

PUBLICATION UPDATE

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Matthew Bender® California Points and Authorities

Publication 186 Release 118

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HIGHLIGHTS

NEW FORMS. This release contains new forms on several topics, including:

- Court Could Award Attorney's Fees Outside of Local Rule Guidelines and Greater Than Damages Awarded. See *Ch. 60, Costs, § 60.481A*.
- Opposing Contention That Award of Punitive Damages Must Be Reduced When Compensatory Damage Award Is Reduced. See *Ch. 64, Damages: Tort, § 64.216*.
- Defendant Not Liable for Unpaid Obligation to Third Party. See *Ch. 64, Damages: Tort, § 64.217*.
- Plaintiff's Express Assumption of Risk Does Not Extend to Defendant's Gross Negligence. See *Ch. 165, Negligence, § 165.421*.
- Heightened Foreseeability Required to Hold Landlord Liable for Failing to Prevent Gang Violence. See *Ch. 178, Premises Liability, § 178.64A*.

Authorities updates the publication in many areas noted in more detail below.

REVISED CHAPTERS. Chapters have been revised throughout to reflect new case law and legislation, including:

New Uniform Foreign-Country Money Judgments Recognition Act. *Ch. 131, Judgments*, has been updated to include information regarding applicability of the new Uniform Foreign-Country Money Judgments Recognition Act, which applies to actions filed on or after January 1, 2008, in which the issue of recognition of a foreign country judgment is raised.

Inadvertent Disclosure of Privileged Material During Discovery. *Ch. 80, Discovery: Scope, Regulation, and Timing*, has been updated to incorporate an important new California Supreme Court cases clarifying the ethical responsibilities of an attorney who receives inadvertently-disclosed privileged materials, and the consequences for failing to act in accordance with those responsibilities.

Release 118 of California Points and

ARBITRATION

Private Arbitration — Class Action/Arbitration Prohibitions in Context of Unwaivable Statutory Rights. The California Supreme Court has considered class action waivers (prohibitions) in the context of unwaivable statutory rights, specifically wage and hour laws, and adopted the determining criteria that if class arbitration is likely to be a significantly more effective practical means of vindicating the statutory rights of the affected parties than individual litigation or arbitration, and the disallowance of the class action will likely lead to a less comprehensive enforcement of the laws involved, a court must invalidate the class arbitration waiver to ensure that those parties can vindicate their unwaivable rights in class arbitration [*Gentry v. Superior Court (Circuit City Stores, Inc.)* (2007) 42 Cal. 4th 443; *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal. App. 4th 138]. See **Ch. 20, Contractual Arbitration, § 20.122.**

Private Arbitration — Nonsignatory Officer Alleged to Be Alter Ego Can Compel Arbitration. In a case of first impression, the Court of Appeal has held that nonsignatory officers alleged to be alter egos of a corporate defendant can compel signatories to arbitrate under an agreement signed by the corporation [*Rowe v. Exline* (2007) 153 Cal. App. 4th 1276]. See **Ch. 20, Contractual Arbitration, § 20.69** new Optional Paragraph C.

Private Arbitration — Deception During Settlement Negotiations Causes Forfeiture of Right to Compel Arbitration. In a case involving interstate commerce, and thus, governed by federal law, the Court of Appeal held that although settlement efforts are not interpreted as waiving the right to arbitrate if the settlement is not finalized, a party who attempts to obtain

settlement by misleading the court and proposed class members about the benefits of the proposed settlement forfeits its right to arbitrate [*Aviation Data, Inc. v. American Express Travel Related Services Company, Inc.* (2007) 152 Cal. App. 4th 1522]. See **Ch. 20, Contractual Arbitration, § 20.184.**

Private Arbitration — Interim Award of Attorney's Fees Approved. Under the specific wording of an arbitration agreement, it was proper for the trial court, in ordering arbitration, to award petitioner its attorney's fees reasonably expended in moving the matter to arbitration, even though it was an interim award and even though petitioner may not have been the ultimate prevailing party [*Acosta v. Kerri-gan* (2007) 150 Cal. App. 4th 1124]. See **Ch. 20, Contractual Arbitration, § 20.10, new Optional Paragraph P.**

Private Arbitration — New Judge Must Reconsider Order Compelling Arbitration Made by Disqualified Judge. If a judge who is disqualified does not disclose the disqualification but instead hears and determines the petition to compel arbitration, the order compelling arbitration must be vacated, because a disqualified judge's rulings are void regardless of their legal correctness. Another judge must reconsider the petition to compel arbitration [*Roscco Holdings Inc. v. Bank of America* (2007) 149 Cal. App. 4th 1353]. See **Ch. 20, Contractual Arbitration, § 20.253.**

Private Arbitration — Standard for Refusing to Postpone Hearing. The arbitrator has discretion to refuse to postpone the arbitration hearing if the party's request for postponement does not establish reasonable cause for needing the postponement and that prejudice will result from the failure of the arbitrator to postpone the hearing. The party's delay in requesting the

postponement is also a factor [*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal. App. 4th 1181]. See *Ch. 20, Contractual Arbitration, § 20.371*.

Private Arbitration — Party’s Conduct Gives Arbitrator Authority Beyond that Conferred in Agreement. When a party responds to an issue not required by its arbitration agreement to be submitted to arbitration and presents evidence on that issue at the arbitration hearing without asserting the limitation in the arbitration agreement, the arbitrator is within his or her power in deciding that issue and awarding damages based on that decision [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc.* (2007) 152 Cal. App. 4th 1300]. See *Ch. 20, Contractual Arbitration, § 20.363*.

