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ARBITRATION

U.S. Supreme Court Rejects Claim That Class Waiver in Arbitration Clause Fails to Effectively Vindicate Federal Statutory Rights. *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ___ [133 S.Ct. 2304].

Extending its recent string of pro-arbitration decisions, the U.S. Supreme Court ruled that an arbitration clause containing a waiver of the right to proceed on a classwide basis is valid and enforceable in a lawsuit asserting federal antitrust claims, even if it is uneconomical to proceed with the claims on an individual basis.

The Supreme Court reaffirmed that arbitration clauses must be rigorously enforced according to their terms, including where they foreclose class proceedings, and that this principle applies to federal statutory claims unless they contain a contrary congressional command. The Court held that federal antitrust laws do not embody any congressional command against class waivers in arbitration clauses.

The Court also clarified the “vindication” principle. The Court has previously suggested that under this principle arbitration clauses need not be enforced if they operate as prospective waivers of a party’s right to pursue federal statutory claims. The Court explained that this principle is limited to provisions forbidding the assertion of statutory claims in arbitration and may also prohibit filing or administrative fees so excessive as to preclude access to the arbitral forum. The Court held that the vindication principle is not violated by a class waiver requiring individual arbitration, including where the expense involved in proving a claim on an individual basis renders it uneconomical to proceed in the absence of a class action.

Orders Compelling Arbitration (But Not Explicitly Dismissing or Staying the Action) Are Not Appealable. *MediVas, LLC v. Marubeni Corp.* (9th Cir., Jan. 27, 2014, No. 12-55375) ___ F.3d ___ [2014 WL 274492].

Under the Federal Arbitration Act (FAA), a district court order compelling arbitration is ordinarily not appealable. (9 U.S.C. § 16(b)(2).) Such an order becomes appealable only when coupled with a dismissal of all claims. (9 U.S.C. § 16(a)(3); *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 86 [121 S.Ct. 513, 148 L.Ed.2d 373].) If such an order merely stays litigation of (but does not dismiss) those claims, the order is not appealable.

In this case, the district court compelled arbitration under the FAA, but did not specify whether it was dismissing or staying the case. The party resisting arbitration appealed. The Ninth Circuit held that the district court's order was not appealable because it was not final—the order had implicitly stayed the action pending the completion of the arbitration. The Ninth Circuit accordingly dismissed the appeal for lack of jurisdiction.

To enhance predictability in future cases, the Ninth Circuit encouraged district courts to state clearly whether they are staying or dismissing cases after compelling arbitration. The Ninth Circuit also adopted a rule that, where a district court is silent, it will be rebuttably presumed to have stayed the action pending completion of arbitration, and the district court's order will be non-appealable.

Ninth Circuit Court of Appeals Holds Federal Arbitration Act Preempts California Rule That Claims for Public Injunctive Relief Cannot be Arbitrated. *Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928 (*Ferguson*).

In *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 (*Broughton*) and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (*Cruz*), the California Supreme Court held that California public policy prohibits arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act, and that the Federal Arbitration Act (FAA) does not

preempt this state public policy. These decisions were called into question by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*) where the United States Supreme Court held that the FAA does preempt state laws (such as bans on class arbitration waivers) that prohibit outright the arbitration of a particular type of claim or that otherwise stand as an obstacle to the FAA's objective to ensure that arbitration agreements are enforced according to their terms.

In *Ferguson*, the Ninth Circuit held that the California anti-arbitration rule announced in *Broughton* and *Cruz* does not survive *Concepcion*, and that the state public policy of prohibiting arbitration of public injunctive relief claims is preempted by the FAA.

California Supreme Court to Address Scope of Review of Arbitration Awards and Honest Belief Defense Under California Family Rights Act. *Richey v. AutoNation, Inc.* (2012) 210 Cal.App.4th 1516, review granted Feb. 13, 2013, S207536 (*Richey*).

The California Supreme Court **granted review** in *Richey*, a case involving arbitration of a terminated employee's claims against his employer for violation of the California Family Rights Act (CFRA).

An arbitrator ruled that termination based on the employer's honest belief that the employee was violating leave policies by working in a second job while on family leave protected the employer against liability under CFRA.

The Court of Appeal rejected the honest belief defense under CFRA. The Court of Appeal relied on *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 to conclude as well that where an arbitrator addresses claims for violation of unwaivable statutory rights, the award in at least some circumstances is subject to de novo judicial review for legal error.

The Supreme Court has granted review to decide whether de novo review for legal error is authorized for every arbitration award that



addresses unwaivable statutory rights, and whether the honest belief defense is recognized under CFRA.

California Supreme Court Addresses Impact of Recent U.S. Supreme Court Precedent on California Arbitration Law. *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109.

This case addresses the enforceability of an arbitration agreement that required an employee with a claim for unpaid wages to forgo an informal administrative “Berman” hearing on his claim before the Labor Commissioner. Under the law providing for such a hearing, the employer may appeal to the trial court for de novo review of an administrative award in favor of the employee. California law provides the employee with certain procedural protections as part of both the administrative hearing process and the ensuing appeal to the trial court, and the California Supreme Court had previously found the arbitration agreement to be unenforceable as written because it required the wage dispute to be resolved through arbitration, without resort to the Berman process.

The California Supreme Court has now held that the Federal Arbitration Act (FAA), as construed by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742], preempts any rule categorically prohibiting an arbitration agreement from waiving an employee’s Berman hearing and requiring the wage dispute to be resolved through arbitration.

The Court left open the possibility that an arbitration agreement’s waiver of a Berman hearing may be deemed unconscionable (and therefore unenforceable) on a case-by-case basis, and permitted one factor in that analysis to be whether the agreement resulted in the employee entirely surrendering protections associated with the Berman process such that the arbitral process would fail to provide the employee with an “accessible and affordable” forum for resolving wage disputes.

CIVIL PROCEDURE

Where Defendant Fails to Obtain a Judgment More Favorable Than Either of Two Section 998 Settlement Offers, Expert Witness Fees May be Recovered From the Date of the First Offer. *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014 (*Martinez*).

Under Code of Civil Procedure section 998, a prevailing plaintiff may recover the fees of its expert witnesses (which ordinarily are not recoverable as costs) if before trial the plaintiff made a section 998 settlement offer that was not accepted by the defendant, and the defendant subsequently failed to obtain a judgment better than either settlement offer. In *Martinez*, the Supreme Court addressed what happens when the plaintiff has made *two* successive offers under section 998, and the defendant fails to obtain a judgment more favorable than either of the offers. Does the plaintiff get to recover only expert fees incurred after the *second* offer, or may it incur such fees from the date of the *first* offer?

