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HORVITZ & LEVY LLP
15760 VENTURA BOULEVARD
18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
T 818.995.0800
WWW.HORVITZLEVY.COM

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ARBITRATION

California's *Discover Bank* Decision, Invalidating Class Arbitration Waivers in Certain Consumer Contracts, is Preempted by the Federal Arbitration Act. *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742].

Until the recent decision by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, consumer contracts that included arbitration agreements waiving consumers' right to participate in class actions were deemed to be unconscionable and unenforceable in California when applied to bar certain types of class claims – those alleging that the defendant carried out a scheme to cheat large numbers of consumers out of individually small sums of money. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162-163.)

By a 5-4 vote, the U.S. Supreme Court held that California's *Discover Bank* rule negating contractual class arbitration waivers is preempted by the Federal Arbitration Act (FAA). The Court therefore held AT&T was entitled to an order compelling arbitration of claims by cell phone purchasers who sought class treatment of claims that they should not have been charged sales tax when buying phones that were advertised as free.

The FAA generally requires courts to enforce arbitration agreements as written. While section 2 of that statute permits arbitration clauses to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," the *Discover Bank* rule impaired the objectives of Congress in enacting the FAA—namely, "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." Under *Discover Bank*, parties were required to participate in class arbitration in the face of the parties' agreement to the contrary. The U.S. Supreme Court noted that class arbitration sacrifices the speed and informality that is the principal purpose of arbitration under the FAA, and substitutes in its place a procedure that is slower, more costly, requires more procedural formality, and carries significantly greater risks for defendants than arbitration of individual consumer claims.

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Arbitration Agreement May Not Require Employee to Waive Berman Hearing As a Condition of Employment. *Sonic Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659.

An employee with a claim for unpaid wages has the right to pursue an informal hearing—known as a "Berman" hearing—before the Labor Commissioner on his claim. If an employee obtains an award from a Berman hearing, the employer may appeal to the trial court for de novo review of the award.

The California Supreme Court has now held that where an employee enters into an arbitration agreement with his employer as a condition of employment, a provision in the arbitration agreement requiring the employee to waive the option of a Berman hearing is both contrary to public policy and unconscionable. Accordingly, the court has determined that the filing of a petition to compel arbitration under such an agreement before the Labor Commissioner holds a Berman hearing and issues a decision is premature and must be denied, including in cases where the arbitration agreement is governed by the Federal Arbitration Act. The court concluded, however, that arbitration agreements may be enforced after a Berman hearing has taken place.

CIVIL PROCEDURE

California Supreme Court Holds That Citizen Proponents Have Standing to Defend Voter Initiative. *Perry v. Brown* (2011) 52 Cal.4th 1116.

The California Supreme Court is authorized to answer questions of California law posed by, among others, United States Courts of Appeals. In this case, the Ninth Circuit Court of Appeals asked for the California Supreme Court's interpretation of state law to help the Ninth Circuit resolve an appeal challenging under the federal constitution Proposition 8, an initiative passed by California's voters in 2008 to forbid same-sex marriage. The Supreme Court agreed to answer the question.

The question before the Supreme Court was solely a procedural one—whether Proposition 8's proponents had legal standing under

California law to defend the initiative in court. The standing issue was important because no appropriate state official—including the governor, attorney general, and secretary of state—would agree to defend Proposition 8's constitutionality.

The court held that, under California law, an initiative's proponents do have standing to defend the initiative when the public officials who ordinarily would act decline to do so. The court noted that no official of the executive or legislative branch has the power to veto or invalidate an initiative and that "[i]t would exalt form over substance to . . . permit these public officials to indirectly achieve such a result" by not defending an initiative in court.

Pre-litigation Settlement of One Heir's Wrongful Death Claim Does Not Bar Later Wrongful Death Action by Other Heirs Under the One-Action Rule. *Moody v. Bedford* (2012) 202 Cal.App.4th 745.

The adult child of a woman killed in a vehicle collision made a claim against a driver involved in the collision. Before any lawsuit was filed, the driver's insurer settled for the policy limits after the adult child represented she was the decedent's sole heir. Once the settlement was paid, the decedent's minor children filed a wrongful death action against the driver. The trial court granted summary judgment for the driver, ruling that the one-action rule, which requires all heirs to join in a single wrongful death action, barred the minor children's lawsuit.

The Court of Appeal reversed, holding that the one-action rule applies only after a wrongful death action has been filed, and is inapplicable to the pre-litigation settlement of a wrongful death claim by one heir— even where that heir secures the settlement by fraudulently misrepresenting that she was the decedent's sole heir. Thus, to gain the protection of the one-action rule, an insurer must require a wrongful death claimant to file suit before settling that claim.

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CLASS ACTIONS

California Supreme Court Construes California's Mandatory Dismissal Statute and Holds That Only a Complete Stay of All Proceedings in an Action is a "Stay Of Proceedings" Sufficient to Toll the Five Year Period for Bringing an Action to Trial. *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717.

The plaintiff initiated a putative class action but failed to bring her action to trial within five years of filing her complaint. The defendants moved to dismiss the action under California's mandatory dismissal statute, Code of Civil Procedure section 583.340, which requires dismissal of cases not brought to trial within five years. The trial court granted the motion. A divided Court of Appeal reversed, holding that the trial court erred in dismissing the action in part because the mandatory dismissal statute contains an exception for periods when "[p]rosecution or trial of the action was stayed or enjoined." (Code Civ. Proc., § 583.340, subd. (b).) The Court of Appeal ruled that "a partial stay of an action," such as a stay of discovery, is a stay of prosecution within the meaning of the statute and thus tolls the five-year period.

The California Supreme Court granted review and reversed. After reviewing the statute's language and the broader statutory framework, the Supreme Court held that only complete stays—those that bar all activity in a case—are "stays of prosecution" within the meaning of the mandatory dismissal statute. The Court remanded to the Court of Appeal for a determination of whether the trial court abused its discretion by concluding that, under a different subdivision of the mandatory dismissal statute (Code Civ. Proc., § 583.340, subd. (c)), the partial stays at issue did not render it "impossible, impracticable or futile" to bring the action to trial within five years.

Horvitz & Levy represented defendant E-Commerce Exchange, Inc. in the Supreme Court and Court of Appeal.

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Where an Order Sustains a Demurrer to Both Class Claims and Individual Claims, an Appeal Lies Only from the Subsequent Entry of a Final Judgment. *In re Baycol Cases I & II* (2011) 51 Cal.4th 751.

A trial court in a single order issued in April 2007 sustained a defendant's demurrer without leave to amend to both class action allegations and the plaintiff's individual claims. The court then entered a judgment, but not until October 2007. The defendant served notice of entry of judgment that same month. The plaintiff filed a notice of appeal in December 2007 challenging the dismissal of both the class allegations and the individual claims.

The Court of Appeal reversed the portion of the order sustaining the demurrer to the plaintiff's individual claims but dismissed as untimely the appeal as to the class allegations. The Court of Appeal held that while an order sustaining a demurrer without leave to amend is generally not an immediately appealable order—the appeal typically lies from the subsequent judgment of dismissal—the portion of the April 2007 order dismissing the class allegations was immediately appealable because it was tantamount to a dismissal of the action as to all members of the class other than plaintiff. Thus, the court held the plaintiff's December 2007 notice of appeal was untimely as to the class claims.

The California Supreme Court reversed, holding that, where an order sustains a demurrer as to both class claims and individual claims, an appeal lies only from the subsequent entry of a final judgment, not from the earlier order dismissing the class claims. The Court therefore held the plaintiff's appeal as to the class allegations was timely.

