# SUMMARY OF CALIFORNIA APPELLATE DECISIONS

Prepared By:
**MICHAEL J. BRADY**
Appellate Department


201 Spear Street, Suite 1000
San Francisco, CA 94105
(415) 543-4800

1001 Marshall Street, Suite 500
Redwood City, CA 94063
(650) 364-8200

515 South Flower Street, Suite 1100
Los Angeles, CA 90071
(213) 312-2000

50 West San Fernando Street, Suite 1400
San Jose, CA 95113
(408) 287-6262

750 Third Avenue, 25th Floor
New York, NY 10017
(212) 668-5927

60 State Street, Suite 700
Boston, MA 02109
(617) 973-5720

# HOW TO USE THIS CASE SERVICE

When you receive your summaries, each page will have an alphabetical letter located in the upper right-hand corner. Each alphabetical letter corresponds to a separate subject matter category. For a description of the subject matter included within each letter category, consult the Table of Contents in the binder previously received by you. Each page of the summaries should simply be filed behind the appropriate letter category for future reference.

**EXAMPLE:**

**K**

**DAMAGES; EMOTIONAL DISTRESS; DILLION V. LEGG PRINCIPLE**

*Jones v. Smith*, 82 Cal.App.3d 145

The example cited above deals principally with damages and, therefore, is filed under Category K.

Good luck and pleasant reading!

**Michael J. Brady**

LAWYERS
RMKB
ROPERS MAJESKI KOHN BENTLEY

# A

**INSURANCE COVERAGE; PRIMARY EXCESS; HORIZONTAL EXHAUSTIONS; STACKING**

*Kaiser Cement and Gypsum Corporation v. Insurance Company of the State of Pennsylvania*
(2011) 196 Cal.App.4th 140, 126 Cal.Rptr.3d 602

**FACTS:**

This is a complicated case involving primary and excess coverage. It involves exposure of thousands of people, of various occupations, to asbestos products while working in shipyards and in years thereafter. Kaiser, of course, was a major manufacturer of such products. From the middle 1960s to the late 1980s, Kaiser was covered by Truck and some other carriers with primary coverage. Truck's primary coverage was roughly $500,000 per occurrence. Kaiser also had excess coverage with Insurance Company of the State of Pennsylvania (ICSOP) in the amount of $5,000,000. The present dispute involves the issue as to whether all primary insurance has to be exhausted in a continuous and progressive loss situation, before any excess coverage is triggered or whether it is enough for the primary coverage to be exhausted in one year, then allowing the excess coverage above that primary policy to be triggered.

In an earlier Appellate Court decision, the Appellate Court held that each person equaled one occurrence, and that therefore there were multiple (thousands) of occurrences. This decision actually may have hurt Kaiser since there was a sizeable deductible per occurrence.

In the present case, the trial court ruled that "stacking" was appropriate, and that all of the primary coverage for all of the years had to be exhausted before any excess coverage was triggered.

**APPELLATE COURT DECISION:**

Reversed. The Appellate Court found that based upon the policy language alone, Truck's policy language indicated that no one claimant could obtain more coverage than was offered in the primary policy of one year, and that amount was $500,000. This meant that there was the possibility that excess coverage could be triggered. However, the matter was remanded to the trial court because this anti-stacking rule would only apply when one insurer (such as Truck) provided all the insurance on a primary basis for the entire period in question. But this would not apply in the present case because there were other insurers who also provided primary insurance, and an analysis of their policy language and other issues would have to be undertaken by the trial court before deciding

the question as to whether any excess coverage was triggered.



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; ACCIDENTS/SICKNESS/DISABILITY POLICY.**

*August v. Provident Life and Accident Insurance Co.*
(2011) 772 F.Supp.2d 1197 (Central Dist., California) (WL 1097461)

**FACTS AND HOLDING:**

The insured (August) had a disability policy with Provident. If the disability was caused by accident, benefits were paid on a life-time basis. If the disability resulted from "sickness," benefits stopped at age 65. In 1997, the insured the involved in a ski accident and injured his neck. The insured was a ophthalmologist by profession. The neck injury resulted in surgery and difficulties at work. Plaintiff filed a disability claim with Provident. On the claim forms, plaintiff indicated that the disability was caused by the ski accident. Nothing was said about the claim resulting from "sickness." Ten years later, in 2007, Provident informed the insured that it was putting off disability payments since it had determined that the disability resulted from sickness, not accident.