The Supreme Court held that to promote the statutory purpose of section 998 to encourage the settlement of lawsuits before trial, the plaintiff may recover its expert fees incurred from the date of the earlier settlement offer. The Supreme Court emphasized that this rule applies only when the judgment is more favorable than *either* section 998 offer. The Supreme Court left in place prior lower court decisions holding that where a party makes an initial offer, followed by a second offer, and the prevailing party obtains a judgment that is more favorable than the second offer but not the first, the second offer extinguishes the first offer for purposes of section 998. (See *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382; *Distefano v. Hall* (1968) 263 Cal.App.2d 380.)



CIVIL RIGHTS

Anesthesiologist Who Cancels Surgery Due to Patient’s HIV-Positive Status Violates the Unruh Civil Rights Act. *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519.

Upon discovering that the plaintiff was HIV-positive and was not taking anti-viral medications, the defendant anesthesiologist canceled the plaintiff’s scheduled surgery due to his concern for the safety of the surgical team. The patient sued, claiming that the doctor unlawfully discriminated against her in violation of the Unruh Civil Rights Act. The jury returned a defense verdict based on its finding that the plaintiff was not disabled.

The Court of Appeal reversed, holding the plaintiff was disabled *as a matter of law* due to her HIV-positive status, and that denial of a medically necessary surgery based on her HIV-positive status “was a violation of the Unruh Civil Rights Act.”

CLASS ACTIONS

Class Certification Is Improper Absent a Damages Model Capable of Calculating Damages on a Classwide Basis. *Comcast Corp. v. Behrend* (2013) 569 U.S. ___ [133 S.Ct. 1426, 185 L.Ed.3d 515].

Rule 23(b)(3) of the Federal Rules of Civil Procedure (28 U.S.C.) permits class certification only if a court “finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.”

The U.S. Supreme Court has now held that rule 23(b)(3)’s predominance requirement cannot be satisfied, and therefore class certification would be improper, where a plaintiff’s damages model fails to “establish[] that damages are capable of measurement on a classwide basis.” Absent such a methodology for calculating damages, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”

A damages model may serve as a means of computing an award in a class action only if the model measures those damages specifically attributable to the liability theory for which class treatment is sought. “[A]t the class-certification stage (as at trial), any model supporting a ‘plaintiff’s damages case must be consistent with its liability case.’” “If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”

Class Action Lawyers May Not Stipulate to Avoid Federal Jurisdiction. *Standard Fire Ins. Co. v. Knowles* (2013) 568 U.S. ____ [133 S.Ct. 1345, 185 L.Ed.2d 439].

The U.S. Supreme Court has held that a class representative cannot prevent removal of a putative class action from state to federal court by stipulating to forego damages that would otherwise make the case removable.

Class representative Knowles filed a proposed class action in Arkansas state court against Standard Fire Insurance Company. In an effort to defeat removal, Knowles stipulated that the class would seek less than \$5 million in damages, a threshold requirement for exercising original federal jurisdiction under the Class Action Fairness Act. Standard Fire nonetheless removed the case, arguing that the amount in controversy exceeded \$5 million and that Knowles’ stipulation could not bind the class. The federal district court found that the amount in controversy did exceed \$5 million, but ruled that Knowles had validly stipulated to take less. The Eighth Circuit agreed, and the action was remanded to state court.

The U.S. Supreme Court reversed in a unanimous opinion. The Court held that a plaintiff who files a proposed class action cannot legally bind members of the proposed class before a class is certified, and that Knowles lacked authority to seek less than \$5 million in damages for the class. Absent a valid stipulation, Standard Fire had properly removed the case.

Class action lawyers in Arkansas and elsewhere have used such stipulations and comparable loopholes to evade federal jurisdiction over

their cases. (Horvitz & Levy filed an amicus brief in this case highlighting some of the tactics used by class action lawyers.) The Supreme Court's decision eliminates a tactic frequently used by class action lawyers to defeat federal jurisdiction and furthers Congress' objective of ensuring that federal courts are available to adjudicate large class actions.

U.S. Supreme Court Rules that Whether Misrepresentations are Material in Securities Fraud Cases is not a Barrier to Class Certification. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* (2013) 568 U.S. ___ [133 S.Ct. 1184, 185 L.Ed.2d 308] (*Amgen*).

To recover damages in a private securities fraud action under section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission rule 10b-5, a plaintiff must prove reliance upon the defendant's material misrepresentations or omissions. The U.S. Supreme Court has previously endorsed a "fraud-on-the-market" theory that permits certain plaintiffs alleging securities fraud violations to invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public.

Unless a plaintiff can invoke the fraud-on-the-market theory, individualized issues raised by the reliance element would predominate in a securities fraud lawsuit and preclude class certification under rule 23(b)(3) of the Federal Rules of Civil Procedure (28 U.S.C.). However, the fraud-on-the-market theory applies only if the plaintiff proves the misrepresentation or omission was material, and courts have disagreed over whether plaintiffs must prove materiality before the securities fraud lawsuit could be certified as a class action under rule 23(b)(3).

In *Amgen*, the Supreme Court held that proof of materiality is not needed to satisfy rule 23(b)(3)'s predominance requirement for class treatment of federal securities actions because the potential immateriality of the misrepresentations and omissions is no barrier to class treatment.

Interestingly, four of the justices—Justices Scalia, Kennedy, Thomas, and Alito—signaled that they might be amenable to reconsidering the propriety of the "fraud-on-the-market" theory in an appropriate future case.



U.S. Supreme Court Holds Offer to Satisfy Individual Claim in Fair Labor Standards Act Lawsuit Moots Collective Action. *Genesis Healthcare Corp. v. Symczyk* (2013) 569 U.S. ___ [133 S.Ct. 1523, 185 L.Ed.2d 636].

The United States Supreme Court has ruled that a named plaintiff in a putative collective action under the Fair Labor Standards Act (FLSA) does not have a legally recognizable interest in pursuing a collective action on behalf of others once her individual claim becomes moot.

The plaintiff sued her employer for meal break violations and sought to pursue a collective action under the FLSA. Soon after the complaint was filed, the defendant offered the plaintiff all of the individual relief she was seeking, plus attorneys’ fees and costs. Though the plaintiff did not accept this offer, the district court and the Court of Appeals held that this offer mooted the plaintiff’s individual claim. The Court of Appeals went on to hold that this offer did not moot the collective action.