United States Supreme Court Holds Gender Discrimination Class Action Against Wal-Mart Cannot Proceed. *Wal-Mart Stores, Inc. v. Dukes* (2011) __ U.S. __ [131 S.Ct. 2541, 180 L.Ed.2d 374].

In *Wal-Mart Stores, Inc. v. Dukes, et al.*, the United States Supreme Court held that a class action on behalf of 1.5 million women pursuing gender discrimination claims against Wal-Mart could not be certified under Federal Rule of Civil Procedure 23(a) and (b)(2).

The plaintiff class alleged that Wal-Mart discriminated against female employees under Title VII in making pay and promotion decisions. The district court certified the class, and the Ninth Circuit affirmed.

The U.S. Supreme Court reversed, holding that the proposed class failed to raise any common questions of law or fact, as required by Rule 23(a)(2). Specifically, the Court concluded that plaintiffs' statistical and anecdotal evidence was insufficient to show that Wal-Mart operated under a general policy of discrimination that applied at every store, and that as a result, the proposed class could not "generate common answers apt to drive the resolution of the litigation."

The Court also held that claims for individualized monetary relief (such as the backpay plaintiffs sought in this case) may not be certified under Rule 23(b)(2), but left open whether class claims for monetary relief can ever proceed under Rule 23(b)(2).

CONTRACTS

California Supreme Court Will Decide Whether Evidence of Misrepresentations Regarding the Terms of a Written Contract is Admissible Under the Fraud Exception to the Parol Evidence Rule. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2011) 191 Cal.App.4th 611, review granted April 20, 2011 (S190581).

California's parol evidence rule generally prohibits the introduction of extrinsic evidence, including evidence of any prior or contemporaneous oral agreement, to vary, alter, or add to the terms of an integrated written instrument. This rule is subject to an exception "to establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g).) In 1935, the California Supreme Court limited this exception, holding that it did not authorize the admission of parol evidence to prove an oral promise made without intent to perform where the alleged promise directly contradicts the provisions of the written agreement. (See *Bank of America Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263.) Since then, other courts, including the Court of Appeal here, have held that the Pendergrass limitation to the fraud exception does not apply to bar admission of parol evidence of

misrepresentations regarding the content of a written contract used to induce a party to sign the contract.

The Supreme Court may use this case to reconsider Pendergrass (i.e., whether evidence of promissory fraud is admissible under the fraud exception to the parol evidence rule) or to decide whether the post-Pendergrass cases limiting Pendergrass to promissory fraud were properly decided.

COPYRIGHT

"First sale" Defense to Copyright Infringement Does Not Apply to Goods Manufactured Outside the United States. *John Wiley & Sons, Inc. v. Kirtsaeng* (2d. Cir. 2011) 654 F.3d 210.

Section 602(a)(1) of the Copyright Act enables a copyright owner to prohibit the unauthorized importation into the United States of copies of copyrighted works acquired abroad. But under the "first sale" doctrine–codified in section 109(a) of Title 17 of the United States Code–the sale of a copy "lawfully made under this title" terminates the copyright owner's right to interfere with subsequent sales or distribution of that particular copy and therefore provides a defense to copyright infringement liability.

In 2010, the U.S. Supreme Court examined the interplay between section 602(a)(1) and section 109's first sale doctrine in the *Costco Wholesale Corp. v. Omega, S.A.* case out of the Ninth Circuit. Ultimately, the Supreme Court wound up evenly divided 4 to 4 over the issue of whether or not the first sale doctrine applies to goods that are lawfully manufactured abroad and then imported into the United States without the copyright owner's authorization, with Justice Kagan having recused herself from the case.

This issue has now resurfaced before the Second Circuit in *Kirtsaeng*, which has decided that section 602(a)(1) trumps the first sale doctrine. *Kirtsaeng* holds "the first sale doctrine does not apply to works manufactured outside of the United States." The Second Circuit arrived at this conclusion because it determined "that the phrase 'lawfully made under this [t]itle' in § 109(a) refers specifically and exclusively to works

that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works."

DAMAGES

California Supreme Court Will Decide Whether Trial Court Erred by Excluding Expert Opinion Regarding Lost Profits in Case Testing the Extent to Which Innovation Reasonably Equates to Market Share. *Sargon Enterprises, Inc. v. University of Southern California* (2011) 2011 WL 437295, review granted April 27, 2011 (S191550).

When a defendant prevents the operation of an unestablished business, the plaintiff may recover an award of lost anticipated profits only by showing with reasonable certainty their nature and occurrence. Here, plaintiff alleged he invented a superior dental implant, but was unable to market that implant because of defendant's alleged breach of a clinical trial agreement. Plaintiff's damages expert would have testified that the anticipated lost profits depended principally on the implant's innovativeness. Thus, according to plaintiff's expert, if the jury found a high degree of innovation, plaintiff would have achieved a larger market share and larger profit than if the jury found a lower degree of innovation. The lost profits under this theory ranged from $1.18 billion to $220 million. The trial court excluded the expert's opinion as speculative.

In a split decision, the Court of Appeal reversed. The majority held the trial court's ruling was "tantamount to a flat prohibition on lost profits in any case involving a revolutionary breakthrough in an industry," but also acknowledged the "factor of innovation . . . is not easily converted into dollars and cents." The dissent concluded that the trial court acted within its discretion in ruling that a comparison of "degrees of innovation" was inherently speculative.

The California Supreme Court granted review on the issue whether the trial court erred by excluding the plaintiff's expert's opinion. The Supreme Court is expected to address the type of evidence that can show with reasonable certainty the nature and occurrence of anticipated lost profits. And at the heart of the case appears to be the question whether

innovation can, with reasonable certainty, be expected to equate to market share.

ENVIRONMENTAL/TOXIC TORTS

United States Supreme Court Rejects Federal Common Law Nuisance Claims Aimed at Curbing Global Warming. *American Elect. Power Co., Inc. v. Connecticut* (2011) __ U.S. __ [131 S.Ct. 2527, 180 L.Ed.2d 435].

In *American Electric Power Co., Inc., et al. v. Connecticut et al.*, the United States Supreme Court held that federal common law public nuisance claims aimed at reducing carbon-dioxide emissions that allegedly contribute to global warming may not proceed because such lawsuits are displaced by the actions the Clean Air Act authorizes the Environmental Protection Agency to take in this area.

Eight states, the City of New York and three non-profit land trusts sued five electric power companies, claiming that, as a matter of federal common law, the power companies' combined emissions of carbon dioxide created a public nuisance by contributing to global warming and thereby threatening damage to public lands, infrastructure, environmental habitats, and public health. Plaintiffs sought injunctive relief that would cap the defendants' carbon dioxide emissions.

The Supreme Court held that, whether or not the plaintiffs could state a federal common law claim, any such claim has been displaced by Congress' enactment of the Clean Air Act authorizing the Environmental Protection Agency to regulate carbon emissions into the environment. The Supreme Court noted that displacement of plaintiffs' claims is not dependent on the EPA actually exercising its authority by setting emission standards. Displacement occurs, the Court held, because Congress delegated to the EPA the authority to decide whether and how to regulate carbon-dioxide emissions, and that delegation alone displaces federal common law. The Court added that, as an expert agency, the EPA is better equipped than individual federal judges to address the issues raised by the regulation of carbon emissions.

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The Court left open the question whether the Clean Air Act preempts state nuisance law claims for the relief sought by plaintiffs in this case.

Appellate Court Interprets Product Identification Pleading Rules in Toxic Tort Cases. *Jones v. ConocoPhillips* (2011) 198 Cal.App.4th 1187.

The California Court of Appeal has issued a significant new decision concerning the sufficiency of pleading allegations in a toxic tort case.

