

PUBLICATION UPDATE

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California Torts

Publication 116 Release 55

October 2013

HIGHLIGHTS

Case Law Updates

Court Erred in Excluding Expert Declaration. In *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal. App. 4th 173, the court of appeal held that the trial court in a products liability case erred in excluding the expert declaration of a scientist who conducted extensive tests and concluded that a prosthetic device was softer than the minimum required hardness, when the exclusion was based solely on a failure to identify with specificity the particular tests employed or to describe the test results. See *Ch. 3, Proof of Negligence*, § 3.04[2][e].

Primary Assumption of Risk Applies to Non-Sport Recreational Activities Involving Inherent Element of Risk. In *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal. 4th 1148, the California Supreme Court held that the primary assumption of risk doctrine applies to recreational activities that may not be classified as sports, if those activities involve an inherent risk of injury to voluntary participants and the risk cannot be eliminated without altering the fun-

damental nature of the activity, and in that particular case the primary assumption of risk doctrine provided a defense to an action to recover for an injury sustained while riding bumper cars at an amusement park. The Court also held that the operator of a bumper car ride is not a common carrier, as the riders are not passively carried or transported from one place to another. See *Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03[2][d][i], and *Ch. 23, Carriers*, § 23.01[1][a][i].

Plaintiff Asserting NIED to Bystander Must Have Contemporaneously Understood Defendant's Role in Causing Injury. In *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal. App. 4th 830, the court of appeal held that for purposes of a cause of action for negligent infliction of emotional distress to a "bystander," the plaintiff's "contemporaneous observance" of the injury requires that plaintiff understood at the time of the injury the defendant's role in causing the injury. See *Ch. 5, Negligent Infliction of Emotional Distress*, § 5.04[3][b].

Allegations Insufficient to Raise Issue

of Joint Venture Liability. In *Simmons v. Ware* (2013) 213 Cal. App. 4th 1035, the court of appeal held that generic allegations in the complaint that “each defendant was the agent and employee of every other defendant” were insufficient to raise the issue of joint venture liability, and if the complaint is not amended to include proper allegations and the issue is not otherwise tried before the jury, the trial court errs in granting JNOV in favor of the plaintiff on the basis that the defendants were part of a joint venture. See **Ch. 8, Vicarious Liability, § 8.07[2]**.

Conspiracy Claims Properly Stated Against Attorneys. In *Rickley v. Goodfriend* (2013) 212 Cal. App. 4th 1136, the court of appeal held that plaintiffs had stated a cause of action against attorneys who allegedly conspired with their client to interfere with a remediation plan imposed by the trial court in an earlier lawsuit involving the dumping by that client of contaminated materials on plaintiffs’ residential property and conspired to disburse funds held in the attorneys’ trust account for that remediation to their clients in contravention of the purpose for which the funds were intended. See **Ch. 9, Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability, § 9.03[3][b][iii]**.

Local Governments May Regulate or Ban Medical Marijuana Dispensaries. In *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal. 4th 729, the California Supreme Court held that the medical marijuana statutes do not expressly or impliedly preempt the authority of a local government to regulate or even completely ban as a nuisance the presence of medical marijuana dispensaries or cooperatives. See **Ch. 17, Nuisance and Trespass, § 17.08**.

State Remedies May Survive Using Federal Standard of Care in Aviation Cases. In *Gilstrap v. United Air Lines, Inc.* (9th Cir. 2013) 709 F.3d 995, the Ninth Circuit Court of Appeals held that when determining the preemptive extent of the Federal Aviation Act and its various amendments, even if state standards of care in a particular area of aviation law are preempted by the presence of pervasive federal regulation, state remedies in that same area of law may survive so long as they use the applicable federal regulations to define the standard of care. See **Ch. 21, Aviation Tort Law, § 21.02[3][a]**.

Notice Provision in Professional’s Contract Enforceable. In *Zamora v. Lehman* (2013) 214 Cal. App. 4th 193, the court of appeal held that when a claim is being asserted against a professional or skilled expert, a contractual provision requiring that one party notify the other contracting party within a specified time in order to assert a claim against the other party is enforceable, even when that notice period is shorter than the time available in the applicable statute of limitations, so long as the contractual notice provision incorporates a delayed discovery rule. See **Ch. 30, General Principles of Liability of Professionals, § 30.30, and Ch. 71, Commencement, Prosecution, and Dismissal of Tort Actions, § 71.03[3][a]**.