The Supreme Court assumed without deciding that the defendant’s offer mooted the plaintiff’s individual claim, and held that the offer mooted the plaintiff’s collective action allegations because she had “no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness.” Left open by the decision is the question (on which the circuits are split) of whether a plaintiff’s individual claim can be mooted by a defendant’s unaccepted settlement offer for all the individual relief the plaintiff seeks.

Ninth Circuit Court of Appeals Clarifies Interplay of CAFA Mass Action Removal Provisions and General Joinder Rules. *Visendi v. Bank of America, N.A.* (9th Cir. 2013) 733 F.3d 863.

A group of 137 plaintiffs filed a single state-court complaint stating, “Plaintiffs, and each of them, demand a jury trial.” Defendants removed the case to federal court under the Class Action Fairness Act (CAFA), and then moved to dismiss the action on the ground that plaintiffs’ claims were misjoined under rule 20(a) of the Federal Rules of Civil Procedure (28 U.S.C.) because they lack commonality. The trial court accused defendants of “gamesmanship and bad faith” for taking

what it considered inconsistent positions: defendants obtained CAFA removal by showing that “claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact,” (28 U.S.C. § 1332(d)(11)(B)(i)), and then defendants subsequently argued that plaintiffs’ claims were misjoined because they did not raise common issues of law or fact (Fed. Rules Civ. Proc., rule 20(a), 28 U.S.C.).

The Ninth Circuit reversed, holding defendants acted properly. The court held that CAFA removability is determined at the time removal is sought, and once plaintiffs filed a single complaint with over 100 plaintiffs alleging their claims share common issues of law or fact and proposing a joint trial, removability was proper at that time, regardless of whether the claims ultimately proceeded to a joint trial. Once in federal court, however, defendants are free to argue that, notwithstanding plaintiffs’ allegations, plaintiffs’ claims lack sufficiently common issues of law or fact to merit joinder, in which case the court may sever the misjoined plaintiffs by dismissing the claims of all but the first named plaintiff without prejudice to the filing of individual actions. Thus, defendants may properly seek removal based on the allegations in plaintiffs’ complaint that their claims share common issues, but subsequently argue that plaintiffs do not actually demonstrate the commonality of issues required to join plaintiffs under the federal rules.

Ninth Circuit Decides to Reconsider Case Denying Removal Under the Class Action Fairness Act. *Romo v. Teva Pharmaceuticals USA, Inc.* (9th Cir. 2013) 731 F.3d 918, rehearing en banc granted Feb. 10, 2014, No. 13-56310.

Over 40 multi-plaintiff lawsuits were filed in California state court, each with less than 100 plaintiffs, alleging similar claims of injuries from the ingestion of pharmaceutical products. A majority of plaintiffs petitioned the court to coordinate all these actions before a single trial judge. A divided Ninth Circuit panel held that these suits could not be removed to federal court under the Class Action Fairness Act (CAFA) because the plaintiffs’ coordination petition was not a proposal to try the claims jointly, as required by the statute for removability. The dissenting judge would have held that the coordination petition constituted a proposal to try the claims jointly because regardless of the language in

the coordination petition, the claims were substantively grouped into a mass action of the sort that CAFA was designed to bring into federal court. The dissenting judge pointed to recent decisions by the United States Supreme Court and the Seventh Circuit Court of Appeals which he said conflicted with the majority's opinion.

The Ninth Circuit has decided to rehear this decision en banc, giving the court the opportunity to eliminate the circuit split created by the panel opinion.

Horvitz & Levy LLP filed amicus briefs before the panel and in support of the en banc petition on behalf of the Chamber of Commerce of the United States of America and PhARMA.

ELDER ABUSE

California Supreme Court to Decide Scope of “Neglect” Under Elder Abuse Act. *Winn v. Pioneer Medical Group, Inc.* (2013) 216 Cal.App.4th 875, review granted Aug. 14, 2013, S211793 (*Winn*).

The California Supreme Court **has granted review** in *Winn* to decide whether “neglect” under the Elder Abuse Act (Welf. & Inst. Code, § 15657), includes a health care provider's failure to refer an elder patient to a medical specialist where the elder patient's care took place on an outpatient basis.

After the death of their 83-year-old mother, plaintiffs sued defendant physicians for elder abuse, based on defendants' repeated decisions not to refer their mother to a vascular specialist. Defendants contended they could not be liable for elder abuse because they treated decedent as an outpatient, and liability for elder abuse “requires assumption of custodial obligations.”

A divided Court of Appeal held that a custodial relationship with the decedent was not required to state an elder abuse claim.



ENVIRONMENTAL LAW

California Supreme Court to Address State University’s Requirements to Commit Funding For Environmental Mitigation Associated with University Expansion. *City of San Diego v. Board of Trustees of California State University* (2011) 201 Cal.App.4th 1134, review granted Apr. 18, 2012, S199557 (*City of San Diego*).

The California Supreme Court granted review in *City of San Diego* to examine California State University’s (CSU) responsibility under the California Environmental Quality Act (CEQA) to alleviate impacts of additional traffic caused by a university expansion.

CSU is undertaking an expansion of the capacity of San Diego State University. As required by CEQA, CSU prepared an Environmental Impact Report (EIR). The EIR determined that the expansion would cause significant impacts on traffic and transit in the surrounding area and proposed appropriate mitigations. The EIR determined, however, that should the Legislature approve the project but deny funding for the traffic mitigations, the project could proceed because its benefits outweighed the potential traffic impacts.

The Court of Appeal held that this determination rendered the EIR legally flawed, and that CEQA required CSU to undertake a complete, public review of alternative funding sources that could be used to pay for the mitigations if the Legislature refused to fund them. The Supreme Court has granted review to decide whether a state university is required, as part of its EIR process, to explore and either guarantee or demonstrate the infeasibility of using alternative funding sources for environmental impact mitigation measures that the Legislature has refused to fund.

Horvitz & Levy represents California State University in the Supreme Court.

FEDERAL PREEMPTION

U.S. Supreme Court Holds Federal Law Preempts State Law Claim Alleging Generic Drug Was Defectively Designed. *Mutual Pharmaceutical Co. v. Bartlett* (2013) 570 U.S. ____ [133 S.Ct. 2466, 186 L.Ed.2d 607].

Plaintiff was injured after she ingested a generic form of sulindac, a non-steroidal anti-inflammatory pain reliever. Plaintiff sued the drug's manufacturer on a design-defect theory under New Hampshire law and prevailed at trial. The First Circuit affirmed.