In *Jones v. ConocoPhillips*, the plaintiffs alleged they were injured by exposure to products containing toxicologically significant levels of organic solvents and other toxic chemicals. The trial court sustained the demurrer of some of the defendants and entered a judgment of dismissal on grounds that plaintiffs had failed to plead causation with the specificity required for toxic tort cases by the California Supreme Court's decision in *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71.

Defendants argued that *Bockrath* requires plaintiffs to specifically plead not only the product that allegedly caused their injuries but also the specific toxin in the product that was a substantial factor in causing their injuries. The Court of Appeal rejected this argument, holding that *Bockrath* requires only that the plaintiffs identify in the complaint the product that allegedly caused injury, not the specific chemical compounds in that product allegedly responsible for the injury.

The Court of Appeal went on to conclude that plaintiffs adequately pled a cause of action for fraudulent concealment against the product manufacturers by alleging the manufacturers were aware of the toxic nature of their products and concealed or failed to disclose the toxic properties of those products. Finally, the Court of Appeal held that plaintiffs could state a cause of action against the product manufacturers for breach of implied warranty even though it was their employer, and not plaintiffs, that purchased the product.

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FEDERAL CIVIL PROCEDURE

Prevailing § 1983 Defendants May Appeal a Ruling That They Violated a Plaintiff's Constitutional Rights. *Camreta v. Greene* (2011) ___ U.S. ___ [131 S.Ct. 2020, 179 L.Ed.2d 1118].

Camreta, a state child protective services worker, interviewed a 9-year-old girl at her elementary school about allegations that her father had sexually abused her. After charges against the father were dismissed, the girl's mother sued Camreta under 42 U.S.C. § 1983, alleging that the in-school interview violated the Fourth Amendment. The district court granted summary judgment to Camreta, and the Ninth Circuit affirmed. The Ninth Circuit held that Camreta had violated the Constitution by seizing the girl without a warrant, court order, or parental consent. But the court concluded Camreta was entitled to qualified immunity because no clearly established law warned him that his conduct was illegal.

Although the judgment favored Camreta, he petitioned the Supreme Court to review the Ninth Circuit's threshold holding that his conduct violated the Fourth Amendment. The Court typically declines to hear appeals by prevailing parties, but the Court held that Camreta could seek review because the Ninth Circuit's holding that he violated the Constitution gave him a sufficiently "personal stake" in the case. The Court observed that a contrary ruling would require an official like Camreta either to acquiesce in a ruling he had no opportunity to contest or to persist in the conduct declared illegal, inviting further lawsuits and possibly punitive damages.

Orders denying summary judgment because of factual disputes cannot be reviewed on appeal from a judgment after trial. *Ortiz v. Jordan* (2011) ___ U.S. ___ [131 S.Ct. 884, 178 L.Ed.2d 703].

Former inmate Ortiz sued prison officials under 42 U.S.C. § 1983 for failing to protect her from violence while in custody. The officials moved for summary judgment based on qualified immunity, but the district court denied the motion based on the existence of triable issues of fact. The case proceeded to trial, where officials unsuccessfully sought

judgment as a matter of law under Federal Rule of Civil Procedure 50(a) at the close of evidence. The jury returned a verdict for Ortiz, and the district court entered judgment upon the verdict. The officers appealed without renewing their motion for judgment under Rule 50(b). On appeal, the Sixth Circuit reversed the judgment on the ground that the district court should have granted the officials' motion for summary judgment based on qualified immunity.

The Supreme Court reversed. The Court held that, after a full trial on the merits, a ruling denying summary judgment based on factual disputes is unreviewable. The moving party must instead pursue its argument by moving for judgment during and after trial under Rule 50 in light of the evidentiary record made at trial. Here, the officials had sought review of the summary judgment ruling because they had neglected to renew their Rule 50(a) motion after trial under Rule 50(b). The Court indicated that approach is improper.

The Supreme Court confined its holding to summary judgment rulings based on the presence of disputed facts. In the Ninth Circuit, a ruling denying summary judgment on a purely legal ground may still be reviewed on appeal from a final judgment. E.g., *First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1064-65 (9th Cir. 2011).

Bankruptcy Courts Lack Constitutional Authority to Enter Judgment on Common Law Tort Claims. *Stern v. Marshall* (2011) ___ U.S. ___ [131 S.Ct. 2594, 180 L.Ed.2d 475].

J. Howard Marshall II married Vickie Lynn Marshall about a year before he died. Shortly before J. Howard died, Vickie sued his son, Pierce, in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust, and that Pierce had tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy in California. Pierce filed a proof of claim in that proceeding, seeking to recover damages from Vickie's bankruptcy estate because Vickie had defamed him. Vickie responded by filing a counterclaim for tortious interference with the gift she expected from J. Howard—the same claim she was litigating in Texas. The bankruptcy court eventually awarded Vickie hundreds of millions of dollars in damages on her counterclaim. The bankruptcy court

ruled that it could enter judgment for Vickie on the counterclaim because it was a "core proceeding" under 28 U.S.C. § 157.

The district court reversed the bankruptcy court—ruling that the counterclaim was not a core proceeding—but the district court went on to decide the matter itself in Vickie's favor. In the meantime (and before the district court entered judgment), a Texas state court had conducted a jury trial and entered a judgment in Pierce's favor. On Pierce's appeal of the district court ruling, the Ninth Circuit held that the bankruptcy court lacked authority to enter final judgment on Vickie's counterclaim because it was not "closely related" to Pierce's proof of claim. Because that holding made the Texas judgment the earliest, pertinent final judgment, the Ninth Circuit held that the district court should have given the Texas judgment preclusive effect.

The Supreme Court affirmed, holding that the bankruptcy court lacked constitutional authority to enter judgment on Vickie's counterclaim (though it had statutory authority to do so under § 157). Bankruptcy judges do not enjoy the tenure and salary protections of Article III of the Constitution. The Court held that Congress may vest only Article III-protected jurists with jurisdiction to resolve state-law claims against a person or entity that is not otherwise part of the bankruptcy proceedings.

GOVERNMENT

California Supreme Court Upholds Law Dissolving Redevelopment Agencies. *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231.

The Legislature authorized the creation of redevelopment agencies over 65 years ago to receive and use a share of property taxes to help local governments revitalize blighted communities.

In 2011, the Legislature, faced with a fiscal emergency, passed two laws to stop or slow the diversion of tax revenue from schools to redevelopment agencies. One of the statutes it passed provided for the windup and dissolution of the redevelopment agencies. The other statute

allowed redevelopment agencies to continue operating if the cities and counties that created them paid into funds benefiting the state's schools.

The redevelopment agencies and others challenged the two statutes in a lawsuit filed suit directly in the Supreme Court. The agencies argued, among other things, that the legislation violated a 2010 voter-approved initiative that had amended the state constitution to limit the state's ability to require payments from redevelopment agencies for the state's benefit.

The Supreme Court unanimously upheld the statute that ended the redevelopment agencies altogether and, by a 6-1 vote, struck down the law that gave the agencies an alternative path to continued existence. The court held that the Legislature had the constitutional power to both create and dissolve entities like redevelopment agencies and that the 2010 initiative did not rescind that power. However, the court concluded, the initiative did forbid the Legislature from requiring payments as a condition to the continued operation of the agencies.

HEALTH CARE

Court of Appeal Holds Plaintiffs Do Not Have to Satisfy Statutory Requirement of Showing Probability of Success on Punitive Damages Claim Brought Against Health Care Service Plan. *Kaiser Foundation Health Plan, Inc. v. Superior Court* (Feb. 15, 2012, B233759) ___ Cal.App.4th ___ [2012 WL 473092].