Insurance Broker Owed No Duty to Investor in Construction Project. In *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal. App. 4th 561, the court of appeal held that an insurance broker hired by a construction developer to obtain a policy for a homeowners association owed no tort duty to an investor in the construction project to provide a certain type of coverage. See **Ch. 30, General Principles of Liability of Professionals, § 30.13[4]**.

Claim Delivered to Staffing Office of County Hospital Was Not Properly Delivered to Recipient Mandated in Statute. In *DiCampi-Mintz v. County of Santa Clara* (2012) 55 Cal. 4th 983, the California Supreme Court held that a claim against a local public entity must be delivered to, or actually received by, one of the persons or public bodies specified in Gov. Code § 915, and if an appropriate public employee or board never receives the claim, an undelivered or misdirected claim fails to comply with the claims presentation requirements. Thus, a claim delivered to the medical staffing office of a county hospital for delivery to the risk management department was not properly presented as it was not delivered to a statutorily-prescribed recipient. See *Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.05, and Ch. 62, Claims and Actions Against Public Entities and Employees, §§ 62.11, 62.14[1]*.

Action for Ordinary Negligence Not Occurring During Rendering of Professional Services Not Governed by MICRA Limitations Period. In *So v. Shin* (2013) 212 Cal. App. 4th 652, the court of appeal held that because negligence by a physician that is not undertaken “in the rendering of professional services” does not constitute professional negligence for purposes of applying the MICRA limitations period provided in Code Civ. Proc. § 340.5, the post-surgery actions of an anesthesiologist in trying to intimidate a patient into not reporting the doctor’s alleged negligence during surgery was not governed by the MICRA statute of limitations. See *Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.10*.

Fraud Sufficiently Alleged. In *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal. App. 4th 780, the court of appeal held that plaintiff’s allegations against a bank

that specified the dates of letters from the bank and the dates of telephone conversations with persons in specified departments were sufficiently specific to allege fraud, even absent knowledge of the exact identity of the persons with whom plaintiff communicated. See *Ch. 40, Fraud and Deceit and Other Business Torts, § 40.02[2]*.

Parol Evidence of Fraud in Inducement of Contract Allowed Even When Contradicting Written Terms. In *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal. 4th 1169, the California Supreme Court, in explicitly overruling its earlier opinion in *Bank of Am. Nat’l Trust & Sav. Ass’n v. Pendergrass* (1935) 4 Cal. 2d 258, and its progeny, held that parol evidence of fraud in the inducement of a contract could be introduced even if that proof would contradict the substantive terms of an integrated written agreement. See *Ch. 40, Fraud and Deceit and Other Business Torts, § 40.03[1][a][ii]*.

Triable Issue Whether Banker’s Statements About Loan Approval Were Actionable. In *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal. App. 4th 872, the court of appeal held that when the representative of a bank told a borrower that it was “highly probable,” “likely,” and “looked good” that a modification of the borrower’s loan agreement would be approved, there was a triable issue of fact as to whether the representative was merely expressing an opinion or had superior knowledge of facts that would allow him to reasonably assess the probability that the modifications would in fact be made. See *Ch. 40, Fraud and Deceit and Other Business Torts, § 40.03[1][b][i]*.

Insurance Claim May Constitute Activity Protected Under Anti-SLAPP Statute. In *People ex rel. Fire Ins. Exchange v.*

Anapol (2012) 211 Cal. App. 4th 809, the court of appeal held that while the submission of an insurance claim to an insurer for payment in the regular course of business is not petitioning activity protected by the anti-SLAPP statute, if the claim is submitted merely as a necessary prerequisite to expected litigation or as the equivalent of a prelitigation demand letter, the claim may constitute protected petitioning activity. See **Ch. 40, Fraud and Deceit and Other Business Torts, § 40.106[3][b][i]**.

Denial of Anti-SLAPP Motion in Federal Court is Immediately Appealable. In *DC Comics v. Pacific Pictures Corp.* (9th Cir. 2013) 706 F.3d 1009, the Ninth Circuit Court of Appeals held that if a motion to strike under Code Civ. Proc. § 425.16 is denied in a suit brought in federal court, this denial is immediately appealable under the federal collateral order doctrine. See **Ch. 40, Fraud and Deceit and Other Business Torts, § 40.106[3][b][ii]**.