The U.S. Supreme Court reversed, concluding that the state-law design-defect claim was preempted by federal law. The Court observed that under New Hampshire law, a drug manufacturer could escape design-defect liability only by changing the composition or labeling of the drug. Federal law, however, prohibits a manufacturer from unilaterally altering the composition or labeling of a drug after FDA approval. Because it was impossible for the manufacturer to comply with both state law and federal law, the Supreme Court held that federal law preempted the state-law design-defect claim. In doing so, the Supreme Court rejected the Court of Appeals' conclusion that the defendant could comply with both its federal and state law duties by choosing not to make sulindac at all, explaining that this "stop-selling" rationale was incompatible with prior Supreme Court preemption jurisprudence.

Court of Appeal Finds No *Mensing* Preemption Where Plaintiff Alleges That Generic Drug Label Failed to Match Brand Name Label. *Teva Pharmaceuticals USA, Inc. et al. v. Superior Court* (2013) 217 Cal.App.4th 96 (*Teva*).

In *Teva*, the plaintiff alleged injury after ingesting both a brand-name drug and its generic equivalent. She sued the manufacturers of both drugs alleging various product liability theories. The generic drug manufacturers argued that, under the U.S. Supreme Court's decision in *PLIVA, Inc. v. Mensing* (2011) 564 U.S. ____ [131 S.Ct. 2567, 180 L.Ed.2d 580] (*Mensing*), all of plaintiff's claims were preempted by federal law. *Mensing* held that federal law requires a generic drug's label to match the



corresponding brand-name drug’s label, and that a state could not require a generic drug manufacturer to provide information on its label beyond what is required on the brand-name drug’s label. In *Teva*, the Court of Appeal concluded that insofar as the plaintiff alleged the generic drug manufacturers failed to update their labels to match the corresponding brand-name drug’s label, plaintiff’s claims are not preempted by federal law.

Horvitz & Levy represented petitioner Teva Pharmaceuticals in the Court of Appeal.

HOSPITAL STAFF PRIVILEGES

California Supreme Court Scales Back Exhaustion Requirements for Doctors Suing Hospitals Alleging Retaliatory Peer Review. *Fahlen v. Sutter Central Valley Hospitals* (Feb. 20, 2014, S205568) ___ Cal.4th ___.

The California Supreme Court has ruled that a doctor who believes that a hospital initiated peer review proceedings in order to terminate his staff privileges—in retaliation for his complaints about substandard care—may file a whistleblower action under Health and Safety Code section 1278.5 (section 1278.5) without first exhausting his judicial remedy of challenging the peer review decision through a state-court mandamus action.

The Court had previously held, in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, that doctors must exhaust both hospital administrative peer review and judicial mandamus remedies—and must succeed—before initiating any tort suit. *Fahlen* creates an exception to the exhaustion requirement when a doctor files a section 1278.5 whistleblower action contending that peer review proceedings were the very means of retaliation. In such cases, the pendency of hospital peer review proceedings and the lack of any action seeking mandamus relief does not stay the whistleblower action.

The Court declined to address a host of issues that will now be litigated in future cases, including

- whether a doctor who initially fails to exhaust administrative remedies (or who does not succeed while doing so) will be barred by res judicata or collateral estoppel from pursuing the parallel whistleblower action;
- whether a hospital can be liable if the whistleblower action presents a “mixed motive” scenario, in which the hospital’s decision to terminate staff privileges was prompted both by personal enmity toward the doctor and by concerns for patient care and safety; and
- whether hospitals and peer reviewers will succeed in asserting the immunity from damages available under the federal Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., in whistleblower actions.

Horvitz & Levy LLP filed an amicus brief in this case on behalf of multiple hospitals.

Medical Staff’s Delegation to Hospital Governing Board of Power to Appoint Review Committee Members and Hearing Officer, Even if a Violation of Hospital Bylaws, Did Not Per Se Deprive Reviewed Physician of a Fair Hearing. *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976.

Dr. Osamah El-Attar challenged the decision of Hollywood Presbyterian Medical Center to deny his application for reappointment to the medical staff. The Court of Appeal concluded that the Hospital did not provide Dr. El-Attar with an appropriate hearing because the Hospital itself appointed the hearing officer and the members of the Judicial Review Committee who would conduct the internal review of the denial of Dr. El-Attar’s application. The hospital bylaws at the time required those appointments to instead be made by the hospital medical staff’s medical executive committee (MEC).

The California Supreme Court reversed. The Court concluded that even if the appointment procedure violated the Hospital’s bylaws, “the violation was not material and, by itself, did not deprive Dr. El-Attar of a fair hearing” because the MEC had in effect delegated to the hospital’s governing board the responsibility to make the complained-of

appointments. The court applied the principle that “departures from an organization’s procedural rules will be disregarded unless they have produced some injustice.” It also said that “at times the governing body may assume the role normally played by the medical staff in the peer review process without necessarily violating basic norms of fair procedure.”

Horvitz & Levy represented the hospital in the Supreme Court.

INSURANCE BAD FAITH

California Supreme Court to Determine Whether an Insurer May Seek Reimbursement of Excessive Fees Directly from *Cumis* Counsel. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2013) 216 Cal.App.4th 1444, review granted Sept. 18, 2013, S211645 (*J.R. Marketing*).

Under California Civil Code section 2860, an insurer hires independent counsel, known as *Cumis* counsel, to defend its insured when the insurer’s reservation of rights under a policy creates a conflict of interest with the insured. Section 2860 regulates the qualifications for *Cumis* counsel and the rates they may charge, and provides for final and binding arbitration of disputes concerning attorney fees.

In *J.R. Marketing*, the trial court found that the provisions of section 2860 did not apply and the insurer’s only remedy for unreasonable or excessive attorney fees was an action for reimbursement brought following the close of the underlying litigation after the defense costs have been paid. Hartford brought the reimbursement action authorized by the trial court, and argued it has a common-law, quasi-contractual right to bring the action directly against *Cumis* counsel as well as its insureds. However, both the trial court and the Court of Appeal said that the insurer may seek reimbursement only from its insureds.

On September 18, 2013, the California Supreme Court **unanimously granted Hartford’s petition for review** to decide whether an insurer may bring an action for reimbursement directly against *Cumis* counsel.



Horvitz & Levy LLP represents petitioner Hartford Casualty Insurance Company.