ATTORNEYS

Attorneys — Court Looks at Whether Confidential Information Was Conveyed to Determine Conflict of Interest. In *Med-Trans Corporation v. City of California City* (2007) 156 Cal. App. 4th 655, 666–669, the court held that for purposes of a conflict of interest analysis, if the former contact with the attorney was a preliminary conversation that did not result in professional employment or services, the party seeking disqualification must show, directly or by reasonable inference, that the attorney acquired confidential information in the conversation, i.e., the presumption that confidential information was conveyed does not apply. See *Ch. 24, Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear, § 24.28*.

Moving Party Has Burden to Prove That Opposing Counsel Obtained Confidential Information. In *Shandralina G. v. Homonchuk* (2007) 147 Cal. App. 4th 395, the court held that in a motion to disqualify opposing counsel, the moving party has the burden of proving that confidential infor-

mation it imparted to its expert witness has been transmitted to the opposing party. See *Ch. 24, Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear, § 24.41*.

CIVIL PROCEDURE

Demurrer — Judicially Noticed Facts.

This chapter is updated with *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal. App. 4th 659, 63 Cal. Rptr. 3d 537, which holds settlement agreements that were outside the four corners of the complaint could still be subject to judicial notice since they were attached to plaintiff’s opposition to the demurrer and there could be no factual dispute concerning their contents. See *Ch. 71, Demurrers and Motions for Judgment on the Pleadings, § 71.32*.

Judges — Peremptory Challenge. This chapter is updated with *Bravo v. Superior Court* (2007) 149 Cal. App. 4th 1489, 57 Cal. Rptr. 3d 910, which holds although two cases may involve the same parties (e.g., same employee and the same employer), if the second action arises out of later events distinct from those in the previous action, the second action does not constitute a continuation of the previous action and a party’s peremptory challenge may be timely. See *Ch. 130, Judges, § 130.30*.

Judges — Challenge for Cause. This chapter is updated with *Roscco Holdings, Inc. v Bank of America* (2007) 149 Cal. App. 4th 1353, 58 Cal. Rptr. 3d 141, which holds a trial judge must disqualify himself or herself under Code Civ. Proc., § 170.1(a)(8) because he or she had engaged in conversations with dispute resolution providers regarding possible employment. In this case, the good cause exception of Code Civ. Proc., § 170.3(b)(4) did not apply because the disqualified judge knew

of the disqualifying facts when he issued an order, even if he was unaware of their legal effect. See **Ch. 130, Judges, § 130.67.**

Limitation of Actions — Fraud and the Discovery Rule. This chapter is updated with *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal. App. 4th 1308, 64 Cal. Rptr. 3d 9, which holds a suit against an accounting agency that provided a accountant who later embezzled over \$1 million was timely due to the discovery rule. The accrual trigger was the client's discovery that the agency had misrepresented the accountant's record, which put the client on notice under Civ. Code, §§ 18, 19. The complaint adequately alleged that the client had no previous reason to suspect inadequate screening and specifically described both the time and the circumstances of the client's discovery of its claim. The court found the plaintiff pleading sufficiently alleged the plaintiff was not aware of the employee's prior convictions for theft and welfare fraud and that her academic credentials had not been verified until after her embezzlement became known in November 2003 when plaintiff was first informed of the employee's criminal record by the police. See **Ch. 143, Limitation of Actions, § 143.52.**

Limitation of Actions — Professional Malpractice. This chapter is updated with *Sahadi v. Scheaffer* (2007) 155 Cal. App. 4th 704, 66 Cal. Rptr. 3d 517, which holds the two-year statute of limitations prescribed by Code Civ. Proc. § 339(1) applies to actions for accounting malpractice, and where the gravamen of the case is accounting negligence, the two-year statute is applicable, notwithstanding the existence of other claims against the professionals, such as misrepresentation, for which a different statute of limitations might otherwise apply. See **Ch. 143, Limitation of Actions, § 143.61.**

Anti-SLAPP — Commercial Conduct and Speech. This chapter is updated with *Midland Pacific Building Corp. v. King* (2007) 157 Cal. App. 4th 264, 68 Cal. Rptr. 3d 499, which holds the anti-SLAPP statute, Code Civ. Proc. § 425.16, does not categorically exclude any particular type of action and that the focus on the statute is the activity giving rise to the action, not the form of the plaintiff's cause of action. The breach of contract action was clearly based on the defendant's submission of a map to the City Planning Commission and therefore the acts were in the course of an official proceeding. See **Ch. 160, Motions to Strike, § 160.38.**

Anti-SLAPP — Matter of Public Interest. This chapter is updated with *McGarry v. University of San Diego* (2007) 154 Cal. App. 4th 97, 64 Cal. Rptr. 3d 467, which holds plaintiff's defamation claims arose out of a newspaper article reporting on the reasons for plaintiff's termination as head coach of the University of San Diego football team, as well as statements made during a meeting with the parents of football players after the termination. The facts of the case supported a finding that Code Civ. Proc. § 425.16 applied because the coach was a public figure in San Diego, and his termination was a matter of widespread public interest because his termination was of concern to a substantial number of people. See **Ch. 160, Motions to Strike, § 160.38.**

Anti-SLAPP — Official Proceedings. This chapter is updated with *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal. App. 4th 790, 63 Cal. Rptr. 3d 575, which holds although the challenged conduct on the part of Wal-Mart occurred in the course of the preparation of traffic studies and the submission of applications for permits to the city, the complaint was not based essentially on protected conduct.

Wal-Mart's alleged improper conduct in implementing plans for the construction of its store did not arise from its petitioning activities in pursuing the permits, but rather from its conduct in executing its contract with the plaintiffs. The protected conduct in pursuing governmental approval was merely collateral to the activities which formed the gravamen of the complaint. See *Ch. 160, Motions to Strike, § 160.70*.