Fraudulent Misrepresentation Action Not Preempted by National Bank Act. In *Gutierrez v. Wells Fargo Bank, NA* (9th Cir. 2012) 704 F.3d 712, the Ninth Circuit Court of Appeals held that enforcement of the California unfair competition statute's prohibition on misleading statements against a national bank under the fraudulent prong of the unfair competition statute was not preempted by the federal National Bank Act, although other claims brought for alleged violation of a state statute requiring that a bank exercise good faith when posting transactions to a customer's account were preempted. See **Ch. 40, Fraud and Deceit and Other Business Torts, § 40.150[2][a]**.

Attorney Had Standing Under Unfair Competition Statute to Sue Competitor. In *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214

Cal. App. 4th 544, the court of appeal held that a lawyer had alleged sufficient injury from the alleged unlicensed practice of law of a competitor company that offered criminal record expungement services to establish standing under the unfair competition statute, despite no direct business dealings between the competitors. See **Ch. 40, Fraud and Deceit and Other Business Torts, § 40.150[4][a]**.

Common Law Accrual Rules Applicable to Unfair Competition Action. In *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal. 4th 1185, the California Supreme Court held that when applying the statute of limitations, a cause of action under the unfair competition statute is governed by common law accrual rules to the same extent as any other statute, which may include application of the delayed discovery rule, the continuous violation rule, or the continuous accrual rule. See **Ch. 40, Fraud and Deceit and Other Business Torts, § 40.150[4][c]**.

Retaliation for Filing Report of False Claim Against Government May Support Wrongful Termination Action In *McVeigh v. Recology San Francisco* (2013) 213 Cal. App. 4th 443, the court of appeal held that a report of suspected false claims against the government may support a cause of action for wrongful discharge in violation of public policy, as the False Claims Act specifically protects employees from retaliation for reporting reasonably suspected false claims or otherwise furthering an action under the False Claims Act. See **Ch. 40A, Wrongful Termination, § 40A.12[2][e][i]**.

Permissible Remedies in FEHA Wrongful Discharge Action Clarified. In *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, the California Supreme Court held that in a wrongful termination lawsuit

brought under the FEHA, if the jury finds by a preponderance of the evidence that unlawful discrimination was a substantial motivating factor in the termination, but the employer also proves by a preponderance of the evidence that it would have made the same decision at the time to terminate the employee for legitimate, nondiscriminatory reasons, the court is not permitted to award damages, backpay, or an order reinstating the plaintiff to the employment. However, the plaintiff may still be awarded declaratory or injunctive relief, if appropriate, to stop discriminatory practices, and the plaintiff may also be eligible for reasonable attorney's fees and costs. See **Ch. 40A, Wrongful Termination, § 40A.30[3][a]**.

Period for Filing Whistleblower Administrative Claim Not Topped by Filing Lawsuit First. In *Bjorndal v. Superior Court* (2012) 211 Cal. App. 4th 1100, the court of appeal held that in an action under the California Whistleblower Protection Act, because it would defeat the purpose for first requiring the exhaustion of administrative remedies, the time period for filing an administrative claim is not equitably tolled by filing a lawsuit first. See **Ch. 40A, Wrongful Termination, § 40A.30[13]**.

Anti-Retaliation Provisions of FEHA Do Not Protect Employee Who Lies or Withholds Information During Employer Investigation. In *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal. App. 4th 1510, the court of appeal held that the statutory protection given to an employee when testifying or assisting in any proceeding under the FEHA does not shield an employee from termination of employment or lesser discipline for lying or withholding information during an employer's internal investigation of a discrimination claim. See **Ch. 40B, Employment Discrimination and Harassment, § 40B.10[8]**.

Actual Hatred Not Element in Action Under Civ. Code § 51.7. In *Ventura v. ABM Industries, Inc.* (2012) 212 Cal. App. 4th 258, the court of appeal held that while Civ. Code § 51.7 is often described as a statute protecting against "hate crimes," a civil plaintiff is not required to plead or prove that the defendant perpetrator actually harbored any hatred toward plaintiff. See **Ch. 40B, Employment Discrimination and Harassment, § 40B.20[2]**.

Employee Must Allege Discrimination in Administrative Wrongful Discharge Proceeding to Preserve Issue for Subsequent Lawsuit. In *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal. App. 4th 866, the court of appeal held that if an employee pursuing a wrongful termination claim pursues administrative remedies, and the employee is given a full and fair opportunity before the applicable administrative body to challenge the termination decision, the employee must assert at the administrative hearing any claims of discrimination that the employee believes are relevant to the termination or risk facing a collateral estoppel defense if he or she later pursues such discrimination claims in court. See **Ch. 40A, Wrongful Termination, § 40A.30[13], and Ch. 40B, Employment Discrimination and Harassment, § 40B.50[10][a]**.