**DISTRICT COURT DECISION:**

The U.S. District Court granted plaintiff's motion for partial summary judgment, finding that the insurer had waited 10 years before making its determination and was, therefore, estopped from doing so. Partial summary judgment in favor of the insureds. Breach of contract action was therefore appropriate. (The insured is also suing for bad faith.)

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; ECONOMIC LOSS**

*National Union Fire Insurance Co. of Pittsburgh, PA v. Ready Pac Foods, Inc.* (2011) ___ F.Supp.2d ___ (WL 1083374) (Central District, California)

**FACTS AND HOLDING:**

Taco Bell bought shredded lettuce from Ready Pac, the insured of National Union. The policy provided coverage for bodily injury and property damage and personal injury. There was an outbreak of E. coli in the Taco Bell restaurants. Various claims were filed against Taco Bell. Taco Bell made claims against Ready Pac and, *inter alia*, Taco Bell sought damages for lost patronage and loss of business. The insurer brought a declaratory relief action, and the District Court held that such claims were for economic loss and were not covered.



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; DUTY TO DEFEND**

*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America* (2011) 197 Cal.App.4th 424, 127 Cal.Rptr.3d 444

**FACTS:**

Deubler was the plaintiff; Deubler sued numerous defendants, including Ulta Salon, and the claim was that the defendants' manufactured nail (fingernail/toenail) products which contained a toxic substance (DBP) which was dangerous and toxic for the reproductive system. The claim was that this was a Proposition 65 product and that warnings should have been provided as to its danger to the reproductive system. Penalties were sought in the amount of $2,500 per day for each individual exposed to the DBP, together with an injunction barring the defendants from distributing the products unless adequate warnings were set forth. The insured, Ulta, tendered to Travelers and requested a defense. Travelers denied coverage and refused to defend. The insured then incurred $240,000 to defend and settle the action for $25,000. Ulta then sued Travelers for coverage and bad faith. The trial court sustained Travelers' demurrer without leave to amend and dismissed the suit.

**APPELLATE COURT DECISION:**

Affirmed. Travelers is only obligated to defend suits alleging bodily injury or property damage. The Deubler suit did not allege that Deubler had suffered bodily injury or property damage. Mere exposure to a toxic product is not enough to create a potential for bodily injury, and allegations of exposure alone will not trigger a duty to defend. Complaint only sought penalties and injunctive relief. The insurer is not required to speculate as to how a third party complaint might be amended in the future to allege a potential for coverage.

# A

**INSURANCE COVERAGE; DUTY TO DEFEND; INTENTIONAL ACTS**

*State Farm General Ins. Co. v. Frake*
(2011) 197 Cal.App.4th 568, 128 Cal.Rptr.3d 301

**FACTS:**

King and Frake were high school friends. King invited Frake to visit him in Chicago, and they went out for a night on the town. They resumed an old game whereby one of them would strike the other in the groin with his fist and the other would do likewise! King first struck Frake; then Frake struck King, and King claimed that he was seriously injured and sued Frake. Frake tendered to State Farm which defended under reservation and then sought declaratory relief. The trial court ruled against State Farm.

**APPELLATE COURT DECISION:**

Reversed. State Farm has no duty to defend or provide coverage. The act was intentional, and it makes no difference that Frake may not have intended to cause harm. In so ruling, the court refused to follow *State Farm Fire and Casualty v. Superior Court (Wright)* 164 Cal.App.4th 317 (2008).