Anti-SLAPP — Nonjudicial Proceedings. This chapter is updated with *Garrettson v. Post* (2007) 156 Cal. App. 4th 1508, 68 Cal. Rptr. 3d 230, which holds nonjudicial foreclosure proceedings are statutorily based and private in nature. Such proceedings are not linked to any governmental, administrative, or judicial proceedings or regulation and therefore such proceedings cannot form the basis for a SLAPP suit. See *Ch. 160, Motions to Strike, § 160.70*.

CLASS ACTIONS

Class Actions — “Anecdotal” Evidence About Particular Class Members May Be Used To Establish Matters Relating Issues Common to Class as Whole. A California Court of Appeal has held that the use of “anecdotal” evidence about particular class members does not mean that individual facts predominate over common issues, if the anecdotal evidence is relevant to establish a matter that relates to the class as a whole. See *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, now covered in *Ch. 41, Class and Representative Actions, §§ 41.39, 41.45*.

Class Actions — Court in Putative Class Action Must Assess Propriety of Class Treatment in Light of Defendant’s Claimed Adoption of Policy Applicable to Entire Class. The California Supreme Court has held that, in a putative class action seeking reimbursement for employees’ business expenses, the lower courts

abused their discretion in framing the class-certification issue as whether each employee had an agreement with employer regarding the manner of reimbursement, since the employer contended that it had adopted a reimbursement policy applicable to all employees who would be members of the putative class. See *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, now covered in *Ch. 41, Class and Representative Actions, § 41.45*.

CONTRACTS AND COMMERCIAL LAW

Suretyship — Guarantor’s Contract Cannot Waive Usury Defense to Creditor’s Claim Against Debtor-Principal. Resolving an issue not previously addressed by California appellate courts, a court of appeal has held that insofar as a guaranteed debt for interest is unenforceable on the ground of usury, the guarantor’s contract cannot be construed or enforced so as to waive the guarantor’s right to raise that defense, since a promise to pay usurious interest is illegal and therefore cannot be enforced on any theory [*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal. App. 4th 525, 542–544]. See *Ch. 222, Suretyship, § 222.280[4][a]*.

Usury — Exemption for Broker-Negotiated Loan. In *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.* (2007) 153 Cal. App. 4th 1373, 1379–1380, a California appellate court has resolved a novel issue arising under the constitutional usury prohibition and an implementing statute. Exempted from the constitutional prohibition is a loan “made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property” [Cal. Const., art. XV, § 1]; and for that purpose, a loan is “arranged” by a broker who “acts for compensation or in expectation of compensation for soliciting,

negotiating, or arranging the loan for another” [Civ. Code § 1916.1]. The issue for the court was whether a broker who negotiates a loan on behalf of the lender, and who is an officer and employee of an affiliate of the lender but is not employed by the lender itself, negotiates the loan “for another” as the statute provides. The court concluded that the broker in this case did negotiate the loan for another and that, therefore, the usury prohibition did not apply. See **Ch. 166, Negotiable Instruments, § 166.135[4][a]**.

CORPORATIONS

Alter-Ego Liability — Enforcing Corporation’s Arbitration Agreement. In the first California case to address the issue, a court of appeal has held that when a person is sued on the theory that a corporation is the person’s alter ego, that person has standing to enforce the corporation’s agreement to arbitrate the underlying dispute, even though that person was not a party to the agreement [*Rowe v. Exline* (2007) 153 Cal. App. 4th 1276, 1285]. See **Ch. 52, Corporations, § 52.03**.

COSTS AND ATTORNEY’S FEES

Attorney’s Fees — Court Could Award Attorney’s Fees Outside of Local Rule Guidelines and Greater Than Damages Awarded. In *Cruz v. Ayromloo* (2007) 155 Cal. App. 4th 1270, in which tenants successfully sued a landlord, the trial court properly awarded them attorney’s fees under an attorney’s fees clause in their lease, and was within its discretion in awarding fees greater than the suggested guidelines for fees in contract cases provided by local rule and greater than the damages assessed against the landlord. A new form has been added to **Ch. 60, Costs**, as § **60.481A**, to support a motion to fix attorney’s fees outside guidelines sug-

gested by a local rule and greater than the damages assessed.

Attorney’s Fees — Attorney’s Fees Were Awardable Under Code Civ. Proc. § 1021.5 Based on Necessity and Burden of Litigation Against Real Party in Interest. In *Mejia v. City of Los Angeles* (2007) 156 Cal. App. 4th 151, the court held that a plaintiff’s substantial personal interest as a homeowner and resident in opposing a proposed development based on inadequate environmental review did not preclude a finding that the financial burden of the litigation was out of proportion to her personal stake in the matter, and therefore did not preclude an award of attorney’s fees under Code Civ. Proc. § 1021.5. Further, the developer who opposed, as the real party in interest, the homeowner’s petition seeking invalidation of a mitigated negative declaration and the preparation of an environmental impact report under CEQA prior to the city’s approval of the development was an “opposing party” under Code Civ. Proc. § 1021.5, and its purported absence of fault or misconduct did not relieve it of liability for attorney’s fees. See **Ch. 60, Costs and Attorney’s Fees**.

DISCOVERY

Discovery — Inadvertent Disclosure of Privileged Material. In *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal. 4th 807, the California Supreme Court has clarified the ethical obligations of an attorney who receives privileged information from the opposing party’s counsel that was inadvertently supplied in the course of discovery. The Court concluded that an attorney in this situation may not ethically examine the document any more closely than necessary to ascertain that it is privileged and, once it appears that the document is privileged, plaintiffs’ attorney should immediately notify defense counsel. Disqualification is an appropriate remedy for failure to comply

with these guidelines. For discussion, see **Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.220[3][a]**.