2011 Malicious Prosecution Limitations Holding Denied Retroactive Application. In *Silas v. Arden* (2013) 213 Cal. App. 4th 75, the court of appeal held that a 2011 court holding first applying the one-year limitations period to malicious prosecution actions against attorneys should not be applied retroactively to a cause of action that was filed more than three years before that holding was announced. See **Ch. 43, Malicious Prosecution and Abuse of Process, § 43.07[4]**.

Judicial Privilege Applied to Statements Made to Sheriff's Investigation. In *Vivian v. Labrucherie* (2013) 214 Cal. App. 4th 267, the court of appeal held that the judicial privilege of Civ. Code § 47(b) applied to statements made in response to the inquiries of a sheriff's department internal affairs investigator who was investigating inappropriate conduct by a police officer plaintiff, despite the fact that the person who made the statements was arguably bound by a prior settlement agreement not to make disparaging comments about the plaintiff. See **Ch. 45, Defamation, § 45.11[4][c][i]**.

Non-Governmental Employee May Be Public Official. In *Young v. CBS Broadcasting, Inc.* (2012) 212 Cal. App. 4th 551, the court of appeal held that when determining who is a public official for purposes of liability for defamation, the fact that the plaintiff was not a government employee is not a dispositive factor if a plaintiff in all other respects serves as a public official, and that in the instant case, a court-appointed conservator was acting as a public official. See **Ch. 45, Defamation, § 45.13[2][c]**.

Oral Disclosure May Support Action for Public Disclosure of Private Facts. In *Ignat v. Yum! Brands, Inc.* (2013) 214 Cal. App. 4th 808, the court of appeal held that to be actionable as a public disclosure of private facts, the public disclosure may be either written or oral. See **Ch. 46, Invasion of Privacy, § 46.03[3][b]**.

Action for Negligent Credit Defamation Preempted. In *Lafferty v. Wells Fargo Bank* (2013) 213 Cal. App. 4th 545, the court of appeal held that a common law cause of action for negligent credit defamation based on a false report to credit agencies about the plaintiff's failure to meet credit obligations is preempted by the fed-

eral Fair Credit Reporting Act. See **Ch. 46, Invasion of Privacy, § 46.07[5]**.

Statutory Protection for Personal Information in Credit Card Transaction Inapplicable to Online Purchases of Electronically Downloadable Products. In *Apple Inc. v. Superior Court* (2013) 56 Cal. 4th 128, the California Supreme Court held that the protections for personal information in credit card transactions provided in Civ. Code § 1747.08, do not apply to online purchases of electronically downloadable products, concluding that the statute was tailored to apply to transactions in which the consumer was physically present and providing a credit card as the means of purchase, and that the statute was also written to provide retailers with ways to ensure the identification of the cardholder to protect against credit card fraud. See **Ch. 46, Invasion of Privacy, § 46.07[11][b]**.

Private Attorney General Fee Requirements Clarified. In *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, the court of appeal held that when applying the private attorney general statutory provisions for recovering attorney's fees in a suit that does not result in a favorable final judgment, a trial court has the discretion to conclude that the plaintiff is not barred from recovering fees even though he or she failed to provide a timely prelitigation demand letter and attempt to negotiate before filing suit, if the court concludes that the plaintiff did not bring the lawsuit merely to recover attorney's fees and that a demand letter would have been futile as evidenced by the fact that the defendant insisted well after the litigation began that it was doing nothing wrong and refused to negotiate an end to the lawsuit. See **Ch. 50, Damages, Costs, Attorneys' Fees, and Interest, § 50.31[3]**.

Benefit to Members of Organizational

Plaintiff May be Considered in Private Attorney General Analysis. In *California Redevelopment Assn. v. Matosantos* (2013) 212 Cal. App. 4th 1457, the court of appeal held that under the private attorney general doctrine, when the plaintiff is an organization suing on behalf of its members, the court may consider the financial benefit that the litigation confers on those members when determining the plaintiff's financial stake in pursuing the litigation. Moreover, the fact that the financial gain to the members will be passed on to creditors of those members does not preclude a finding that the organization's financial interest in pursuing the litigation, through benefit to its members, defeats a right to recover attorneys' fees. See *Ch. 50, Damages, Costs, Attorneys' Fees, and Interest*, § 50.31[3].