California Code of Civil Procedure section 425.13 precludes a plaintiff from pleading a claim for punitive damages in an "action for damages arising out of the professional negligence of a health care provider" unless the plaintiff first submits evidence establishing "that there is a substantial probability that the plaintiff will prevail on the claim. . . . ."

In *Kaiser Foundation Health Plan, Inc. v. Superior Court*, the Court of Appeal held, following review of legislative history, that a plaintiff does not have to comply with section 425.13 in an action brought against a health care service plan because such a plan "does not directly

provide medical care to its subscribers. Instead, the Health Plan contracts with other . . . entities to deliver medical care to subscribers who enroll in its plans."

Treating Medical Professional Who Submits Patient Evaluation in Official Proceedings is Immune From Suit Based on Evaluation Itself and Conduct Related to Evaluation. *Cang Wang v. Heck* (Jan. 25, 2012, B228191) ___ Cal.App.4th ___ [2012 WL 207034].

A treating neurologist provided a written evaluation to the Department of Motor Vehicles (DMV), clearing one of her epilepsy patients to resume driving. Following an administrative hearing, the DMV, relying on the evaluation, reinstated the patient's license. Shortly thereafter, the patient failed to take his epilepsy medications properly suffered a seizure while driving, and struck plaintiffs. Plaintiffs sued the neurologist for negligence and medical malpractice, claiming she had negligently cleared her patient to resume driving.

On appeal, plaintiffs conceded that the litigation privilege—California Civil Code section 47(b), which protects litigants from tort liability based on communications in official proceedings—immunized the neurologist from any suit based on her written submission to the DMV. Nonetheless, plaintiffs argued that the neurologist's treatment and care of her patient, which included her allegedly negligent failure to warn her patient not to drive, was independent of her submission, and, therefore, not protected by the litigation privilege. The appellate court disagreed, holding that the litigation privilege immunized the neurologist from suit because her "noncommunicative conduct prior to completing the DMV evaluation form . . . was necessarily related to the form itself" and plaintiffs "have not demonstrated that there was any wrongful act independent of" the neurologist's completion and submission of the evaluation to the DMV.

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INSURANCE COVERAGE

Fire Policy Exclusion For Losses Caused by the Intentional Act Of "Any" Insured Cannot be Enforced to Deny Coverage to Innocent Coinsured. *Century-National Ins. Co. v. Garcia* (2011) 51 Cal.4th 564.

In a unanimous opinion of particular interest to fire insurers, the California Supreme Court held that a policy provision excluding coverage for fire losses caused by the intentional act of "any" insured cannot be enforced to deny coverage to an innocent coinsured, i.e., a coinsured who neither directed nor participated in setting the fire.

The court explained that Insurance Code sections 2070 and 2071 prescribe a standard form of fire policy for use in California. Insurers may vary the form only if their policies provide fire coverage that is substantially equivalent to or more favorable to the insured than the fire coverage afforded by the form policy.

The form policy incorporates a statutory exclusion for losses resulting from a willful act by "the" insured (see Insurance Code section 533), but that exclusion is not triggered by the willful act of "any" insured. Other exclusionary provisions in the form policy likewise are tied to "the" insured rather than "any" insured. The statutory form thus reflects "the Legislature's intent to ensure coverage on a several basis and protect the ability of innocent insureds to recover for their fire losses despite neglectful or intentional acts of a coinsured." "[A]n insurance clause purporting to exclude coverage for an innocent insured based on the intentional acts of a coinsured impermissibly reduces statutorily mandated coverage and is unenforceable to that extent."

The Supreme Court noted that because its decision involved a fire policy subject to sections 2070 and 2071, the decision "should not be read as necessarily affecting the validity of clauses that deny coverage for the intentional acts of 'any' insured in other contexts."

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INSURANCE LAW

Insured's Default Does Not Prevent Insurer From Intervening in Action Against Insured to Contest Liability and Damages. *Western Heritage Insurance Co. v. Superior Court* (2011) 199 Cal.App.4th 1196.

Plaintiffs sued both an employer and its employee for the wrongful death of the decedent. The employer's liability insurer defended both the employer and the employee, and retained counsel who filed a joint answer to the complaint. The employee, however, refused to comply with numerous court orders compelling discovery responses, and instead fled the country. In response, the court struck the employee's answer, entered the employee's default, and then allowed the insurer to intervene but only to contest damages.

The Court of Appeal granted the insurer's petition for writ relief, holding that the employee's default did not restrict the insurer's right to contest both liability and damages. The appellate court noted that when an insurer defends its insured, the insurer, even if it reserves the right to contest coverage in the future, may intervene to contest both liability and damages, notwithstanding the insured's default.

LABOR LAW

U.S. Supreme Court Expands Protection From Workplace Retaliation. *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) __ U.S. __ [131 S.Ct. 1325, 179 L.Ed.2d 379].

The U.S. Supreme Court has allowed an employee to recover against his former employer for retaliation based on a verbal (as opposed to written) complaint about its employment practices. Plaintiff claimed he was fired because he complained verbally to his employer that its timeclocks were in a location that prevented him from getting credit for otherwise compensable work time.

The Fair Labor Standard Act (FLSA) protects an employee who has "filed any complaint." 29 U.S.C. section 315(a)(3). In a 6-2 decision, the

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Court held that the phrase "filed any complaint" covers verbal complaints. In dissent, Justice Scalia argued that, whether a complaint is verbal or written, the phrase "filed any complaint" is limited to formal complaints to a judicial or administrative body.

The Court's protection of verbal complaints widens employee protection from retaliation under the FLSA. Given the broad application of that law to common wage-based disputes, the decision is likely to prove significant in both the workplace and the courts for years to come.

U.S. Supreme Court Broadens Potential Liability for Employment Discrimination. *Staub v. Proctor Hosp.* (2011) ___ U.S. ___ [131 S.Ct. 1186, 179 L.Ed.2d 144].

The U.S. Supreme Court has unanimously allowed an employee to recover against his former employer for discrimination where only the plaintiff's intermediate supervisors, who provided information that influenced the employer's decision, acted with a discriminatory intent that was not shared by the final decision-maker who terminated plaintiff's employment. In so doing, the court accepted the so-called "cat's paw" theory of employer liability.

Writing for five other justices, Justice Scalia based the court's decision on both the language of the statute at issue, the Uniformed Services Employment and Reemployment Rights Act of 1994 which requires only that a plaintiff's military service was a "motivating factor" in the challenged adverse employment action, and general tort principles of causation. Because other federal discrimination laws, including Title VII provisions on race and gender discrimination, provide similar "motivating factor" language, the court's decision in *Staub* may have implications well beyond the military context.

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Supreme Court Narrows Union Rights in Public Layoffs But Expands Access to Judicial Review. *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259.

In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 (*Vallejo*), the California Supreme Court held that a city had no duty to bargain with the union representing its firefighter employees over staffing decisions, including layoffs, unless its decision affected the "workload and safety of the remaining workers." *Vallejo* left unclear, however, whether this safety exception—when it applied—requires a public employer to bargain over the layoff decision itself or merely bargain over the effects of that decision on retained employees—e.g., the timing, number, or sequence of such layoffs.

In *City of Richmond*, the Supreme Court held that, where the *Vallejo* exception applies, an employer must bargain only over the effects of a layoff decision. The Court further held that a public employer's duty to bargain under California's Meyers-Milias-Brown Act depends on which of the following three decision types is involved: (1) a pure business decision with only an attenuated link to employment, where no duty to bargain is required; (2) a pure employment decision, where a duty to bargain arises; or (3) a mixed decision that affects employment but chiefly concerns the entity's overall direction, where only a duty to negotiate effects is required. Because the City of Richmond's layoffs were based on a budget crisis, the decision fell into the third category and the city could thus conduct unilateral layoffs and need only bargain with the union over the effects.