Discovery — Non-Party Insurer's Financial Information Is Not Discoverable Under Code Civ. Proc. § 2017.210. In *Catholic Mut. Relief Soc'y v. Superior Court* (2007) 42 Cal. 4th 358, the California Supreme Court held that Code Civ. Proc. § 2017.210 does not authorize discovery of reinsurance policies by an injured plaintiff to facilitate settlement of the underlying tort action. See **Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.51**.

Discovery — Terminating Sanctions. In *Stephen Slesinger, Inc. v. The Walt Disney Co.* (2007) 155 Cal. App. 4th 736, the court held that a trial court may, when faced with pervasive, deliberate, and egregious misconduct — abuse that makes lesser sanctions inadequate to ensure a fair trial — use its inherent judicial power to dismiss the action. See **Ch. 82, Discovery: Sanctions, § 82.02[2]**.

Discovery — Filing Motion to Compel Production of Business Records. In *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal. App. 4th 123, the court held that the 60-day period for filing motion to compel under Code Civ. Proc. § 2025.480(b) applies to subpoenas for business records, as well as to subpoenas for oral or written depositions. See **Ch. 83, Discovery: Depositions, § 83.45[4][a]**.

EMPLOYMENT LAW

Employment Law — Public Policy Protects Employees From Termination for Reporting Threats of Violence in Workplace. A California Court of Appeal has held that the California Occupational Safety and Health Act (Lab. Code § 6400 et seq.) and Code Civ. Proc. § 527.8 establish an explicit public policy that requires every employer to provide a safe and secure

workplace, and that prohibits termination of an employee for reporting credible threats of violence in the workplace. See *Franklin v. Monadnock Co.* (2007) 151 Cal. App. 4th 252, now covered in **Ch. 100, Employer and Employee: Wrongful Termination and Discipline, § 100.45**.

Employment Law — School District's Notice to Terminate Probationary Teacher Must Be Personally Served on Teacher. Education Code § 44929.21(b) provides that a teacher on probationary status becomes a permanent employee unless the district notifies the teacher by March 15 of the teacher's second complete consecutive school year of employment of the district's decision not to reelect him or her. A California Court of Appeal has held that a notice of nonreelection under § 44929.21(b) must be given by personal service or some other method equivalent to imparting actual notice. See *Hoschler v. Sacramento City Unified Sch. Dist.* (2007) 149 Cal. App. 4th 258, now covered in **Ch. 211, Schools: Certification, Dismissal, and Related Employment Issues, § 211.40**.

INSURANCE

Personal Injury Insurer had no Duty to Defend Cross-Complaint Alleging Financial Mismanagement. In *Storek v. Fidelity & Guaranty Ins. Underwriters, Inc.* (N.D. Cal. 2007) 504 F. Supp. 2d 803, the U.S. District Court for the Northern District of California found an insurer had no duty to defend regarding a cross-complaint in a lawsuit among family members when the cross-complaint alleged financial mismanagement of the family-owned business. See **Ch. 120, Insurance, § 120.30[4][a]**.

Homeowners' Policy Exclusions Bar Coverage for Losses Arising from Landslide and Third-Party Negligence. In *Loughney v. Allstate Ins. Co.* (S.D. Cal. 2007) 465 F. Supp. 2d 1039, the U.S.

District Court for the Southern District of California granted the insurer's motion for judgment on the pleadings because the homeowners' policy excluded all alleged causes of the insureds' loss resulting from landslide and third-party negligence. See *Ch. 120, Insurance, § 120.30[4][a]*.

CGL Policy's Pollution Incident Clause Potentially Covers Personal Injury Claims. In *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal. App. 4th 1436, 63 Cal. Rptr. 3d 816, personal injury claims against an oil company were potentially covered by a commercial general liability policy "pollution incident" clause, establishing the insurer's duty to defend. See *Ch. 120, Insurance, § 120.50[4][a]*.

Insureds' Material Misrepresentations in Application Warrant Rescission of Policy. The U.S. District Court for the Central District of California, in *United States Specialty Ins. Co. v. Bridge Capital Corp.* (C.D. Cal. 2007) 482 F. Supp. 2d 1164, held that D&O liability policies were void ab initio because the insureds made material misrepresentations in their application regarding the number of previous sexual harassment claims. See *Ch. 120, Insurance, § 120.250[4][a], [4][d]*.

JUDGMENTS

Judgments — Uniform Foreign Money Judgments Recognition Act Replaced. Effective January 1, 2008, and applicable to all actions filed on or after January 1, 2008 in which the issue of recognition of a foreign country judgment is raised, the Uniform Foreign Money Judgments Recognition Act has been replaced by the Uniform Foreign-Country Money Judgments Recognition Act [Code Civ. Proc. § 1713 et seq.]. The Uniform Foreign Money-Judgments Recognition Act continues to apply to actions filed before January 1, 2008, in which the issue of recognition

of a foreign-country judgment is raised. *Ch. 131, Judgments*, has been updated to include information on the status and applicability of both the old and new acts.

MANDATE AND PROHIBITION

Mandate Available to Enforce Ministerial Duty. In *City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 62 Cal. Rptr. 3d 614, 161 P.3d 1168, the California Supreme Court held that mandamus was available when one public entity sought to force another to release funds in accordance with a statutory duty. See *Ch. 150, Mandate and Prohibition, § 150.39[3][a]*.