Accrual of Interest on Postjudgment Costs and Fees Clarified. In *Lucky United Properties Investment, Inc. v. Lee* (2013) 213 Cal. App. 4th 635, the court of appeal held that interest on an award of costs and fees that were incurred after the judgment, for example, postjudgment enforcement costs, accrues from the date the award of costs and fees is entered, not from the date of the original judgment, as the amount owed is not known until the award of costs and fees is actually made. The court also held that a trial court award of costs and fees incurred on appeal, such as an award of costs and fees awarded by a trial court under Code Civ. Proc. § 425.16, the anti-SLAPP statute, earns interest from the date the award of costs and fees is entered. See *Ch. 50, Damages, Costs, Attorneys' Fees, and Interest*, § 50.53[4].

Plaintiff Limited to Recovering for Medical Expenses Amount Actually Paid by Medicare. In *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal. App. 4th 196, the court of appeal held that the rule from *Howell v. Hamilton Meats &*

Provisions limiting a plaintiff's recovery of past medical expenses to only those expenses actually paid by or on behalf of the plaintiff or for which the plaintiff actually remains liable, applies when plaintiff's medical expenses were paid by Medicare rather than by a private insurer. The court also held that if a post-trial reduction of damages is required because the plaintiff failed to take reasonable steps to mitigate the harm, this reduction should be applied to the amount actually paid for past medical benefits, rather than to the amount billed. See *Ch. 52, Recovery for Medical Expenses and Economic Loss*, § 52.01[2], and *Ch. 53, Mitigation of Damages (Avoidable Consequences) and the Collateral Source Rule*, § 53.01[1].

Public Entity Not Vicariously Liable for Police Officer's Failure to Report Own Acts of Child Abuse. In *Kassey S. v. City of Turlock* (2013) 212 Cal. App. 4th 1276, the court of appeal held that an employing public entity cannot be held vicariously liable for a police officer's failure to report his or her own abuse of a child, as interpreting Pen. Code § 11166(a) to mandate the reporting of one's own abusive conduct would run afoul of the Fifth Amendment's privilege against self-incrimination. See *Ch. 60, General Principles of Liability and Immunity of Public Entities and Employees*, § 60.22[2], and *Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.20.

Public Entities Not Immune for Misrepresentations Causing Reputational Harm. In *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal. App. 4th 358, the court of appeal held that the statutory immunity provided to public entities for employee misrepresentations did not apply when city employees provided inaccurate information to third parties, al-

legedly resulting in reputational harm (slander, trade libel, and intentional interference with prospective economic advantage) to plaintiff, as reputational harm was not included within the category of common law deceit identified by the Supreme Court in prior opinions. See *Ch. 60, General Principles of Liability and Immunity of Public Entities and Employees*, § 60.43[1][a].

Golden Gate Bridge Not Liable for Failing to Adopt Newer Barrier Technology Between Opposing Traffic Lanes. In *Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal. App. 4th 335, the court of appeal held that, in a claim for dangerous condition of public property, the availability of technological advances made elsewhere that might have increased safety at the public property site at which plaintiff was injured, does not constitute a change in physical conditions necessary to defeat a defense of design immunity, and as such, the Golden Gate Bridge District could not be held liable for failing to install movable median barriers between opposing traffic lanes. See *Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[3][d].

Public Entity Not Liable Under Gov. Code § 845.6 When Providing Medical Care Administered Negligently. In *Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal. App. 4th 1051, the court of appeal held that potential liability of a public entity for the failure to provide medical care for a prisoner under Gov. Code § 845.6 only exists when an employee has failed to summon immediate medical care, and the statute does not impose liability on the public entity for medical malpractice when medical care is provided, but done so negligently. The court also held that the failure of the public

entity's defense attorneys to remind a plaintiff that they are required to first file a claim before proceeding with his or her lawsuit is not a basis for estopping the public entity from later relying on the failure to file a claim as a defense. See *Ch. 61, Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.16, and *Ch. 62, Claims and Actions Against Public Entities and Employees*, § 62.15.

Indemnity Claim Against Public Entity Accrued On Serving of Amended Complaint. In *Centex Homes v. Superior Court* (2013) 214 Cal. App. 4th 1090, the court of appeal held that for purposes of establishing the accrual date for an indemnity action against a public entity under Gov. Code § 901, the relevant complaint is the one that gives rise to the indemnity claim, which may be an amended complaint if the original complaint contains no allegations that would support the indemnity claim against the public entity. See *Ch. 62, Claims and Actions Against Public Entities and Employees*, § 62.22[2][a].