Beyond its substantive decision on bargaining, the Supreme Court also addressed a procedural issue that may, in fact, have greater significance going forward. Typically, a union representing public workers obtains redress for illegal practices by filing a charge with the Public Employment Relations Board (PERB). If the union is unsatisfied with the PERB's decision, it can then petition for an extraordinary writ in the Court of Appeal. Where the PERB refuses to even pursue the matter in the first instance, however, judicial review is seemingly precluded by Government Code section 3509.5, which exempts from such review "a decision of the [PERB] not to issue a complaint." But in *City of Richmond*

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the Supreme Court held that judicial review is nonetheless available if it is based on an alleged erroneous construction of an applicable statute. By adopting the "erroneous statutory construction" exception, the Supreme Court arguably widened access to judicial review of PERB determinations. Justice Baxter dissented from this procedural holding.

Court of Appeal Requires Plaintiffs to Prove an "Alter Ego" Relationship to Hold the Owner of Closely-Held Corporation Liable for Employment Discrimination. *Leek v. Cooper* (2011) 194 Cal.App.4th 399.

In *Leek*, employees of a car dealership sued the dealership and its sole shareholder for age discrimination. The plaintiffs argued that the level of control exercised by the sole shareholder over their employment made him personally liable.

The Court of Appeal disagreed, holding that an employee may recover against the sole shareholder of an employer corporation for discrimination in violation of state law only where the employee can demonstrate that the shareholder was an "alter ego" of the employer.

The Court of Appeal explained that mere control is not enough and that the sole shareholder could be held liable only if plaintiffs proved all the traditional elements of "alter ego" liability, including a "unity of interest" between the shareholder and the corporation and the inequity of treating the alleged discrimination as an act of the corporation alone.

MEDIATION

California Supreme Court Addresses Mediation Confidentiality Statutes in the Context of Legal Malpractice Claims. *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

The California Supreme Court held that the mediation confidentiality statutes (Evid. Code, § 1115 et seq.) are absolute and not subject to judicially-created exceptions, even if it means that a plaintiff's legal malpractice action must fail. The court followed a long line of cases holding that the mediation confidentiality statutes should be enforced according to their plain terms. (See *Simmons v. Ghaderi* (2008) 44

Cal.4th 570, 580; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416; *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13-14, 17.)

MEDICAL MALPRACTICE

$250,000 Limit on Noneconomic Damages Does Not Violate Medical Malpractice Plaintiffs' Equal Protection or Jury Trial Rights. *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412.

The California Court of Appeal has rejected a constitutional attack on the portion of the state's Medical Injury Compensation Reform Act (MICRA) that limits medical malpractice plaintiffs to a recovery of $250,000 for noneconomic damages. (Civ. Code, § 3333.2.) A jury awarded the plaintiff $6,000,000 in noneconomic damages for the wrongful death of her husband, but the trial court reduced those damages under MICRA and the Court of Appeal affirmed.

Twenty-six years ago, the California Supreme Court held that the same statute did not violate the constitutional guarantee of equal protection, but the plaintiff in *Stinnett* argued that "changed circumstances" since then had made the legislation no longer constitutional. The Court of Appeal concluded, however, that "it is not the judiciary's function to determine when constitutionally valid legislation has served its purpose" and become obsolete.

The plaintiff also argued that the damage limit violates the state constitutional right to a jury trial, an issue the Supreme Court has not directly addressed, but the Court of Appeal disagreed with this contention as well.

A concurring and dissenting opinion stated that the plaintiff should have been allowed to introduce evidence to support her equal protection argument.

The constitutional issues concerning MICRA are fully discussed in an amici curiae brief Horvitz & Levy wrote two years ago in the case of *Van Buren v. Evans*, where the same Court of Appeal rejected arguments

similar to the *Stinnett* plaintiff's argument and the Supreme Court denied review.

Hospital That Performs Lab Tests for a Patient's Personal Physician is not Liable Under Ostensible Agent Theory for the Physician's Failure to Inform the Patient of the Lab Results. *Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948.

Plaintiff Amber Walker gave birth to a child with cystic fibrosis approximately one year after her personal physician, defendant Donavon Teel, M.D., failed to inform her that she tested positive as a carrier of cystic fibrosis. In the course of upholding a summary judgment for the Hospital based on its limited role in the laboratory testing and reporting process, the Court of Appeal rejected plaintiff's claim that her physician was the Hospital's ostensible agent. The following excerpt from the court's opinion presents an outline of the criteria for avoiding a finding of ostensible agency (for a different outcome on the ostensible agency issue, see *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448):

> "The evidence in this case plainly negated any possibility of ostensible agency. Amber selected and made her appointments with Dr. Teel, who became her personal physician for purposes of managing her pregnancy. She was not treated by Dr. Teel at the Hospital (in the emergency room or otherwise) or referred directly to Dr. Teel by the Hospital. Although Dr. Teel had medical staff privileges at the Hospital, he was an independent contractor. The Hospital had no property ownership or interest in Dr. Teel's office or building, nor was any of the nurses or other personnel at Dr. Teel's office employed by the Hospital. There was no evidence that the Hospital ever said or did anything to lead the Walkers to believe that Dr. Teel was an agent or employee of the Hospital. Moreover, Amber signed a document at the time the laboratory test was performed acknowledging that the physicians who were on staff with the Hospital were not employees or agents of the Hospital, but were independent contractors."

> "The fact that Dr. Teel was on staff at the Hospital in the sense that he had the privilege of using the Hospital facilities for certain medical purposes (e.g., to deliver babies) did not, by itself, create an inference of ostensible agency. . . . Likewise, the facts that Dr. Teel's office happened to be located in the vicinity of the Hospital and that Amber desired to eventually have her baby delivered at the Hospital, were insufficient to create a triable issue of fact. More had to be shown. Specifically, the Walkers had to show that Amber looked to the Hospital for her prenatal care (of which laboratory tests were a part) rather than to her personal physician, and that there was conduct by the Hospital that would cause a reasonable person to believe that Dr. Teel was an agent of the Hospital."

PRIVACY RIGHTS

California Supreme Court to Address Public-Sector Union's Access to Employees' Private Information. *County of Los Angeles v. Los Angeles County Employee Relations Comm.* (2011) 192 Cal.App.4th 1409, review granted June 15, 2011 (S191944).

On June 15, 2011, the California Supreme Court granted review in *County of Los Angeles v. Los Angeles County Employee Relations Commission*. The court's decision will directly affect the privacy rights of thousands of government workers and the ongoing efforts of public-sector labor unions to recruit new members.

The case concerns a labor union's ability to obtain from a public employer the names, home addresses, and home telephone numbers of employees who are represented by the union in collective bargaining (and must pay their "fair share" of the cost of such representation) but have exercised their right under state law not to be full dues-paying members of the union. The Court of Appeal for the Second District, in an opinion by Justice Aldrich, held that, unlike private employees whose contact information might need to be disclosed to a representative union under state or federal labor law, public workers in California have a privacy right under the state constitution and must be afforded notice and an

opportunity to object to the disclosure of their private information to a union that may represent them at the bargaining table but which they have declined to join.

Given the number of public employees affected by the privacy question at issue, and Justice Aldrich's observation that the question is one of first impression, it is perhaps unsurprising that the union's petition for review was granted. Whether the Supreme Court will reverse, affirm, or establish a different balancing approach, of course, remains to be seen.

PRODUCT LIABILITY

California Supreme Court Rules That Product Manufacturers Cannot be Held Liable for Injuries Caused by Replacement Parts. *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335.