Petitioner for Writ of Mandate must Have Special Interest over and above Interests of Public. In *Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 Cal. App. 4th 825, 63 Cal. Rptr. 3d 287, the court of appeal held that standing to petition for a writ of mandate requires the petitioner to have a beneficial interest in the writ's issuance, and that the plaintiff's commercial and competitive interests could not serve as a beneficial interest for purposes of the standing requirement. See *Ch. 150, Mandate and Prohibition, § 150.144[3][a]*.

Standing to Petition for Writ of Mandate May Be Allowed When Public Policy Requires. In *City of Garden Grove v. Superior Court* (2007) 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656, the court of appeal held that while the petitioner did not have standing to file a writ petition in the traditional sense, public policy considerations dictated that the petitioner have standing in order to resolve the important and widespread issues presented in the case. See *Ch. 150, Mandate and Prohibition, § 150.162[3][a]*.

PROBATE

Wills — Validity of Holographic Will. In *Estate of Williams* (2007) 155 Cal. App.

4th 197, the court held that evidence supported the finding that a handwritten document in which decedent wrote his name in block letters at the top, stated the disposition of some of his assets, and included some language indicating testamentary intent, was a valid holographic will. The court further noted that the Prob. Code does not require that a holographic will be signed at the bottom, dispose of all of decedent's property, or that it contain any specific testamentary language. See *Ch. 186, Probate of Wills, § 186.52.*

PUBLIC ADMINISTRATION

Abuse of Discretion. This chapter is updated with *Kolender v. San Diego County Civil Service Commission* (2007) 149 Cal. App. 4th 464, 57 Cal. Rptr. 3d 84, which holds the trial court properly granted a petition for writ of mandate to overturn a decision of the San Diego County Civil Service Commission, which reduced the penalty to a temporary demotion and reinstated her as a supervisor. The Commission had abused its discretion in reducing an employee's penalty in light of the sentencing errors she had made and the prior discipline she had received for ignoring Sheriff's department directives regarding staffing. See *Ch. 195, Public Administrative Law, § 195.10.*

Attorney's Fees. This chapter is updated with *Zuehlsdorf v. Simi Valley Unified School District* (2007) 148 Cal. App. 4th 249, 55 Cal. Rptr. 3d 467, which upholds an award of attorney's fees because the trial court's detailed written decision concluding that the defendant acted arbitrarily and capriciously was a sufficient factual finding to support the award. See *Ch. 195, Public Administrative Law, § 195.19.*

Substantial Evidence Test. This chapter is updated with *Tennison v. California Victim Compensation and Government*

Claims Board (2007) 152 Cal. App. 4th 1164, 62 Cal. Rptr. 3d 88, which holds a plaintiff's claim for compensation for being improperly imprisoned was neither fundamental nor vested; although it could be said the right to claim compensation was vested, the right to obtain compensation did not vest until a claimant persuades the Board on the merits of the application. Accordingly, the court concluded that the trial court properly applied the substantial evidence standard of review to the Board's decision. See *Ch. 195, Public Administrative Law, § 195.60.*

Exhaustion of Administrative Remedies. This chapter is updated with *In re Conservatorship of Whitley* (2007) 155 Cal. App. 4th 1447, 66 Cal. Rptr. 3d 808, and *Eight Unnamed Physicians v. Medical Executive Committee of the Medical Staff of Washington Township Hospital* (2007) 150 Cal. App. 4th 503, 59 Cal. Rptr. 3d 100. In *Whitley*, the court holds the Lanterman Developmental Disabilities Services Act's [Welf. & Inst. Code § 4500 et seq.] comprehensive approach to resolving disagreements concerning placements, including a voluntary informal meeting, voluntary mediation, and an administrative fair hearing with judicial review, clearly manifested the legislature's intent that the Lanterman Act's fair hearing procedures be the exclusive remedy for actions by legal representatives objecting to a community placement decision. In *Eight Unnamed Physicians*, the court holds that for the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense; rather, the party must show what the agency's ruling would be in the particular case before the court. See *Ch. 195, Public Administrative Law, § 195.68.*

TORTS

Special Education Teacher Not Liable

for Battery. The court of appeal held that a special education teacher was not liable for battery when his nonconsensual touching of autistic students was reasonable under the circumstances and the plaintiffs failed to prove that the defendant intended to harm the students. See *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal. App. 4th 860, now discussed in **Ch. 21, Assault and Battery, § 21.46.**

Tolling of Limitations Period for Continued Representation in Attorney Malpractice Action Ends if Client No Longer Represented by Attorney Still With Firm. The California Supreme Court held that if an attorney leaves a law firm and takes the representation of a particular client with him or her, the statute of limitations does not continue to toll under the continued representation exception on a malpractice action that the client may have against the attorney's former law firm or any of the other attorneys in that firm. See *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal. 4th 503, now discussed in **Ch. 24A, Attorneys at Law: Malpractice, § 24A.29.**

Court Reduction in Compensatory Damages Does Not Mandate Corresponding Reduction in Punitive Damages. The court of appeal held that a reduction in compensatory damages will not necessarily mandate a corresponding reduction in punitive damages, and a trial court may issue a remittitur as to compensatory damages, but refuse to grant a reduction in punitive damages, so long as the punitive damage award still bears a reasonable relation to the reduced compensatory damage award and the award is not otherwise excessive. See *McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal. App. 4th 1351, now discussed in **Ch. 64, Damages: Tort, § 64.216.**

Defendant Not Liable for Unpaid Obligation to Third Party. The court of appeal held that if a plaintiff seeks damages to compensate for a liability owed to a third party caused by defendant's actionable conduct, but plaintiff has not yet paid that third-party liability, plaintiff must provide more than just evidence of an obligation to pay, but must prove to a reasonable certainty that plaintiff could and would pay the liability. See *Green Wood Industrial Co. v. Foreman Internat. Development Group, Inc.* (2007) 156 Cal. App. 4th 766, now discussed in **Ch. 64, Damages: Tort, § 64.217.**