California Court of Appeal Holds Insurers Have No Duty to Broach Settlement or Offer Policy Limits Absent Claimant’s Indication of Interest in Settling. *Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262 (*Reid*).

In *Reid*, the California Court of Appeal held that insurers have no duty to initiate settlement efforts, even where it appears that there is a substantial likelihood the claimant will recover damages in excess of policy limits. An insurer cannot be liable for bad faith failure to settle absent an “indication from the injured party that he or she is inclined to settle within policy limits.” “An insurer’s duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, we find there is no liability for bad faith failure to settle.” The Court of Appeal found nothing in California law supports the proposition that an insurer must offer its policy limits or initiate settlement talks as soon as it becomes clear that the insured’s liability will likely exceed the limits.

Claimant Who Settled Action Against Insured Tortfeasor and Received Payment Under Insured’s Liability Coverage Was Not Precluded From Maintaining Separate Action Against Insurer for Breach of Duties Owed Directly to Claimant Under Policy’s Medical Payments Coverage. *Barnes v. Western Heritage Ins. Co.* (2013) 217 Cal.App.4th 249.

Plaintiff suffered a back injury in a recreational program. Western Heritage (Western) insured the program’s co-sponsor, Activities Council (Council). Western paid plaintiff a portion of his medical expenses under the policy’s medical payments coverage but refused to pay all expenses up to policy limits. Plaintiff sued the Council for negligence and later settled the action. Western paid the settlement, which included compensation for plaintiff’s medical expenses, on behalf of the Council under its liability coverage.



Plaintiff later sued Western for breach of contract and bad faith, alleging Western wrongly refused full payment of plaintiff’s medical expenses under the policy’s medical payments coverage. The trial court granted summary judgment for Western, ruling that plaintiff’s settlement with the Council collaterally estopped him from seeking additional medical expenses from Western and that an award of medical expenses against Western would constitute a double recovery.

The Court of Appeal reversed. Western was not a party to the negligence action against the Council, and the plaintiff’s settlement with the Council did not release Western from its own potential liability to plaintiff under the policy’s medical payments coverage. Western paid the settlement in the negligence action under the duties it owed to its insured, the Council. Plaintiff, however, was a third party beneficiary of the policy’s medical payments coverage, under which Western owed duties directly to plaintiff. Plaintiff’s settlement with the Council did not bar him from pursuing an action against Western for breach of duties owed directly to plaintiff.

INSURANCE COVERAGE

California Supreme Court to Examine Meaning of Advertising Injury in General Liability Insurance Policy. *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2013) 210 Cal.App.4th 915, review granted Feb. 13, 2013, S207172] (*Swift*).

On February 13, 2013, the California Supreme Court granted review in *Swift*. The issue presented in *Swift* is whether an “advertising injury” provision in a general liability policy required the insurer to provide a defense against a claim that the insured’s advertisements disparaged another company’s product, when the advertisements contained no false statements and did not mention the other company’s product.

Hartford’s liability policy promised to defend Swift against any lawsuit that sought damages for an advertising injury. The policy defined “advertising injury” as an injury arising from the publication of material that disparages a person’s product.



Swift was sued for damages that allegedly resulted from its advertisements. Swift asked Hartford to defend the lawsuit. Hartford denied coverage.

The Court of Appeal ruled in favor of Hartford because it concluded that the Swift advertisement did not disparage the plaintiff's product. The court held that disparagement requires an injurious falsehood which specifically refers to the derogated product. In this case, Swift's advertisement made no mention of the plaintiff's product. Thus, the court concluded no disparagement occurred and Hartford had no duty to defend Swift.

In reaching its holding, the *Swift* court disagreed with the reasoning in *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969. The Supreme Court granted review presumably to resolve the conflict between *Swift* and *Charlotte Russe*.

Horvitz & Levy LLP submitted a letter to the Supreme Court urging it to grant review in *Swift*.

JURISDICTION

U.S. Supreme Court Holds Multinational Foreign Company May Not Be Sued in California for Conduct Occurring Anywhere in the World Merely Because its U.S. Subsidiary has Substantial California Sales. *Daimler AG v. Bauman* (2014) 571 U.S. ___ [134 S.Ct. 746].

A group of 22 residents of Argentina filed suit against DaimlerChrysler Aktiengesellschaft (Daimler) in California federal court, claiming that Daimler's Argentinian subsidiary collaborated with state security forces during Argentina's "Dirty War" to torture and kill certain of its workers. The plaintiffs claimed that Daimler could be sued in California federal court on causes of action arising anywhere in the world because it had a subsidiary in Delaware that imported and sold Daimler vehicles around the nation, including California. The Supreme Court held that the Constitution prevents the exercise of jurisdiction by a California



federal court over Daimler in a case with no connection to California because, regardless of its U.S. subsidiary’s systematic and continuous contacts with California, Daimler, as a multinational corporation with worldwide sales that manufactures vehicles and has its headquarters in Germany, could not be considered “at home” in California.

The Supreme Court rejected the Ninth Circuit’s holding that California federal courts could exercise jurisdiction over Daimler in cases arising anywhere in the world because Daimler’s U.S. subsidiary’s activities in California were “important” to Daimler.

MEDI-CAL REIMBURSEMENT

U.S. Supreme Court Denies Cert in Ninth Circuit Case Allowing California to Reduce Medi-Cal Provider Rates. *Managed Pharmacy Care v. Sebelius* (9th Cir. 2013) 716 F.3d 1235 (*Managed Pharmacy Care*).

The United States Supreme Court has allowed to stand the Ninth Circuit decision in *Managed Pharmacy Care*. The Court of Appeals’ opinion enabled the California Department of Health Care Services (DHCS) to implement Medi-Cal provider reimbursement rate reductions authorized by the California legislature. The Ninth Circuit held that the Secretary’s approval of California’s requested reimbursement rates is entitled to deference, and that the Secretary’s approval complied with the Administrative Procedure Act.

MICRA

California Supreme Court to Address Scope of “Professional Negligence” Within the Meaning of MICRA. *Flores v. Presbyterian Intercommunity Hospital* (2013) 213 Cal.App.4th 1386, review granted May 22, 2013, S209836.

The California Supreme Court has agreed to decide whether the state’s Medical Injury Compensation Reform Act (MICRA) applies in an action by a patient injured when she fell from a hospital bed after the bed’s rail collapsed.