The California Supreme Court issued a unanimous opinion holding that product manufacturers cannot be held liable in strict liability or negligence for harm caused by another manufacturer's product, even if the defendant manufacturer could have foreseen that its product would be used alongside the injury-causing products.

Defendant Crane Co. manufactured and supplied valves to the Navy in the 1940's, for incorporation in to the steam propulsion systems on Navy ships. The Navy required the use of asbestos-containing gaskets and packing. The asbestos-containing insulation materials were not necessary for the valves to function, but the Navy preferred asbestos over other types of insulating materials.

Lt. Patrick O'Neil served on a Navy ship in the 1960's. The ship contained Crane Co. valves, but by the time of Lt. O'Neil's service, the Navy had removed the original gaskets and packing that Crane Co. supplied with its valves and replaced them with asbestos parts made by third parties. Decades later, O'Neil's family sued Crane Co., alleging that he was injured by his exposure to asbestos on the ship. The trial court granted Crane Co.'s motion for nonsuit, but the Court of Appeal reversed, holding that manufacturers are liable for injuries caused not only by their

own products, but also by products of others that will be foreseeably used with their products.

The Supreme Court reversed the Court of Appeal. The Supreme Court recognized that the Court of Appeal's holding represented "an unprecedented expansion of strict products liability." The court ruled that public policy would not be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell. Although foreseeability is a consideration in products cases, it is not alone a basis for imposing liability.

Suppliers of Raw Materials to manufacturers Generally Are Not Liable for Injuries resulting From Use of Raw Materials in Manufacturing Process. *Maxton v. Western States Metals* (Feb. 1, 2012, B227000) ___ Cal.App.4th ___ [2012 WL 286798].

Plaintiff John Maxton alleged personal injuries as a result of working with metal products that were essentially raw materials manufactured by defendants and supplied to Maxton's employer. The trial court dismissed Maxton's claims.

The Court of Appeal affirmed based on the component parts doctrine, which provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm. The court held that, generally, suppliers of raw materials to manufacturers cannot be held liable for negligence or strict products liability by the manufacturers' employees who sustain personal injuries as a result of using the raw materials in the manufacturing process. The court indicated that such a supplier could be held liable in extraordinary circumstances where: (1) the raw materials are contaminated; (2) the supplier exercises substantial control over the manufacturing process; or (3) the supplier provides inherently dangerous raw materials. The court found no such extraordinary circumstances in Maxton's case.

The court distinguished prior decisions that had imposed liability on suppliers of raw materials in cases involving asbestos. The court did so on grounds that asbestos is an inherently dangerous product whereas

the raw materials in Maxton's case–metal products–were not inherently dangerous.

Manufacturer's Compliance With Industry Standards and Regulations Can be Relevant to Claims Alleging Negligence and Strict Products Liability Design Defect. *Howard v. Omni Hotels Management Corp.* (Jan. 11, 2012, D057627) ___ Cal.App.4th ___ [2012 WL 91360].

Plaintiff filed negligence and strict products liability claims against the manufacturer of a bathtub, alleging that the slip-resistant coating of the bathtub did not comply with applicable standards. The trial court granted summary judgment in favor of the manufacturer.

On appeal, plaintiff argued that the manufacturer could not defend against his claims with evidence that the manufacturer met industry customs or standards on safety. The appellate court disagreed, holding that "the admissibility of expert evidence about a manufacturer's compliance with regulations or trade custom varies with the types of theories under which liability is sought." Thus, the court held that "a manufacturer's 'compliance with regulations, directives or trade custom does not necessarily eliminate negligence but instead simply constitutes evidence for jury consideration with other facts and circumstances,'", and that, "[w]here the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not 'irrelevant,' but instead properly should be taken into account through expert testimony as part of the design defect balancing process."

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PUNITIVE DAMAGES

Court of Appeal Affirms 16:1 Punitive Damages Award. *Bullock v. Philip Morris* (2011) 198 Cal.App.4th 543.

A jury found that $13.8 million was the appropriate amount of punitive damages to award on account of harm to a plaintiff who, a prior jury had found, suffered $850,000 in actual damages. The resulting judgment allowed for a greater than 16:1 ratio between punitive and compensatory damages.

The Court of Appeal (Second District, Division Three) affirmed the judgment in a divided opinion. The court majority acknowledged that, when "substantial" compensatory damages are awarded, there is a presumption of unconstitutionality as to punitive awards significantly exceeding a single-digit ratio in comparison to the compensatory damages. (*Bullock*, *supra*, 198 Cal.App.4th at p. 572.) However, the majority concluded that a departure from a single-digit ratio was acceptable because, in their view, an $850,000 compensatory award is not "substantial" within the meaning of United States Supreme Court jurisprudence, when the award is viewed in light of the defendant's financial condition.

Justice Kitching, dissenting, pointed out that the size of the compensatory award and the defendant's financial condition have not previously been linked. In fact, in many cases around the country, considerably smaller compensatory awards against very well-heeled companies have been deemed "substantial" within the meaning of the due process principles set out by the United States Supreme Court, and have triggered reversal or reduction of punitive awards that exceed single-digit ratios.

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TORT DAMAGES

Injured Tort Victims Can Recover no More Than What They or Their Insurers Paid for Medical Services. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541.

The California Supreme Court today held that a plaintiff in a tort action who receives treatment for his or her injuries because of the defendant's wrong and "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." Plaintiffs had argued, and some Courts of Appeal had held, that, under the collateral source rule, the damages should be the amount a healthcare provider has nominally billed for the treatment even if the provider has accepted a lesser amount as full payment from the plaintiff's health insurer under a negotiated contract. (The collateral source rule provides that, " ' if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.' ")

The court also concluded that the jury can be told the amount that the plaintiff's insurer paid for medical services, but not the source of the payment.

Although the court held that a healthcare provider's full billed amount is irrelevant to determining the plaintiff's past medical expense damages, the court did not decide whether that amount is admissible on issues of noneconomic damages and future medical expenses. Moreover, some Courts of Appeal had left for a special post-trial proceeding the reduction of a plaintiff's medical expense damages if they exceeded the amount paid by the plaintiff's insurer. The Supreme Court found such a procedure unnecessary, given the availability of a motion for new trial on grounds of excessive damages.

Horvitz & Levy filed an amicus brief in the Supreme Court on behalf of a group of insurance associations and individual insurance carriers.

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Court of Appeal Holds That Plaintiff May Recover for Medical Expenses Gratuitously Written Off by Health Care Provider. *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758.

On November 2, 2011, the California Supreme Court's decision in *Howell v. Hamilton Meats & Provision, Inc.* (2011) 52 Cal.4th 541 became final. In *Howell*, the court held a plaintiff in a tort action who receives treatment for his or her injuries because of the defendant's wrong and "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." One issue *Howell* left open was whether a plaintiff could recover as damages under the collateral source rule any "gratuitous" medical services that were provided to him. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 557-558.)

Two days after *Howell* became final, the Fifth District Court of Appeal held in *Sanchez v. Strickland* that "the limitation on recovery set forth in *Howell* does not extend to amounts gratuitously written off by a medical provider." (*Sanchez*, *supra*, 200 Cal.App.4th at p. 761). The court stated the following rule: "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Id.* at p. 769.)

Sanchez is not yet final and may further be challenged by the defendant.

TORT LIABILITY

U. S. Supreme Court Reaffirms Relaxed Causation Standard in FELA Cases. *CSX Transp., Inc. v. McBride* (2011) __ U.S. ___ [131 S.Ct. 2630, 180 L.Ed.2d 637].