Wrongful Death Action Not Barred by Failure to Bring Decedent's Original Action to Trial Within Five Years. The court of appeal held that wrongful death and loss of consortium claims did not relate back to personal injury claims brought by a decedent before his or her death, and therefore the five-year time limit for bringing a case to trial applicable to the original personal injury action did not apply to the subsequent wrongful death and loss of consortium claims. See *Brumley v. FDCC California, Inc.* (2007) 156 Cal. App. 4th 312, now discussed in **Ch. 66, Death and Survival Actions, § 66.34.**

Omitted Heir Named But Not Served in Wrongful Death Action May Maintain Subsequent Action. The court of appeal held that if an actual plaintiff to a wrongful death action joins a potential plaintiff as a nominal defendant, but fails to serve that nominal party with a summons and complaint, that nominal defendant is not a party to the action and he or she is not barred from bringing a separate wrongful death action if the initial action is settled. The court also held that the actual defendant has the burden of determining whether an heir has been served. See *Romero v. Pacific Gas & Elec. Co.* (2007) 156 Cal. App. 4th 211,

now discussed in *Ch. 66, Death and Survival Actions, § 66.41.*

Punitive Damages Barred in Survival Action When Only Actual Damage Alleged is Nonrecoverable Emotional Distress. The court of appeal held that if a decedent's representative files a survival action seeking to recover for injury sustained by the decedent before death, but the only injury alleged is emotional distress, there is no basis for an award of punitive damages because there can be no compensatory damages, as the representative is precluded by statute from recovering for the decedent's pain and suffering. See *Berkley v. Dowds* (2007) 152 Cal. App. 4th 518, now discussed in *Ch. 66, Death and Survival Actions, § 66.62A.*

Judgment May Be Backdated to Precede Plaintiff's Death When Death is After Jury Verdict. The court of appeal held that a trial court may enter judgment nunc pro tunc when a plaintiff dies after a jury verdict, but before judgment is rendered, in order to date the judgment prior to the plaintiff's death for purposes of establishing eligibility for noneconomic damages. See *Cadlo v. Metalclad Insulation Corp.* (2007) 151 Cal. App. 4th 1311, now discussed in *Ch. 66, Death and Survival Actions, § 66.63.*

Reliance on Falsity of Advertising When Purchasing Product in Order to Sue Does Not Constitute Justifiable Reliance. The court of appeal held that a consumer who purchases a product with the belief that the manufacturer has falsely represented the product in its advertising cannot show actual reliance when purchasing the product with the specific intent to sue for fraud if the advertising does turn out to be false. See *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal. App. 4th

798, now discussed in *Ch. 105, Fraud and Deceit, § 105.200.*

Damage Allocation When Determining Good Faith of Settlement May be Altered Upon Proof at Trial. The court of appeal held that in a complex multiparty case, a trial court may make an initial allocation between types of damages when making the determination that a pre-trial settlement is made in good faith, although if the evidence produced at trial against non-settling defendants shows that the defendants should not be held liable for one claimed category of damage, settlement amounts initially allocated to compensate for that type of damage may be allocated by the trial court to other categories of damage. See *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal. App. 4th 1337, now discussed in *Ch. 115, Indemnity and Contribution, § 115.160.*

No Interference With Contract Found. The court of appeal held that neither a party to a contract nor agents of that party may be liable for interference with related subcontracts that would require the performance of the party to the primary contract. See *PM Group, Inc. v. Stewart* (2007) 154 Cal. App. 4th 55, now discussed in *Ch. 122, Interference, § 122.35.*

Alleged Victim of Child Abuse Cannot Be Held Liable Under Penal Code § 11172 for Making False Report. The court of appeal held that an alleged victim of child abuse cannot be held liable under Penal Code § 11172(a) for making a false report of the abuse to police, and the litigation privilege of Civ. Code § 47(b) otherwise immunizes the alleged victim from liability for making statements about the alleged abuse to parents or others in anticipation of litigation. See *Chabak v. Monroy* (2007) 154 Cal. App. 4th 1502,

now discussed in *Ch. 142, Libel and Slander (Defamation)*, § 142.55A.

Postjudgment Settlement Constituted Favorable Termination for Malicious Prosecution Purposes. The California Supreme Court held that if a malicious prosecution plaintiff received a favorable judgment on the merits at trial in the underlying action, but the parties subsequently settled the action without the malicious prosecution plaintiff giving up any portion of the favorable judgment, the postjudgment settlement constitutes a favorable termination of the underlying action for the malicious prosecution plaintiff. See *Siebel v. Mittlesteadt* (2007) 41 Cal. 4th 735, now discussed in *Ch. 147, Malicious Prosecution and Abuse of Process*, § 147.40.

Delaying Service of Process in One Lawsuit to Achieve Larger Settlement in Another Lawsuit Against Same Defendant Can Constitute Abuse of Process.

The court of appeal held that delaying service of process in one lawsuit with knowledge that another identical complaint has already been filed and served by a different plaintiff, with the ulterior motive of obtaining a larger settlement than would be obtained had defendant known of the second claim when settling the first, can support a finding of abuse of process, and such conduct is not protected by the litigation privilege. See *Booker v. Rountree* (2007) 155 Cal. App. 4th 1366, now discussed in *Ch. 147, Malicious Prosecution and Abuse of Process*, §§ 147.76, 147.77.