The case involves MICRA’s one-year statute of limitations (Code Civ. Proc., § 340.5), but the Supreme Court’s opinion will set precedent for other MICRA provisions as well, including the statute limiting medical malpractice plaintiffs to a recovery of \$250,000 for noneconomic damages (Civ. Code, § 3333.2). MICRA applies “[i]n an action for injury or death against a health care provider based upon such person’s alleged professional negligence,” and “professional negligence” is defined in part as “a negligent act or omission to act by a health care provider in the rendering of professional services.” (Emphases omitted.) The Court of Appeal in *Flores* concluded that the plaintiff’s action “sounds in ordinary negligence because the negligence did not occur in the rendering of professional services.”

There has been a conflict in the case law about MICRA’s applicability to cases involving patient falls from hospital beds. The Court of Appeal in *Flores* noted that in other cases, the falls “result[ed] from the failure to properly secure or supervise the patient while on a hospital bed or gurney,” while in *Flores* the plaintiff “alleges she was injured by an *equipment failure*, i.e., a collapsed bed rail.” (Original emphasis.) The Court of Appeal nonetheless criticized one of the prior opinions, concluding, “We reject . . . dictum that a negligently maintained, unsafe condition of a hospital’s premises which causes injury to a patient falls within professional negligence.”

California Supreme Court Agrees to Review Settlement Offset Issue in MICRA Litigation but Refuses to Review Constitutional Challenge to MICRA Cap on Noneconomic Damages. *Rashidi v. Moser* (2013) 219 Cal.App.4th 1170, review granted Jan. 15, 2014, S214430.

A medical negligence plaintiff settled prior to trial with two co-defendants. At the ensuing trial a jury found the defendant physician negligent. The trial court reduced the noneconomic damage award to \$250,000 pursuant to the MICRA cap (Civ. Code, § 3333.2), but refused the physician’s request for a settlement offset after ruling that there was no basis for allocating the pretrial settlements between economic and noneconomic damages. The Court of Appeal reversed, holding that the physician was entitled to an offset as to the economic damages awarded by the jury and to a portion of the noneconomic damages. In a cross-



appeal, the Court of Appeal rejected the plaintiff’s constitutional challenge to the MICRA limit on noneconomic damages.

The California Supreme Court **has granted review** to decide whether Civil Code section 3333.2 entitles a non-settling healthcare defendant to a setoff based on the amount of a pretrial settlement by another healthcare provider that is attributable to noneconomic losses. At issue in the case will be whether the statutory rule that liability for noneconomic damages is several only (not joint and several) bars such a setoff.

The Supreme Court declined to review the constitutional challenge to the MICRA cap on noneconomic damages.

PRODUCTS LIABILITY

California Supreme Court to Decide Whether to Adopt the Sophisticated Purchaser Doctrine in Products Liability Law. *Webb v. Special Electric Co., Inc.* (2013) 214 Cal.App.4th 595, review granted June 12, 2013, S209927 (*Webb*).

The California Supreme Court has agreed to decide whether a broker who arranged for the sale of raw materials to a manufacturer can be liable for failing to warn about the dangers of the raw materials, even when there is undisputed evidence that the manufacturer was already aware of those dangers.

Plaintiff worked with asbestos-containing pipe manufactured by Johns-Manville. Special Electric was a broker who arranged for the sale of asbestos from a mine in South Africa to Johns-Manville. Plaintiff, who was diagnosed with mesothelioma, sued Special Electric on several theories, including a failure-to-warn theory. The jury returned a verdict for the plaintiff, but the trial court granted judgment notwithstanding the verdict (JNOV) on the ground that Special Electric had no duty to warn plaintiff of the dangers of asbestos because Johns-Manville was already fully aware of those dangers.

The Court of Appeal reversed. A majority of the panel held that Special Electric owed a duty to warn of the dangers of asbestos not just to



Johns-Manville, but also to the plaintiff. The majority rejected Special Electric’s contention that it had relied on Johns-Manville to warn users of the product’s dangers, and concluded that any such reliance, if it had existed, would not have been reasonable in this case.

One justice dissented, concluding that the JNOV should be affirmed because, as the plaintiff conceded, Special Electric could not have warned the plaintiff directly about the dangers of asbestos. Moreover, the plaintiff failed to prove that Special Electric’s failure to warn was the cause of his injuries, in light of the undisputed evidence that Johns-Manville already knew everything that Special Electric knew about the dangers of asbestos.

On June 12, 2013, the California Supreme Court granted review. The Court will decide whether the “sophisticated purchaser” doctrine should be adopted in California. In *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, the Supreme Court held that sophisticated users of a product need not be warned about dangers of which they are or should be aware. *Webb* presents the Court with an opportunity to determine whether a different rule applies where the sophisticated person is a manufacturer who purchased raw materials from the defendant, as opposed to the end-user of a finished product.

Special Electric has retained Horvitz & Levy LLP to represent Special Electric in the California Supreme Court.

Manufacturer Has a Duty to Design a Windshield That Will Reasonably Protect a Driver Against Road Hazards Even in Cases Where the Hazard Is the Result of a Criminal Act. *Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486.

A chunk of concrete thrown off an overpass crashed through the windshield of a big rig truck and struck the driver’s head, causing injuries that led to his death. The juvenile who threw the concrete pleaded guilty to assault with a deadly weapon and received a prison sentence.

The driver’s widow sued the truck manufacturer for strict products liability, arguing the windshield could have been designed in a way that



would have made it less vulnerable to penetration by flying debris and was therefore defectively designed.

The trial court instructed the jury to determine, as a threshold issue, whether the juvenile’s criminal conduct was an unforeseeable, supervening cause of the driver’s injury. The jury answered yes to that question, and therefore reached a defense verdict without evaluating the elements of strict products liability.

The Court of Appeal reversed, holding the trial court improperly instructed the jury on whether the manufacturer would have foreseen the juvenile’s criminal conduct. The court reasoned that “[s]trict products liability does not depend on the criminal or noncriminal nature of the source of the risk but on its foreseeability.” The court explained that flying debris is an ordinary and foreseeable road hazard, and that the purpose of a windshield is to protect vehicle occupants against the risk of being hit by such debris. A manufacturer therefore has a duty to design its windshields to be reasonably capable of performing that intended function. It was immaterial that the rock which penetrated the windshield in this particular case was thrown intentionally. The court remanded the case for a new trial.

Court of Appeal Applies *O’Neil* to Preclude Liability for Workplace Injury. *Sanchez v. Hitachi Koki, Co., Ltd.* (2013) 217 Cal.App.4th 948 (*Sanchez*).

In *O’Neil v. Crane Co.* (2012) 53 Cal.4th 335, the California Supreme Court held that “a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer’s product unless the defendant’s own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products.” (*Id.* at p. 342.)