In *CSX Transportation, Inc. v. McBride*, the United States Supreme Court addressed the standard of causation in cases under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. In a 5-4

majority opinion by Justice Ginsburg, the Court upheld its prior interpretation of the FELA in *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, and concluded that the FELA does not incorporate common-law "proximate cause" standards. After the *CSX* decision, it will continue to be proper to instruct juries that a defendant in a FELA case caused or contributed to a plaintiff's injury if the defendant's negligence played "a part—no matter how small—in bringing about the [plaintiff's] injury," or alternatively played "'any part, even the slightest, in producing the injury.'" The Court's decision also determines the causation standard in cases under the Jones Act because the Jones Act extends to seamen the same rights given to railroad workers under the FELA.

The California Supreme Court Has Granted Review to Decide Whether a School District Can be Vicariously Liable for the Alleged Negligence of Administrators Who Hired and Supervised an Employee Charged With Sexually Molesting a Student. *C.A. v. William S. Hart Union High School Dist.* (2010) 189 Cal.App.4th 1166, review granted Feb. 23, 2011 (S188982).

C.A., a minor, had sexual relations with his high school guidance counselor, and then sued the school district for negligence, sexual battery, assault, and sexual harassment. The trial court sustained the school district's demurrer, ruling that the school district could not be vicariously liable for the guidance counselor's misconduct.

The Court of Appeal affirmed in a split decision. The majority opinion held " ' there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices.' " The dissenting justice concluded that, "[a]lthough the school district cannot be liable for the intentional misconduct of the guidance counselor, it may be liable through respondeat superior for the negligence of other employees who were responsible for hiring, supervising, training or retaining her." (Emphasis omitted.)

The Supreme Court has granted review. Although the primary issue concerns the vicarious liability of a public entity, the Supreme Court's opinion regarding the scope of various statutory causes of action for sexual misconduct under Civil Code sections 51.9 and 52.4 could

potentially apply broadly to all employers, in both the public and private sector.

California Supreme Court Limits Fault Assigned to Employer That Admits Vicarious Responsibility for Employee Negligence. *Diaz v. Carcamo* (2011) 51 Cal.4th 1148.

In *Diaz v. Carcamo*, the California Supreme Court held that where an employer admits vicarious liability for its employee's negligent driving, the employer can only be held liable to the extent of the employee's negligence.

The Court explained that "the objective of comparative fault is to achieve an equitable allocation of loss" and that "objective is not served by subjecting the employer to a second share of fault in addition to that assigned to the employee and for which the employer has accepted liability." Accordingly, allowing a jury to assign "to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss." This is because "[n]o matter how negligent an employer was in entrusting a vehicle to an employee, . . . it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring, or retention. . . . If the employee did not drive negligently, and thus is zero percent at fault, then the employer's share of fault is zero percent."

Horvitz & Levy submitted an amicus brief in the Supreme Court on behalf of the employer.

California Supreme Court to Consider Whether Social Hosts Can be Liable for Injuries Caused by Intoxicated Guests Who Pay Admission and are Provided Alcohol. *Ennabe v. Manosa* (2011) 190 Cal.App.4th 707, review granted March 23, 2011 (S189577).

The California Supreme Court has granted review to consider whether a social host who requires paid admission to a private social event and uses the funds to provide alcohol can be liable for injuries caused by an intoxicated minor.

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Social hosts are normally immune under Civil Code section 1714(c) from civil liability where they "furnish[ ] alcoholic beverages to any person." In *Ennabe*, the parents of a child killed by a minor driver who became intoxicated at a private party argued that the host of the party lost the immunity of Section 1714 because she charged admission and was therefore subject to Business & Professions Code section 25602.1, which imposes liability for "sell[ing an] alcoholic beverage to any obviously intoxicated minor." The trial court and Court of Appeal disagreed, holding that the social host immunity of section 1714 still applied because (1) the partygoers served themselves, (2) the party was a social event, and (3) the host was not a commercially licensed liquor vendor.

California Supreme Court to Decide Whether the Common Law Rule That a Release of One Tortfeasor Releases all Tortfeasors Applies When Good Faith Settlement Statutes are Inapplicable. *Leung v. Verdugo Hills Hospital* (2011) 193 Cal.App.4th 971, review granted June 8, 2011 (S192768).

Plaintiff sought damages for a birth-related brain injury. Prior to trial, plaintiff settled with his pediatrician for $1 million in exchange for a release. The trial court ruled the settlement was not in good faith under Code of Civil Procedure sections 877 and 877.6, because it was grossly disproportionate to the pediatrician's potential liability and the total expected recovery. At trial, the jury found both the hospital and the pediatrician negligent, awarded about $15.5 million in damages, and apportioned 40 percent fault to the hospital, 55 percent fault to the pediatrician, and 2.5 percent fault to each of plaintiff's parents.

The Court of Appeal reversed the economic damage award against the hospital, holding that under the common law—which applies to any settlement not governed by the good faith settlement statutes—the plaintiff's release of the pediatrician also released the hospital from liability for all damages except its several liability for 40 percent of the $250,000 non-economic damages award. However, the Court of Appeal "urge[d] the California Supreme Court to grant review, conclusively abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability."

The Supreme Court has now granted review to decide this issue.

Primary Assumption of Risk Doctrine At Issue in New Supreme Court Case. *Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, review granted August 31, 2011 (S195031).

In *Nalwa v. Cedar Fair, L.P.*, the California Supreme Court has granted review to decide an important tort law question involving the scope of the primary assumption of risk doctrine.

The Court of Appeal, Sixth Appellate District, held that the primary assumption of risk doctrine applies only to active sports. As a result, the court held that an amusement park owner could be liable to a patron injured while riding its bumper car attraction. The Court reasoned that because riding bumper cars was not an active sport, the patron could not have assumed the risk inherent in the activity—specifically, bumping. In so doing, the court added its voice to the existing split of authority between those courts that apply the primary assumption of risk doctrine only to active sports (see, e.g., *Record v. Reason* (1999) 73 Cal.App.4th 472), and those courts that have applied the doctrine to all activities involving an inherent risk of injury to voluntary participants (see, e.g., *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650).

The Supreme Court will now need to resolve this split of authority on the primary assumption of risk doctrine crafted in *Knight v. Jewett* (1992) 3 Cal.4th 296, and determine whether the doctrine applies only to active sports, or to all activities involving an inherent risk of injury.

Supreme Court Limits Recovery by Contractors' Employees for Injuries Arising from Alleged Violations of Cal-OSHA Regulations. *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.

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 those who retain contractors may be held liable for injuries sustained by contractors' employees. In *SeaBright*, the Supreme Court has extended the *Privette* doctrine, holding that

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contractors' employees may generally not rely on duties imposed by Cal-OSHA regulations to avoid *Privette*'s limitations on liability of those who hire independent contractors.

The injury at issue in *SeaBright* occurred after US Airways retained a contractor to maintain conveyor belts at an airport. During the course of this work, an employee of the contractor was injured when one of his arms became caught in the moving parts of a conveyor belt. The plaintiff contended that the conveyor belt lacked a necessary safety guard; that US Airways had a duty under Cal-OSHA regulations to ensure that the conveyor belt was in proper working order; and that US Airways could not lawfully delegate that regulatory duty to the contractor. After the trial court granted summary judgment in favor of US Airways based on the *Privette* doctrine, the Court of Appeal reversed, holding that *Privette* permits imposition of liability on a hirer for injuries caused by its failure to ensure a contractor's compliance with Cal-OSHA regulations.

The Supreme Court reversed, holding that the Cal-OSHA regulation governing conveyor belts imposed a duty on US Airways to protect *its own employees* from moving parts on the conveyor belt, but that the regulation did not preclude US Airways from delegating to the contractor the duty to comply with the regulation in order to prevent injury *to the contractor's employees*. The court determined that the right of delegation applied with particular force in this case because the contractor had sole control over the manner in which the maintenance work was performed.