To Recover for Emotional Distress as Bystander, Contemporaneous Awareness of Injury Requires More Than Belief That Injury was More Likely Than Not. The court of appeal held that a wife was not entitled to recover for negligent infliction of emotional distress as a bystander when she heard a loud crash emanating

nating from a nearby area of a store and believed more likely than not that her husband had been injured, but she did not otherwise observe or contemporaneously perceive an injury to her husband as it actually occurred. See *Ra v. Superior Court* (2007) 154 Cal. App. 4th 142, now discussed in *Ch. 153, Mental Suffering and Emotional Distress*, § 153.33.

Primary Assumption of Risk Applied to Errant Golf Shot. The California Supreme Court held that a golfer who injures another golfer with an errant golf shot may defend against liability on the basis of the primary assumption of risk doctrine, so long as the defendant golfer did not intend to injure the other golfer or engage in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. See *Shin v. Ahn* (2007) 42 Cal. 4th 482, now discussed in *Ch. 165, Negligence*, § 165.401.

Pre-Injury Waiver of Liability for Negligence Does Not Extend to Gross Negligence. The California Supreme Court held that even if a pre-injury agreement purporting to excuse a potential defendant from liability for negligence is valid and enforceable, the same release will not generally excuse the defendant from liability for gross negligence. In that specific case, the Court held that an agreement releasing a city from liability for negligence committed against a developmentally disabled child who was participating in a recreational camp designed for the needs of such children violated public policy and was unenforceable to the extent that it could be used to release the city from liability for gross negligence. See *City of Santa Barbara v. Superior Court* (2007) 41 Cal. 4th 747, now discussed in *Ch. 165, Negligence*, § 165.421.

Medical Students and Other Medical

Professionals Exempt From Licensing are Health Care Providers Under MICRA. The court of appeal held that medical students and other medical professionals who are authorized to practice in California, but who are specifically exempt from license or certificate requirements, are considered health care providers subject to MICRA. See *Chosak v. Alameda County Medical Center* (2007) 153 Cal. App. 4th 549, now discussed in *Ch. 175, Physicians and Surgeons: Medical Malpractice, § 175.37.*

Occurrence of Pre-Discussed Medical Complications Can Trigger Statute of Limitations in Medical Negligence Action. The court of appeal held that the occurrence of complications that had been discussed prior to the providing of medical treatment can trigger the running of the statute of limitations in cases in which the patient alleges that the treatment was performed negligently or should not have been performed at all. See *Garabek v. Superior Court* (2007) 151 Cal. App. 4th 1538, now discussed in *Ch. 175, Physicians and Surgeons: Medical Malpractice, § 175.38.*

Sports Facility Under No Duty to Notify Users of Presence of Defibrillator. The court of appeal held that sports facility operators do not owe a duty to sports participants to provide advance notice of the availability of an automatic external defibrillator at the facility for use should a medical emergency arise. See *Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal. App. 4th 307, now discussed in *Ch. 178, Premises Liability, § 178.44A.*

Landlord Generally Owes No Duty to Tenants Not to Rent to Suspected Gang Members. The California Supreme Court held that absent circumstances showing extraordinary foreseeability, a landlord owes no duty to existing tenants not to rent

to suspected gang members, nor to screen the criminal records of suspected gang members before renting, although once having rented, a landlord may have a duty to evict if a threat of violence is highly foreseeable. See *Castaneda v. Olsher* (2007) 41 Cal. 4th 1205, now discussed in *Ch. 178, Premises Liability, § 178.64A.*

Multiple Actions Taken in Furtherance of One Common Plan of Appropriation Limited to One Payment of Statutory Penalty. The court of appeal held that 14,060 separate certificates of authenticity issued to customers over several months by a celebrity autograph authentication business using the plaintiff's name without consent gave rise to only a single cause of action for appropriation under Civ. Code § 3344 and supported only a single payment of \$750 for statutory damages, as these acts were taken with a common purpose and as part of a common plan. See *Miller v. Collectors Universe, Inc.* (2007) 154 Cal. App. 4th 1047, now discussed in *Ch. 184, Privacy: Invasion of Privacy, § 184.44.*

Prisoner-Release Immunity Does Not Extend to Ministerial Act. The California Supreme Court held that ministerial acts undertaken in the performance of correctional policy decisions are not covered by the prisoner-release immunity of Gov. Code § 845.8(a), and while the State's decision to revoke a prisoner's parole, even if based on erroneous information about the person's identity, is a policy decision covered by immunity, the failure of State personnel to release the prisoner after they knew or should have known that they were detaining the wrong person is a ministerial act not protected by immunity. See *Perez-Torres v. State of California* (2007) 42 Cal. 4th 136, now discussed in *Ch. 196, Public Entities, § 196.275A.*

Statutory Damages for Trespass Clarified. The court of appeal held that restoration costs may be recovered under Civ. Code § 3334 for trespass only if restoration is possible and economically feasible in light of all the competing interests. The court also held that profits obtained by the trespasser by virtue of the decision to trespass may be recovered as a “benefit obtained” under Civ. Code § 3334, although the plaintiff must provide evidence specifically linking the profits to the decision to trespass. The court of appeal in another case held that if the defendant presents credible evidence of the expenses incurred, the trial court may offset those amounts against the gross income generated to determine gross profits. However, if the defendant does not present evidence of appropriate expenses, the trial court may award damages based on gross revenue as the benefit obtained by the trespass. See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal. App. 4th 583, and *Bailey v. Outdoor Media Group* (2007) 155 Cal. App. 4th 778, now discussed in *Ch. 225, Trespass, § 225.147*.