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; POLLUTION EXCLUSION**

*Villa Los Alamos Homeowners Association v. State Farm General Insurance Company* (2011) 198 Cal.App.4th 522, 130 Cal.Rptr.3d 374

**FACTS:**

The plaintiff homeowners association was responsible for 94 units. Association hired California Construction Company to scrap acoustical tile throughout the complex. This was part of normal maintenance. The tile contained asbestos and during the operations, asbestos fibers spread throughout the complex and even outside the complex onto adjoining sidewalks and other areas. Association spent $650,000 in cleaning up this problem. They filed a first party claim against State Farm, their insurer, for this expense. State Farm first party policy had a pollution exclusion, and State Farm denied coverage. Trial court ruled in favor of State Farm.

**APPELLATE COURT DECISION:**

Affirmed. The pollution exclusion with respect to first party coverage receives the same interpretation as with respect to third party coverage. The release of the asbestos fibers was not in a narrow confined area, but would be considered "environmental pollution" since it was spread over a larger non-confined area. This meant that the pollution exclusion would apply. The removal of asbestos would not be an ordinary act of maintenance, but instead would be a highly regulated activity. This is much different than the isolated spraying by homeowner of pesticide in the *MacKinnon v. Truck Ins. Exchange* case decided by the California Supreme Court.

# A

**INSURANCE COVERAGE; RIGHT OF PUBLICITY; INTELLECTUAL RIGHTS EXCLUSION**

*Aroa Marketing, Inc. v. Hartford Insurance Co*
(2011) 198 Cal.App.4th 781, 130 Cal.Rptr.3d 466

**FACTS:**

A model entered into an agreement with Aroa whereby the model would be featured in a video which Aroa was going to use at a consumer electronics show. The model, however, charged that Aroa then used the likeness of the model to sell other products, but this was done without her permission, without compensation, and she sued for deprivation of her right to publicity. Aroa tendered to Hartford which denied coverage based upon an exclusion for personal and advertising injury arising out of any violation of intellectual property rights. In an action against Hartford, the trial court ruled that the exclusion applied.

**APPELLATE COURT DECISION:**

Affirmed. Plaintiff's claims are for right of publicity, and these are clearly embraced by the exclusion in question. The trial court correctly ruled in favor of Hartford.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE; MEDICAL INSURANCE; MENTAL PARITY ACT; EXCLUSION FOR ANOREXIA NERVOSA**

*Harlick v. Blue Shield of California*
(2011) 656 F.3d 832 (WL 3796177) (9th Cir.)

**FACTS AND HOLDING:**

Ninth Circuit holds that the Mental Health Parity Act contained in Health & Safety Code section 1374.72 requires equal treatment for mental illness and physical illness, and that accordingly, a Blue Shield exclusion for anorexia nervosa would not be enforced, and that plaintiff, despite other restrictive language, would be entitled for treatment of anorexia in a residential care facility.

# A

**INSURANCE COVERAGE; D&O POLICY; INTERRELATED WRONGFUL ACTS EXCLUSION**

*Feldman v. Illinois Union Insurance Company*
(2011) 198 Cal.App.4th 1495, 130 Cal.Rptr.3d 770

**FACTS:**

Semiconductor company sued a company that provided circuits. Circuit company cross-complained, alleging non-payment for their product. Semiconductor company then filed an amended complaint alleging fraud. Ultimately, a jury ruled that each side was entitled to recover from the other. With respect to the verdict against it, semiconductor referred this to its insurer (a D&O insurer). The D&O insurer relied upon an exclusion taking the position that the claims in the amended cross-complaint were related to the original claim. The trial court granted summary judgment for the insurer based upon this interrelated claim provision.

**APPELLATE COURT DECISION:**

Affirmed. The provision in question dealt with an exclusion called interrelated wrongful acts which states that if the act in question relates to an earlier factual situation, then the exclusion would apply. In the present case, the amended cross-complaint verdict against the semiconductor company did relate to an earlier claim, and that claim incepted before the insurance policy commenced. The exclusion applies.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; AGRICULTURAL PRODUCTS; ACCIDENT**

*Fresh Express, Inc. v. Beazley Syndicate 2623/623 at Lloyd's*
(2011) 199 Cal.App.4th 1038, 131 Cal.Rptr.3d 12