Estoppel Applicable to Attorney Fee Referral Agreement Dispute. In *Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler* (2012) 212 Cal. App. 4th 172, the court of appeal held that when an attorney had obtained the necessary written consent for the attorney's referral fee from the original class representatives in a class action, but the attorney handling the class action then changed class representatives and prevented the referral attorney from contacting the new class representatives on threat of a lawsuit, the referral attorney should have been allowed to argue that the attorney handling the class action was equitably estopped from blocking enforcement of the fee-sharing agreement under the applicable rules governing such agreements. See *Ch.*

70, *The Attorney-Client Relationship*, § 70.11[2].

Defendant Sufficiently Pled Limitations Defense Against Suspended Corporation. In *V & P Trading Co., Inc. v. United Charter, LLC* (2012) 212 Cal. App. 4th 126, the court of appeal held that if a statute of limitations defense is viable only because a corporate plaintiff was suspended at the time that the lawsuit was filed and the limitations period ran before corporate powers were restored to the plaintiff, the fact that the defendant pled only the statute of limitations defense in its answer, without also specifying at that time that it was relying on the suspension of plaintiff's corporate powers, will not defeat the defendant's statute of limitations defense. See **Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.04[5][f].**

Court May Reconsider Forum Non Conveniens Motion. In *Williamson v. Mazda Motor of America, Inc.* (2012) 212 Cal. App. 4th 449, the court of appeal held that when a trial court has previously rejected a defendant's forum non conveniens motion filed shortly after a case is filed, the court has the authority to reconsider the issue on the court's own motion after the issues and relevant facts of the litigation are more fully developed. See **Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.24[5][a].**

Insurer and Insured are Joint Clients of Attorney Retained by Insurer. In *Bank of America, N.A. v. Superior Court* (2013) 212 Cal. App. 4th 1076, the court of appeal held that absent a conflict of interest, an attorney retained by an insurance company to defend its insured under the insurer's contractual obligation to do so represents and owes a fiduciary duty to both the insurer and insured, and the insurer and insured are joint clients of the attorney and

each holds the attorney-client privilege, which may not be waived by one client without the consent of the other. The same attorney-client relationship exists if the insurance contract provides that an insurer must provide counsel when the insured is the plaintiff prosecuting a lawsuit, rather than a defendant being sued. See **Ch. 72, *Discovery*, § 72.21[1].**

District Attorney Could Not Force Disclosure of Confidential Communications Between Parolee and Psychotherapist. In *People v. Gonzales* (2013) 56 Cal. 4th 353, the California Supreme Court held that when applying the patient-psychotherapist privilege, language in Evid. Code § 1012 does not give a third party a right to obtain disclosure of a confidential communication over the patient's objection or without the patient's permission on the theory that such disclosure is necessary to accomplish the purpose for which the therapist has been consulted, and as such, a district attorney in an action under the Sexually Violent Predators Act could not force the disclosure of confidential communications between a psychotherapist and the parolee being evaluated. See **Ch. 72, *Discovery*, § 72.24[3].**

Unapportioned Settlement Offer Made to Wrongful Death Plaintiffs Valid Under Code Civ. Proc. § 998. In *McDaniel v. Asuncion* (2013) 214 Cal. App. 4th 1201, the court of appeal held that an unapportioned offer is valid under Code Civ. Proc. § 998 in a wrongful death action when the offer is made by a defendant to the plaintiff heirs as a group. See **Ch. 73, *Settlement and Release*, § 73.07[6].**

Broad Settlement Release in Car Accident Case Extended to Employer of Defendant. In *Rodriguez v. Oto* (2013) 212 Cal. App. 4th 1020, the court of appeal held that when the victim of a motor vehicle

accident settled with the other driver and his rental car company and insurer, language in the release purporting to release “all other persons, corporations, associations or partnerships” extended to release the employer of the other driver, concluding that the other driver’s employer clearly fell within the scope of this broad language and plaintiff presented no evidence that, at the time the release was signed, any party had shown an intent to exclude the other driver’s employer. See **Ch. 73, Settlement and Release**, § 73.09[3].

Oral Settlement Agreement Does Not Personally Bind Corporation’s Authorized Representative. In *Canaan Taiwanese Christian Church v. All World Mission Ministries* (2012) 211 Cal. App. 4th 1115, the court of appeal held that an oral settlement agreement reached on behalf of a corporation by a person authorized to settle for the corporation does not bind that person authorized to settle for the corporation in their individual capacity under Code Civ. Proc. § 664.6, at least in the absence of evidence that the parties intended to bind that person individually. See **Ch. 73, Settlement and Release**, § 73.10[2].