Revenue From Product Sale May be Recovered As Restitution Under Unfair Competition Statute. The court of appeal held that a plaintiff who purchases a product because of false or misleading advertisements or product packaging statements is entitled to recover the revenue obtained from the sale of the product from the product manufacturer as restitution under the unfair competition statute, Bus. & Prof. Code § 17200 et seq., even if the plaintiff purchased the product from a retailer rather than directly from the manufacturer. See *Shersher v. Superior Court* (2007) 154 Cal. App. 4th 1491, now discussed in *Ch. 235, Unfair Competition, § 235.53*.

Litigation Expenses Not “Injury in Fact” for Purposes of Standing to Sue

Under Unfair Competition Statute. The court of appeal held that a plaintiff may not effectively avoid the changes made to the unfair competition statute by Proposition 64 by claiming as “injury in fact” the expenses incurred in pursuing litigation against the defendant, nor may an individual consumer create the requisite injury by purchasing a defendant’s product if the purchase was made solely to facilitate a subsequent lawsuit. See *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal. App. 4th 798, now discussed in *Ch. 235, Unfair Competition, § 235.62*.

Rules for Transfer of Publicity Rights for Deceased Personalities Amended. The rules governing the vesting and transfer of the right to enforce the right of publicity of a deceased personality have been amended. See Civ. Code § 3344.1, now discussed in *Ch. 184, Privacy: Invasion of Privacy, § 184.42*.

Rules for Immunity for Detention of Patients by Acute Care Hospital Amended. The rules governing civil and criminal immunity for decisions regarding the detention of a person in an acute care hospital or psychiatric hospital have been amended. See Health & Safety Code § 1799.111, now discussed in *Ch. 196, Public Entities, § 196.10[19]*.

WORKERS’ COMPENSATION

Emotional Distress — Workers’ Compensation Exclusive Remedy Rule. The court of appeal has held that, because plaintiff did not establish discrimination, her causes of action for emotional distress failed to the extent that they were tethered to the discrimination claim, and that the causes of action for emotional distress failed also because they were barred by the exclusive remedy rule, since, even if the discriminatory conduct of which plaintiff complained could be characterized as in-

tentional, unfair, or outrageous, it was nevertheless covered by the exclusivity provisions. See *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal. App. 4th 1367, in **Ch. 239, Workers' Compensation Exclusive Remedy Doctrine, § 239.23.**

Civil Actions — Hirer's Negligent Exercise of Retained Control. The court of appeal has held that a general contractor was not liable to an injured employee of a subcontractor when, even if it could be shown that the general contractor retained control over safety conditions at the worksite, there was no triable issue of fact that the general contractor affirmatively contributed to the subcontractor's employee's in-

juries. See *Millard v. Biosources, Inc.* (2007) 156 Cal. App. 4th 1338, in **Ch. 239, Workers' Compensation Exclusive Remedy Doctrine, § 239.33.**

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May 2008

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<input type="checkbox"/>	185-93 thru 185-95	185-93 thru 185-95
<input type="checkbox"/>	186-121 thru 186-127	186-121 thru 186-127

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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	195-11 thru 195-13	195-11 thru 195-14.1
<input type="checkbox"/>	195-51 thru 195-53	195-51 thru 195-54.1
<input type="checkbox"/>	195-67 thru 195-75	195-67 thru 195-75
<input type="checkbox"/>	195-97 thru 195-99	195-97 thru 195-99
<input type="checkbox"/>	195-117 thru 195-135	195-117 thru 195-135
<input type="checkbox"/>	195-187	195-187 thru 195-188.1

VOLUME 19A

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	196-13 thru 196-15	196-13
<input type="checkbox"/>	196-25	196-25
<input type="checkbox"/>	196-35	196-35
<input type="checkbox"/>	196-46.1 thru 196-47	196-47 thru 196-48.1
<input type="checkbox"/>	196-57	196-57
<input type="checkbox"/>	196-231 thru 196-232.1	196-231 thru 196-232.1
<input type="checkbox"/>	196-243	196-243
<input type="checkbox"/>	196-351	196-351 thru 196-352.1
<input type="checkbox"/>	196-373	196-373 thru 196-374.1

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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	201-101 thru 201-108.1	201-101 thru 201-108.1
<input type="checkbox"/>	206-7.	206-7

<u>Check As Done</u>	<u>Remove Old Pages Numbered</u>	<u>Insert New Pages Numbered</u>
<input type="checkbox"/>	206-165	206-165
<input type="checkbox"/>	206-197 thru 206-199	206-197 thru 206-199

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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	210-18.1 thru 210-21	210-19 thru 210-21
<input type="checkbox"/>	210-73 thru 210-76.1	210-73 thru 210-75
<input type="checkbox"/>	211-101	211-101 thru 211-102.1
<input type="checkbox"/>	217-5 thru 217-17.	217-5 thru 217-15
<input type="checkbox"/>	217-129	217-129
<input type="checkbox"/>	217-161	217-161
<input type="checkbox"/>	218-3 thru 218-5	218-3 thru 218-5

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Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	220-37	220-37 thru 220-38.1
<input type="checkbox"/>	220-121	220-121 thru 220-122.1
<input type="checkbox"/>	222-153	222-153
<input type="checkbox"/>	225-85	225-85 thru 225-86.3
<input type="checkbox"/>	225-153	225-153 thru 225-154.1

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	235-84.1 thru 235-91	235-85 thru 235-92.1
<input type="checkbox"/>	235-117 thru 235-120.1	235-117 thru 235-120.1
<input type="checkbox"/>	239-3 thru 239-5	239-3
<input type="checkbox"/>	239-15 thru 239-25	239-15 thru 239-25
<input type="checkbox"/>	239-67	239-67 thru 239-68.1
<input type="checkbox"/>	239-111	239-111

VOLUME 24

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	I-1 thru I-423	I-1 thru I-425

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