**FACTS:**

Fresh Express was the country's largest bagger of spinach. Fresh Express did not grow its own spinach; rather, it acquired spinach from many suppliers, and it expected its suppliers to follow safe growing practices, as prescribed by the Department of Agriculture. In 2066, the FDA issued an advisory that bagged fresh spinach should be removed from grocery shelves because of an outbreak of a serious form of E. coli. Fresh Express did a spot check and did discover some problems with some of its suppliers. All spinach was removed from grocery shelves. Later, the FDA concluded its investigation and isolated the source of the problem, and it was not one of Fresh Express' own suppliers. Fresh Express suffered extensive damage because of the incident, and submitted a claim to its insurer for an accidental loss. The insurer denied the claim. Fresh Express brought suit and recovered a verdict in the lower court.

**APPELLATE COURT DECISION:**

Reversed. Decided in favor of the insurer. This cannot be considered an accidental event because the source of the E. coli was not a supplier to Fresh Express, and therefore, there was no causal nexus resulting in the damage. An accidental event did not take place.

# A

**INSURANCE; DUTY TO DEFEND; CONSERVATORSHIP**

*Jones v. Golden Eagle Insurance Corp.*
(2011) 201 Cal.App.4th 139, 133 Cal.Rptr.3d 874 (2011 WL 5903813)

**FACTS:**

Plaintiffs had various claims against Calsol, a manufacturer of solvents. Calsol had various insurers, including Golden Eagle. Calsol went bankrupt, the bankruptcy judge stayed all lawsuits directly against Calsol, but did allow litigation to proceed against Calsol's insurers. Golden Eagle was itself insolvent and was in the hands of a conservator. Under rules established in the Insurance Code and by the company and conservator itself, it was required that timely claims be presented to the Golden Eagle conservator. Plaintiffs never presented any such claim. The conservator ordered that there was no duty on the part of Golden Eagle to defend by reason of plaintiffs' failure to timely present claims. The other insurers did defend Calsol and they contended that they should be able to obtain contribution from Golden Eagle because it shared a defense obligation. They lost in the trial court.

**APPELLATE COURT DECISION:**

Affirmed. Because plaintiffs had failed to present timely claims, Golden Eagle had no duty to defend. The extinguishment of the duty to defend precluded the other insurers from obtaining any sort of contribution from Golden Eagle.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE; DUTY TO DEFEND; *CUMIS*; FEE ARBITRATION**

*Janopaul Block Companies, LLC v. Superior Court*
(2011) 200 Cal.App.4th 1239, 133 Cal.Rptr.380

**FACTS:**

Janopaul was a contractor and agreed to refurbish the old El Cortez Hotel in San Diego. Construction defect litigation happened several years later and Janopaul was sued. It tendered to its insurer, St. Paul. St. Paul delayed in deciding whether it would defend the action, but did say that it would provide independent counsel. When St. Paul demanded more information concerning fees, Janopaul took the position that St. Paul was in breach of its duty to defend. When St. Paul demanded arbitration under Civil Code section 2860, the trial court agreed to the arbitration request. In the meanwhile, the insured had sued St. Paul for bad faith and breach of the duty to defend.

**APPELLATE COURT DECISION:**

Reversed. The bad faith lawsuit alleged breach of the duty to defend and the scope of the duty to defend. These issues have to be resolved before the *Cumis* fee arbitration, which is not concerned with the duty to defend, but with the amount to be paid to the independent counsel.

**COMMENT:**

Interesting to note that St. Paul had agreed to defend and also had agreed to provide *Cumis* counsel. There were disputes concerning the amount owed to *Cumis* counsel, but difficult to understand what the scope of the defense obligation is if the insurer had taken on the defense.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; ADVERTISING INJURY**

*Oglio Entertainment Group, Inc. v. Hartford Casualty Insurance Co.*
(2011) 200 Cal.App.4th 573, 132 Cal.Rptr 3d 754

**FACTS:**

A recording artist had an arrangement with recording company. The artist claimed that the recording company was trying to obtain a superior position in negotiations with the artist, and that the recoding company was hiring other people who in essence would copy the artist's style of lounge singing, and that the recording company would then market these other artists. In a lawsuit against the recording company, the company tendered to its insurer (Hartford) under the advertising injury portion of the policy. The trial judge held that the advertising injury coverage was not implicated.