Insurance Contract. In *In re Ins. Installment Fee Cases* (2012) 211 Cal. App. 4th 1395, an appellate court held that a monthly installment fee is not an insurance premium or rate that must be stated on the declarations page or elsewhere in the policy. See **Ch. 80, Overview of Insurance Contracts**, § 80.02[2].

Insurer’s Duty to Defend. In *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal. App. 4th 1385, an appellate court held that Ins. Code § 533.5(b), which prohibits insurance coverage or indemnity for the payment of a fine, penalty, or restitution in a criminal proceeding or in certain other proceedings under the Bus. & Prof. Code brought by state or local prosecutors, does not preclude an insurer from providing a defense to federal criminal charges. See **Ch. 81, Types of Insurance Policies**, § 81.01[2][d][v].

Limitation of Insurance Coverage. In *Travelers Prop. Cas. Co. of America v. Superior Court* (2013) 215 Cal. App. 4th 561, the vacancy limitation in an HOA’s condominium insurance policy, precluding coverage if the building had been vacant for more than 60 consecutive days prior to the loss or damage, applied to loss resulting from the removal of fixtures and appliances from the property after construction but prior to any occupancy of the condominium complex. See **Ch. 82, Claims and Disputes Under Insurance Policies**, § 82.43[2][a].

Liability of Insurance Broker. In *Travelers Prop. Cas. Co. of America v. Superior Court* (2013) 215 Cal. App. 4th 561, the insurance broker did not breach any duty to the insured when it procured insurance for an HOA following the developer’s construction of a condominium complex, based on the request of the developer’s agent to replace the developer’s builder’s risk policy with a condominium policy issued to the HOA. See **Ch. 82, Claims and Disputes Under Insurance Policies**, § 82.52[2].

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- ☐ 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 54. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 54, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
- ☐ 2. This Release Number 55 contains only White Revision pages.
- ☐ 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

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VOLUME 1

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	xi thru xiii	xi
<input type="checkbox"/>	1-61 thru 1-64.1.	1-61 thru 1-64.1
<input type="checkbox"/>	2-18.1 thru 2-18.5.	2-18.1 thru 2-18.5
<input type="checkbox"/>	3-23 thru 3-24.1.	3-23 thru 3-24.1
<input type="checkbox"/>	4-1 thru 4-3.	4-1 thru 4-4.1
<input type="checkbox"/>	4-27 thru 4-29	4-27 thru 4-30.1
<input type="checkbox"/>	5-33 thru 5-37	5-33 thru 5-39
<input type="checkbox"/>	9-19 thru 9-25	9-19 thru 9-27

VOLUME 2

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	17-35 thru 17-36.1	17-35 thru 17-36.1
<input type="checkbox"/>	20-311 thru 20-312.1	20-311 thru 20-312.1
<input type="checkbox"/>	21-7 thru 21-8.1.	21-7 thru 21-8.1
<input type="checkbox"/>	23-8.1	23-8.1
<input type="checkbox"/>	23-73 thru 23-75	23-73 thru 23-75

VOLUME 3

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	30-45 thru 30-50.3	30-45 thru 30-50.3
<input type="checkbox"/>	30-67.	30-67 thru 30-68.1
<input type="checkbox"/>	31-21 thru 31-23	31-21 thru 31-24.5
<input type="checkbox"/>	31-101 thru 31-102.1	31-101 thru 31-102.1
<input type="checkbox"/>	40-17 thru 40-21	40-17 thru 40-22.1
<input type="checkbox"/>	40-39.	40-39 thru 40-40.1
<input type="checkbox"/>	40-78.1	40-78.1
<input type="checkbox"/>	40-125	40-125
<input type="checkbox"/>	40-135 thru 40-137	40-135 thru 40-137
<input type="checkbox"/>	40-155 thru 40-161	40-155 thru 40-162.1
<input type="checkbox"/>	40-166.5 thru 40-166.15	40-166.5 thru 40-166.16(1)
<input type="checkbox"/>	40-187	40-187 thru 40-188.1
<input type="checkbox"/>	40-196.1 thru 40-196.15	40-197 thru 40-198.15
<input type="checkbox"/>	40A-17 thru 40A-18.1	40A-17 thru 40A-18.1