Horvitz & Levy submitted an amicus brief in the Supreme Court in support of US Airways' position.

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UNFAIR COMPETITION

California Supreme Court Loosens Consumer Standing Requirements to Bring Suit Under the Unfair Competition Law. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310.

James Benson sued Kwikset Corporation under the Unfair Competition Law (UCL), claiming that locksets sold as "Made in U.S.A." were falsely labeled because they contained some screws or other component parts made elsewhere. To satisfy the standing requirements of the UCL, plaintiff alleged that he purchased several Kwikset locksets in reliance on their "Made in U.S.A." label and would not have done so absent that false designation of origin. The trial court concluded these allegations were sufficient but the Court of Appeal reversed.

In a 5-2 decision, the California Supreme Court reversed the Court of Appeal, interpreting Proposition 64's standing requirements to impose a minimal burden on UCL plaintiffs, who now have standing so long as they allege that they would not have bought the product but for a misrepresentation on its label, even if the product performs precisely as advertised. The Supreme Court explained that such allegations show that "because of the misrepresentation the consumer . . . was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury and affords the consumer standing to sue."

WAGE & HOUR

California Supreme Court Likely to Hold Employers Need Not Ensure Employees Take Their Meal Breaks. *Brinker Restaurant Corp. v. Superior Court* (2011) __ Cal.4th __ [Nov. 10, 2011/(Oct. 22, 2008, S166350)].

On November 8, 2011, the California Supreme Court held the much anticipated oral argument in *Brinker Restaurant Corp. v. Superior Court*, the case in which the Court is set to address questions concerning the

interpretation of California statutes and regulations governing meal and rest breaks. The California Channel broadcast the argument, which remains available for viewing on its website here and here (the argument is split among these two links).

Among the issues raised in *Brinker Restaurant Corp.* is whether employers must ensure employees take their meal breaks. The justices' questions at the argument indicated that a majority of the court—perhaps even all of the justices—were set to hold that employers need not ensure their employees take meal breaks.

California Supreme Court Indicates Insurance Claims Adjusters May be Exempt Employees Not Entitled to Overtime Compensation. *Harris v. Superior Court* (2011) 53 Cal.4th 170.

California workers are generally entitled to overtime compensation unless they fall within an exemption to overtime requirements. One such exemption is for "administrative" employees. Under Industrial Welfare Commission Wage Order 4-2001, a person generally cannot be considered an administrative employee unless he or she is engaged in the performance of work directly related to management policies or general business operations of his or her employer's customers.

The California Supreme Court has held that, under Wage Order 4-2001, an insurance adjuster's work satisfies the directly-related standard if it satisfies two components. "First, it must be *qualitatively* administrative[, and] [s]econd, *quantitatively*, it must be of substantial importance to the management or operations of the business."

The Court explained that administrative operations include work done by "white collar" employees engaged in servicing a business, such as advising the management, planning, negotiating, and representing the company.

The Court further held that the "administrative/production worker dichotomy" is not a dispositive test and that a court instead should consider the particular facts of the case and apply the language of the relevant statutes and wage orders at issue to decide whether employees are exempt. Accordingly, whether work is part of the "administrative

operations" of a business will depend, in part, on whether it involves advising management, planning, negotiating, and representing the company, and activities such as interviewing witnesses, making recommendations regarding coverage and value of claims, determining fault and negotiating settlements may satisfy that test.

Significantly, the Supreme Court distinguished *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 and *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, which held claims adjusters were nonexempt "production workers," on grounds that those decisions were limited to their facts, and the Bell courts did not have the benefit of the current test for determining whether work is "administrative."

California Overtime Law and the UCL Apply to Work Performed by Non-Resident Employees in California for a California-Based Employer. *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 119.

The California Supreme Court has held that California law applies to claims for overtime compensation by out-of-state employees for work performed in California for a California-based employer. The Court also decided that these overtime claims can serve as the basis for claims alleging violations of California's Unfair Competition Law (UCL).

At the same time, the Supreme Court held that overtime claims under federal law for work done in other states by non-resident employees of a California-based employer cannot serve as the predicate for a UCL claim. The Court concluded that an employer's decision in California to classify its employees as exempt from overtime compensation does not, standing alone, justify applying the UCL to non-resident employees' federal claims for overtime worked in other states.

California Law Permits up to Two Premium Payments per Work Day if an Employer Fails to Provide Both a Meal and Rest Period. *United Parcel Service, Inc. v. Superior Court* (2011) 196 Cal.App.4th 57.

Labor Code section 226.7 requires an employer who fails to provide an employee with a meal or rest period to pay that employee one additional hour of pay—also known as a premium payment—"for each work day that the meal or rest period is not provided." The Court of

Appeal held that section 226.7 permits an employee to recover up to two premium payments per work day—one premium payment for the employer's failure to provide one or more meal periods and another premium payment for the employer's failure to provide one or more rest periods.

The appellate court arrived at this conclusion based primarily on section 226.7's legislative history. The court determined that, in enacting section 226.7, the Legislature sought to match the premium payment provisions adopted by the Industrial Welfare Commission in its wage orders, which were structured in such a way that they provided a separate remedy for violations of meal and rest period requirements and thereby indicated that up to two premium payments were allowed per work day. The Court of Appeal held that since the Legislature clearly intended to match the wage orders' premium payment provisions, section 226.7 should also be construed to permit up to two premium payments per work day. The appellate court also held that this interpretation was supported by (1) the principle that section 226.7 must be construed broadly in favor of protecting employees and (2) public policy.

WORKERS' COMPENSATION

U.S. Supreme Court Resolves Conflict Concerning Federal Workers' Compensation Rights of Offshore Drilling Workers. *Pacific Operators Offshore, LLP v. Valladolid* (2012) ___ U.S. ___ [132 S.Ct. 680.

The federal Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, governs workers on oil drilling platforms and other fixed structures at sea that are beyond state maritime boundaries. Workers are eligible for benefits under a workers' compensation scheme for injuries occurring as the result of operations conducted on the Outer Continental Shelf. A worker injured *on a drilling platform* is plainly eligible for benefits under the scheme. But lower courts divided on whether such a worker is eligible for benefits when he is injured *on land*, for example, when an injury occurs at an onshore loading or storage facility. The Supreme Court granted review to resolve this split of authority and determine the scope of workers' eligibility for federal benefits.

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The U.S. Supreme Court affirmed the judgment of the Ninth Circuit in this case. The Court (per Justice Thomas) adopted the Ninth Circuit's "substantial nexus" test under which "the injured employee [must] establish a significant causal link between the injury that he suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS." (*Pacific Operators Offshore, LLP*, *supra*, 132 S.Ct. at p. 691.) The Court then remanded the case for further proceedings, rather than trying to apply this pliable standard to our facts.

Justice Scalia (joined by Justice Alito) concurred separately because he would have interpreted the Ninth Circuit's "substantial nexus" test to require an employee to make a showing of proximate causation. " 'Substantial nexus' is novel legalese with no established meaning in the present context. . . . [I]f we must adopt an indeterminate standard (and the statute's 'as the result of' language leaves us no choice) I prefer the devil we know to the devil of the Ninth Circuit's imagining. I would hold that an employee may recover under [OCSLA] if his injury was proximately caused by operations on the Outer Continental Shelf." (*Pacific Operators Offshore, LLP*, *supra*, 132 S.Ct. at p. 691, emphasis omitted.)

Horvitz & Levy represented Pacific Operators Offshore, LLP and prepared the cert petition and the briefing on the merits in the U.S. Supreme Court.