only one to one, when the amount of compensatory damages is substantial. Accordingly, the court concluded that the punitive damages could not exceed the $1.9 million in compensatory damages.

In a concurring and dissenting opinion, Justice Werdegar (joined by Justice Moreno), reasoned that a higher award—double the compensatory damages—was warranted because: (1) the defendant's conduct was more reprehensible than described by the majority, and (2)

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the defendant is a large corporation, ranked in the top 50 of the Fortune 500.

California Supreme Court to Decide Whether Punitive Damages Claims may be Assignable if They Arise from an Assignable Cause of Action that is not Personal in Nature. *Nelson v. Exxon Mobil Corp.*, review granted February 10, 2010, S179122.

In this case, the Court of Appeal addressed whether the right to recover punitive damages is assignable under California law. The court held that the right to recover punitive damages is assignable in cases where the right arises from an assignable cause of action. In this particular case, the plaintiff's right to recover punitive damages arose from a claim for groundwater contamination, an injury to real property. The court concluded that, because claims for injury to real property transfer with the property when title passes from one owner to another, punitive damages claims connected to such injuries are assignable.

The court noted, however, that punitive damages claims are not assignable when they arise out of a cause of action of a personal nature (e.g., slander, assault, malicious prosecution). The court acknowledged that some other cases, including California Supreme Court cases, suggest that the right to seek punitive damages is never assignable. But the court said the results in those cases could be harmonized with the new rule announced in this opinion.

The California Supreme Court granted review and the case is currently pending in that court.

Trial Court Properly Dismissed Punitive Damages Claim Because Defendant had a Good Faith Basis for Believing that its Conduct was Proper, and Issue of Liability Turned on a Legal Question of First Impression. *Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156.

The plaintiff, an automobile wholesaler, provided vehicles to a retail dealer for sale on a consignment basis. The defendant, a finance company that loaned money to the retail dealer, repossessed the vehicles when the dealer went out of business. The plaintiff sued to reclaim the

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vehicles under the Uniform Commercial Code (UCC), and also asserted claims for fraud and punitive damages. The trial court granted a directed verdict on the fraud and punitive damages claims but sent the UCC claim to the jury. The jury ruled in favor of the plaintiff and the trial court entered judgment awarding the plaintiff possession of the vehicles plus $32,000 in damages.

On appeal, the plaintiff challenged the trial court's directed verdict on the issue of punitive damages. The Court of Appeal affirmed. It held that no reasonable jury could have found by clear and convincing evidence that the defendant acted with malice, oppression, or fraud when it repossessed the vehicles. There was no clear evidence that the defendant knew the plaintiff's interest in the vehicles was superior to its own. Rather, the issue of ownership of the vehicles turned on the resolution of an issue of first impression under the UCC. Accordingly, there was no clear and convincing evidence that the defendant intended to deprive the plaintiff of his property or legal rights.

UNFAIR BUSINESS PRACTICES

Divided California Supreme Court Largely Nullifies Consumer Law Reforms Previously Understood to Have Been Enacted by the Voters Under Proposition 64. *In re Tobacco II Cases* (2009) 46 Cal.4th 298.

In 2004, California voters passed Proposition 64 to eliminate the anomalous provision that previously gave "any person" the right to act as a public prosecutor in bringing consumer claims on behalf of the state's citizens under the Unfair Competition Law (UCL). Proposition 64 brought UCL cases in line with generally applicable standing requirements by providing that only a person who has suffered injury in fact, and lost money or property as a *result* of an unfair business practice, has standing to sue under the UCL.

In an opinion issued on May 18, 2009, however, four members of the California Supreme Court construed Proposition 64 to mean that consumers who could not themselves establish standing to bring an action in their own name under the new rule could nonetheless be included in a

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class of plaintiffs represented by a single named individual who can establish standing. In holding that Proposition 64's "standing requirements are applicable only to the class representatives, and not all absent class members," the court effectively read into Proposition 64 an implicit intent to carve out UCL claims from the rule that class actions are procedural devices for case management, and are not intended to alter the substantive rights that the parties would have if the same claims were pursued individually.

The court further indicated that, because the new standing requirements do not impose any impediment to unnamed class members' right to recovery, those members may obtain a monetary award for restitution measured by what they "may have" lost by means of the defendant's unfair business practice, even if there is no evidence of an injury actually caused by the claimed acts of unfair competition.

Finally, the court held that, in an action based on allegedly deceptive business practices, the named plaintiff (either in an individual action or as the named representative in a class action) must nominally show actual reliance on the claimed deception, but such reliance by the individual may be inferred from evidence that the defendant's misrepresentation would have been "material" to a reasonable person, in the abstract. The court did not explain how this approach can be squared with the court's earlier flat rejection of such a "fraud on the market" theory of liability; it will be interesting to see how lower courts interpret this part of the court's opinion in future cases.

The three dissenting justices disagreed with the majority's approach, noting that the counterintuitive effect of the reasoning as applied in the case before it is that "so long as the named plaintiffs actually relied on the [tobacco company defendant's] allegedly deceptive advertising claims when buying and smoking cigarettes, they may seek injunctive and restitutionary relief on behalf of *all California smokers who simply saw or heard such ads* during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes."