In *Sanchez*, the plaintiff tried to cut an automobile tire using a grinder tool. When the grinder became stuck, plaintiff went to a hardware store, and purchased a grinder and a saw blade to use with the grinder. Although the safety instructions and manual for the grinder warned that saw blades should never be used with the grinder, plaintiff attached the saw blade to the grinder, and tried to cut the tire. When the saw blade



came into contact with the tire, plaintiff lost control, and the saw blade cut plaintiff's hand.

The Court of Appeal upheld a trial court order granting summary judgment. The court observed that “[l]ike the plaintiff in *O’Neil*, Sanchez sued one manufacturer for the harm caused by another manufacturer’s product. And as in *O’Neil*, Sanchez’s injuries arose when the product used with the defendant-manufacturer’s product caused him harm.” The court went on to apply *O’Neil* and hold the manufacturer of the grinder was not liable because

(a) “Sanchez was not injured by any intended use of the grinder Imposing liability under the circumstances here would convert strict liability into ‘absolute liability’ for product manufacturers,”

(b) “[N]o evidence suggests that the grinder would inevitably cause personal injury when used as directed,”

(c) “[N]o evidence shows that respondents specifically designed the grinder to be used in proximity to or in combination with saw blades,” and

(d) “[R]espondents were under no duty to warn of the consequences of attaching to the grinder an accessory with which it was never intended to be used”

PRODUCTS LIABILITY/PUNITIVE DAMAGES

Court of Appeal Rejects Sophisticated Purchaser Defense and Affirms \$14.5 Million Punitive Damages Award in Asbestos Case. *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270 (*Pfeifer*).

In *Pfeifer*, the California Court of Appeal upheld a judgment in excess of \$20 million, including a \$14.5 million punitive damages award. *Pfeifer* involves an issue currently before the California Supreme Court in another matter, *Webb v. Special Electric Co., Inc.* (2013) 214 Cal.App.4th 595, review granted June 12, 2013, S209927. Both *Pfeifer* and *Webb* raise the following question: When a defendant provides a product to a



purchaser who is already aware of dangers of the product, can the defendant still be liable for failure to warn?

Pfeifer holds that a defendant can be liable for failure to warn under these circumstances, unless it can show it had a sufficient basis for believing that the ultimate users of the product would be aware of the product’s dangers. The court held that a supplier can make this showing in a variety of ways: (1) the supplier may offer evidence that it reasonably believed the purchaser would warn the end users, (2) the supplier may offer evidence that the plaintiff already knew or should have known of the dangers, or (3) the supplier may show that the dangers were so “readily known and apparent” to the purchaser that it would be expected to protect the end users. The *Pfeifer* court concluded that the defendant failed to establish any of these theories, and therefore could be held liable for failure to warn.

Aside from that “sophisticated purchaser” issue, the opinion also contains an extensive discussion of various issues in connection with the punitive damages award. Ultimately, the opinion concludes that the jury’s \$14.5 million award, which was more than twice the \$6.2 million in compensatory damages awarded against the defendant, was not excessive in light of the highly reprehensible nature of the defendant’s conduct.

PUNITIVE DAMAGES

California Supreme Court Grants Review in Punitive Damages Case. *Nickerson v. Stonebridge Life Ins. Co.* (2013) 219 Cal.App.4th 188, review granted Dec. 11, 2013, S213873 (*Nickerson*).

The California Supreme Court **has granted review** in a case of particular significance to all California insurers facing punitive damages claims. In *Nickerson*, the jury awarded \$19 million in punitive damages, which the trial court reduced to \$350,000, a 10-to-1 ratio in relation to the tort damages awarded by the jury (not counting contract damages or attorney’s fees awarded by the court after the verdict). The Court of Appeal affirmed the trial court’s order reducing the award. The Supreme Court has now granted the plaintiff’s petition for review, which raised the following issues:

1. In calculating the 10:1 ratio between punitive and compensatory damages, the Court of Appeal held that insurance policy proceeds must be excluded. Two other published California decisions follow this approach; and one published opinion rejects it. Does due process require that the policy proceeds be excluded from the compensatory damages used to compute the ratio between punitive and compensatory damages?
2. In *Brandt v. Superior Court* (1985) 37 Cal.3d 813, the California Supreme Court held that a policyholder's damages in an insurance bad-faith case included the attorney's fees incurred to recover the policy proceeds. In calculating the 10:1 ratio between punitive and compensatory damages, the Court of Appeal excluded the *Brandt* fees because they were awarded by the trial court in post-trial proceedings, and not by the jury. Does due process require that *Brandt* fees must be awarded by the jury in order for them to be factored into the ratio between punitive and compensatory damages?
3. Both the trial court and the Court of Appeal stated that the \$350,000 punitive-damage award in this case was too low to deter Stonebridge from engaging in the same misconduct. Yet both courts felt "constrained" by due process to award no more than 10 times the compensatory award. If the courts determine that punitive damages reduced on this basis of a 10:1 ratio to compensatory damages will not deter a defendant from repeating its misconduct, can they permit substantially higher ratios without offending due process?

TORT DAMAGES

Howell Cap on Medical Expense Damages Applies Before Damages Are Reduced for Plaintiff's Contributory Negligence.
Luttrell v. Island Pacific Supermarkets, Inc. (2013) 215 Cal.App.4th 196 (*Luttrell*).

In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), the California Supreme 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." (*Id.* at p. 566.)

In *Luttrell*, plaintiff sued a supermarket for personal injury after an automatic door malfunctioned causing him to fall. The jury found that negligence by both the supermarket and the plaintiff contributed to the injury. The Court of Appeal held (1) the *Howell* decision is *not* limited to payments made by private health insurance, but applies equally when medical expenses are paid by Medicare; and (2) the *Howell* "amount-paid cap" on medical expense damages applies before those damages are further reduced to account for the plaintiff's contributory negligence.

Evidence of "Billed" But Unpaid Medical Expenses is Not Admissible to Prove Future Medical Damages or Noneconomic Damages. *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 (*Corenbaum*).

Corenbaum addresses a question left open by the California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), which addressed the measure of damages for medical expenses in a personal injury case.

Howell held an injured plaintiff "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." (*Howell, supra*, 52 Cal.4th at p. 566.) *Howell* did not decide whether evidence of a medical services provider's "bill," reflecting amounts never paid by the plaintiff or the plaintiff's health insurer, could be admissible for other purposes including future economic damages and noneconomic damages.