Check As Done	<u>Remove Old Pages Numbered</u>	<u>Insert New Pages Numbered</u>
<input type="checkbox"/>	40A-37 thru 40A-38.1	40A-37 thru 40A-38.1
<input type="checkbox"/>	40A-71 thru 40A-73.	40A-71 thru 40A-73
<input type="checkbox"/>	40A-83 thru 40A-88.3	40A-83 thru 40A-88.3
<input type="checkbox"/>	40A-97 thru 40A-103	40A-97 thru 40A-103
<input type="checkbox"/>	40B-21 thru 40B-22.1	40B-21 thru 40B-22.1
<input type="checkbox"/>	40B-29 thru 40B-30.1	40B-29 thru 40B-30.1
<input type="checkbox"/>	40B-78.1 thru 40B-80.1	40B-79 thru 40B-80.1
<input type="checkbox"/>	40B-91 thru 40B-93	40B-91 thru 40B-93

VOLUME 4

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	43-31.	43-31
<input type="checkbox"/>	43-57.	43-57 thru 43-58.1
<input type="checkbox"/>	45-41 thru 45-53	45-41 thru 45-54.1
<input type="checkbox"/>	45-65.	45-65 thru 45-66.1
<input type="checkbox"/>	45-81.	45-81 thru 45-82.1
<input type="checkbox"/>	45-111	45-111
<input type="checkbox"/>	46-18.1 thru 46-20.1.	46-19 thru 46-20.1
<input type="checkbox"/>	46-63 thru 46-75	46-63 thru 46-76.1
<input type="checkbox"/>	50-5	50-5
<input type="checkbox"/>	50-23.	50-23 thru 50-24.1
<input type="checkbox"/>	50-33.	50-33 thru 50-34.1
<input type="checkbox"/>	50-55 thru 50-58.1	50-55 thru 50-58.2(1)
<input type="checkbox"/>	50-103	50-103
<input type="checkbox"/>	52-7 thru 52-14.1	52-7 thru 52-14.1
<input type="checkbox"/>	52-39 thru 52-41	52-39 thru 52-41
<input type="checkbox"/>	53-3 thru 53-5	53-3 thru 53-5
<input type="checkbox"/>	53-25 thru 53-29	53-25 thru 53-29
<input type="checkbox"/>	55-37 thru 55-44.1	55-37 thru 55-44.1

VOLUME 5

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	60-5 thru 60-9	60-5 thru 60-9
<input type="checkbox"/>	60-21 thru 60-25	60-21 thru 60-26.1
<input type="checkbox"/>	60-49.	60-49
<input type="checkbox"/>	61-45.	61-45 thru 61-46.1
<input type="checkbox"/>	61-67 thru 61-73	61-67 thru 61-74.7
<input type="checkbox"/>	61-80.1 thru 61-81	61-81 thru 61-82.1
<input type="checkbox"/>	62-9	62-9
<input type="checkbox"/>	62-21 thru 62-41	62-21 thru 62-42.1

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<input type="checkbox"/>	62-73 thru 62-77	62-73 thru 62-77
<input type="checkbox"/>	70-28.1 thru 70-29	70-29 thru 70-30.1
<input type="checkbox"/>	71-47 thru 71-50.1	71-47 thru 71-50.1
<input type="checkbox"/>	71-63.	71-63 thru 71-64.1
<input type="checkbox"/>	71-179 thru 71-181	71-179 thru 71-181
<input type="checkbox"/>	72-32.1	72-32.1
<input type="checkbox"/>	72-51 thru 72-52.1	72-51 thru 72-52.1
<input type="checkbox"/>	73-36.1 thru 73-37	73-37 thru 73-38.1
<input type="checkbox"/>	73-47 thru 73-59	73-47 thru 73-61

VOLUME 6

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	80-9	80-9 thru 80-10.1
<input type="checkbox"/>	80-49 thru 80-51	80-49 thru 80-52.1
<input type="checkbox"/>	81-19 thru 81-23	81-19 thru 81-24.1
<input type="checkbox"/>	81-193	81-193 thru 81-194.1
<input type="checkbox"/>	82-43 thru 82-45	82-43 thru 82-46.1
<input type="checkbox"/>	82-111	82-111 thru 82-112.1
<input type="checkbox"/>	82-143	82-143 thru 82-144.1
<input type="checkbox"/>	TC-1 thru TC-305.	TC-1 thru TC-315
<input type="checkbox"/>	TS-1 thru TS-87	TS-1 thru TS-89
<input type="checkbox"/>	I-1 thru I-267	I-1 thru I-267

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