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California Supreme Court Enforces Class Action and Injury in Fact Requirements for UCL. *Arias v. Superior Court* (2009) 46 Cal.4th 969; *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993.

In *Arias*, the California Supreme Court held that a plaintiff who sues a defendant on behalf of himself and others under California's Unfair Competition Law (UCL) must satisfy procedural class action requirements. Thus, the Court held the Court of Appeal correctly affirmed a trial court's decision to strike a UCL claim brought by the plaintiff against his former employer on behalf of himself and others because the plaintiff failed to comply with the pleading requirements for class actions.

In *Amalgamated Transit Union*, the California Supreme Court held that an association that has not itself suffered an actual injury cannot bring an action under California's Unfair Competition Law (UCL). The court determined that allowing an uninjured assignee of a UCL claim to stand in the shoes of the original injured claimant would contravene the UCL's express statutory standing requirement, which provides that a private UCL action can be brought only by a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition." The court also decided that an association cannot maintain a UCL claim based on the premise that its members have suffered an injury.

WAGE AND HOUR LAW

California Supreme Court to Consider Employee Recovery of Tips and Waiting Time Penalties. *Lu v. Hawaiian Gardens Casino*, review granted April 29, 2009, S171442; *Pineda v. Bank of America*, review granted April 22, 2009, S170758.

In these cases, the California Supreme Court will decide whether Labor Code section 351—which prohibits employers from taking "any gratuity or a part thereof that is paid, given to, or left for an employee by a patron"—creates a private right of action for employees.

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In *Lu*, a former casino dealer brought a class action challenging the legality of a casino's policy requiring dealers to contribute part of the gratuities they receive as tips to a tip pool for employees who provide service to casino patrons. Plaintiff's class action was based in part on Labor Code section 351. The Court of Appeal affirmed the dismissal of the section 351 claim, holding that section 351 did not afford employees a private right of action to enforce the protections contained in that statute.

This case is fully briefed, awaiting oral argument and decision.

The California Supreme Court also granted review of the Court of Appeal's decision in *Pineda v. Bank of America*.

In *Pineda*, an employee gave his employer two weeks advance notice of his resignation. His employer, however, did not give its employee his final pay until several days after his resignation date. Plaintiff brought a class action asserting claims under both the Labor Code and the Unfair Competition Law (UCL) based on the defendant's failure to timely pay his final wages. The trial court dismissed plaintiff's claims and plaintiff appealed.

The Court of Appeal held that plaintiff's claim for willful failure to timely pay wages under Labor Code section 203 was barred by the applicable one-year statute of limitations. The Court of Appeal also affirmed the dismissal of plaintiff's UCL claim, which sought to recover the section 203 penalties as restitution, holding that section 203 penalties are not restitutionary payments and thus cannot be recovered under the UCL.

This case is fully briefed, awaiting oral argument and decision.

Plaintiff May Bring a Representative PAGA Claim Without Satisfying Class Action Requirement. *Arias v. Superior Court* (2009) 46 Cal.4th 969.

The California Supreme Court held that an employee who brings a representative claim under the Labor Code Private Attorneys General Act (PAGA) seeking civil penalties for various violations of wage-and-hour laws need not satisfy class action requirements.

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Claim Alleging Violation of the FLSA is not Subject to Class Certification Under California Law. *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067.

Plaintiffs filed an action alleging violations of the federal Fair Labor Standards Act (FLSA). The trial court denied their motion for class certification.

The FLSA contains provisions governing minimum wages and maximum hours. Employers who violate those provisions may be liable under section 216 of title 29 of the United States Code. On appeal from the trial court's denial of class certification, the Court of Appeal held that FLSA claims cannot be maintained as class actions under the California class action statute. As the court explained, section 216 contains an "opt-in" feature providing that "'[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'" (Emphasis omitted.) The court concluded that this opt-in provision could not be reconciled with a class action under California law.

Defendant May Settle Claims Involving a Bona Fide Dispute Over Wages. *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796.

The Court of Appeal held that Labor Code sections 206.5 and 1194 do not prohibit a defendant from settling claims involving a bona fide dispute over whether wages are owed.

WRONGFUL TERMINATION

Ninth Circuit Decides Employer's Legitimate, Independent Decision to Terminate Employee Insulates Lower-Level Supervisor with Illegal Motive to Retaliate Against Employee. *Lakeside-Scott v. Multnomah County* (9th Cir. 2009) 556 F.3d 797.

The Ninth Circuit Court of Appeals, addressing an issue of first impression for that court, held that an employer's independent, legitimate decision to terminate an employee insulates from liability a lower-level supervisor who had an illegal motive to retaliate against the employee. The court focused on causation, holding that the supervisor was not liable

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because there was no evidence the supervisor's retaliatory motive influenced the final decision maker's decision to terminate. The court suggested that the result would be different if the employer would not have considered dismissal but for the supervisor's retaliatory conduct.

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