The Court of Appeal in *Corenbaum* answered some of the open questions:

1. The so-called billed amount is inadmissible to prove future medical expenses. The "full amount billed for past medical services is not



relevant to the amount of future medical expenses and is admissible for that purpose.”

2. Amounts billed, but not paid, cannot form the basis for expert testimony on that issue. “Because the full amount billed for past medical services provided to plaintiffs is not relevant to the value of those services, we believe that the full amount billed for those past medical services can provide no reasonable basis for an expert opinion on the value of future medical services.”
3. Evidence of amounts billed, but not paid, is not relevant to the issue of noneconomic damages. Such evidence “is not admissible for the purpose of providing plaintiff’s counsel an argumentative construct to assist a jury in its difficult task of determining the amount of noneconomic damages.”

Horvitz & Levy represented the defendant on appeal.

Court of Appeal Holds Hospital Cannot Prove Amount of Lien Under Hospital Lien Act by Reference to Full Amount Billed for Services. *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463 (*Huff*).

In *Huff*, a hospital sought to enforce its lien under the Hospital Lien Act by presenting evidence of its so-called “full billed” charges rather than evidence of its reasonable and necessary charges for the injured person’s treatment. The Court of Appeal rejected the hospital’s claim. It held that a hospital asserting a right under the Act must prove its claimed fees were reasonable and necessary. A hospital cannot establish that amount by introducing evidence of its “full billed” charges because those charges are “not an accurate measure of the value of medical services.” *Huff* relies on the line of authority beginning with *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which established that evidence of the “full billed” charges is irrelevant in a tort action on the issue of past medical expenses.



Court of Appeal Holds Defendant Is Entitled to Discovery on Amount Actually Paid for Medical Services Under *Howell*. *Dodd v. Cruz* (Feb. 5, 2014, B247493) ___ Cal.App.4th ___ [2014 WL 461158].

Consistent with the holdings in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 and *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, the Court of Appeal has held that a defendant is entitled to discovery to determine how much a medical finance company actually paid for a receivable representing the cost of medical services.

The plaintiff was referred for treatment to a medical provider. The medical provider sold the receivable for the services performed to a third-party medical finance company. The medical finance company contended that the plaintiff was liable for 100 percent of the face amount of the receivable, i.e., 100 percent of the billed amount. The Court of Appeal held that the defense is allowed discovery into the facts and circumstances surrounding this transaction, including how much the medical finance company actually paid for the receivable.

TORT LIABILITY

California Supreme Court to Decide Whether Assumption of Risk Applies to Care Giver Suing Alzheimer’s Patient for Injuries. *Gregory v. Cott* (2013) 213 Cal.App.4th 41, review granted Apr. 10, 2013, S209125 (*Gregory*).

The question presented is whether the primary assumption of risk doctrine bars the tort claims of an in-home caregiver for negligence, battery, and premises liability against a patient with Alzheimer’s disease and the patient’s husband. Under the primary assumption of risk doctrine in California, participants in some inherently dangerous activities can be held liable for injuries to other participants only when they increase the risk inherent in the activities. In *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, the Supreme Court held that the primary assumption of risk doctrine is not limited to active sports but applies to other inherently dangerous recreational activities.



In *Gregory*, a majority of the Court of Appeal held that the doctrine also applies to bar a claim by a caregiver hired to provide care and supervision in a private home to an Alzheimer’s patient known to be violent. Justice Armstrong dissented, reasoning that California law does not extend the doctrine to this context, and that he would limit its application to professional caregivers in institutional settings.

Court of Appeal Holds That Primary Assumption of Risk Doctrine Bars Suit by College Swimmer Injured in Weight Room. *Cann v. Stefanec* (2013) 217 Cal.App.4th 462.

During weight training exercises for the UCLA women’s swim team, Annie Stefanec lost her balance and dropped the weight she was lifting. Stefanec’s teammate Scarlet Cann was doing push-ups near Stefanec at the time, and Cann alleged the weight hit her in the head. Cann sued Stefanec for personal injuries, alleging Stefanec was negligent.

The trial court granted summary judgment in favor of Stefanec on the grounds of primary assumption of risk. The Court of Appeal (Second District, Division Five) affirmed. The court held that by participating in strength training together with Stefanec, Cann assumed the risk of being injured by a dropped weight, even though she was engaged in a different exercise at the time of the accident. The court rejected Cann’s argument that she was not a co-participant in a sport, concluding that “it is of no moment whether the [weight] training by Cann and Stefanec is characterized as a sport or recreation, as the doctrine of primary assumption of the risk applies to both types of activity.”

Horvitz & Levy represented Stefanec in the appeal.



UNFAIR BUSINESS PRACTICES/INSURANCE BAD FAITH

California Supreme Court Holds That an Unfair Competition Claim May Be Based on Insurer’s Bad Faith Claims Handling.
Zhang v. Superior Court (2013) 57 Cal.4th 364.

The plaintiff claimed that California Capital Insurance Company violated the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), by promising to provide timely coverage in the event of a compensable loss, when it allegedly did not intend to pay the true value of its insureds’ covered claims. California Capital contended plaintiff’s claim was an impermissible attempt to plead around the holding in *Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) that a private right of action could not be based on violation of the Unfair Insurance Practices Act (UIPA) (Ins. Code, § 790 et seq.).

The California Supreme Court held that while *Moradi-Shalal* bars private actions for violation of the UIPA, including UCL claims directly based on the UIPA, it does not preclude first party UCL actions based on grounds independent of the UIPA even when the insurer’s conduct may also violate the UIPA.

WAGE & HOUR

California Supreme Court Will Review Extent to Which Employers Must Compensate Guards for Hours Spent at Jobsites.
Mendiola v. CPS Security Solutions, Inc. (2013) 217 Cal.App.4th 851, review granted Oct. 16, 2013, S212704.

The California Supreme Court **has granted review** to decide whether employers must compensate trailer guards for certain hours that the guards spend at jobsites. The question presented is: “Are the guards that defendants provide for construction site security entitled to compensation for all nighttime ‘on call’ hours, or may defendants deduct sleep time depending on the structure of the guards’ work shifts?”



In these wage and hour class actions brought against defendants who employed security guards for building construction sites, the Court of Appeal held that the defendants were required to compensate trailer park guards for the nighttime hours the guards spent at jobsites on weekdays. But the Court of Appeal held that the defendants could deduct 8 hours of compensation for sleeping time on those weekend days when the trailer guards were on duty for 24 hours.