**APPELLATE COURT DECISION:**

Affirmed. The recording company was not really dealing with some type of advertising or advertising idea that the artist possessed or was engaged in. Rather, the recording company was dealing with a product of the artist, and this does not bring the matter within the advertising injury coverage.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# A

**INSURANCE COVERAGE; MARIJUANA PLANTS; THEFT; POLICE SEIZURE**

*Barnett v. State Farm Gen. Ins. Co.*
(2011) 200 Cal.App.4th 536, 132 Cal.Rptr.3d 742

**FACTS:**

Barnett grew some marijuana plants (12) in his backyard. He claimed these were for medical purposes and were permitted under California's "compassionate use" law. Acting under a search warrant, the police searched Barnett's property and seized (dug up) the plants and took two freezer bags full of marijuana in addition. They later burned this property. Barnett was charged criminally, but the charges were subsequently dismissed. Barnett sought return of his property by filing an action in court; a judge, not knowing the property had been burned, ordered the property to be returned.

Barnett was insured by State Farm. The State Farm policy provided coverage for theft of outdoor plants on Barnett's property. State Farm ultimately turned down coverage and was sued for bad faith by Barnett. The trial court granted summary judgment for State Farm.

**APPELLATE COURT DECISION:**

Affirmed. This was not a theft. The property was taken by police officers acting under a valid warrant with reasonable cause to believe that the warrant was regular and proper. Although the word "theft" is not defined in the policy, it has a common, plain, and accepted meaning, and what happened here does not fall within that meaning.

# A

**INSURANCE; INTERVENTION; DEFAULT**

*Western Heritage Insurance Company v. Superior Court (Parks)*
(2011) 199 Cal.App.4th 1196, 132 Cal.Rptr.3d 209

**FACTS:**

An employee of a health care company was driving a patient home; the patient was ill and was left at home and subsequently died. The survivors sued the employee and the employer, claiming that the employee had acted negligently, and that the employer was negligent in failing to check the qualifications of the employee before hiring the employee. The insurer undertook to defend both the employer and the employee. Although the employee's deposition was noticed several times, he failed to appear and, therefore, the trial court entered default against the employee. The insurer sought to intervene at the trial to contest liability and damages; the trial judge ruled that the insurer could only contest damages since the insurer stood in the shoes of the employee (who was in default) and the employee would be precluded from contesting liability.

**APPELLATE COURT DECISION:**

Reversed. The insurer has the right to protect its interests; it was defending; it does not stand in the shoes of the employee under these circumstances, and it is entitled to contest both liability and damages. Therefore, the insurer can assert defenses that might be available to the insured.

**COMMENT:**

This is a clear expression of the insurer's rights when the insurer is defending and a default is taken for some reason against the insured. This will protect the insurer from a subsequent direct action since, otherwise, the insurer would have no way to protect against a liability verdict and excessive damages in the underlying case.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# C

**INSURANCE; PRIVATE RIGHT OF ACTION; CAR REPAIRS**

*Hughes v. Progressive Direct Insurance Co.*
(2011) 196 Cal.App.4th 754, 126 Cal.Rptr.3d 750

**FACTS:**

For many years, there was controversy as to whether an insurer could gently (or otherwise) influence the insured to take the damaged car to a repair facility favored by the insurance company. Insurance Code § 758.5 addresses this issue and requires that the insurance company must inform the insured that the insured is entitled under the policy to have the car repaired at a facility of the insured's choosing. In the present case, the insured, Hughes, had his car damaged in an accident. He was encouraged by Progressive to take the car to one of Progressives' DRP (direct repair program) facilities. The insured's complaint against Progressive alleged that he was never told that he could take the car to any repair facility of his choosing. The insured was unhappy with the job that Progressive's choice performed. He brought a class action suit against Progressive alleging violation of the Unfair Competition Law (Business & Professions Code § 17200), and the action was brought on behalf of himself and a class.

In the trial court, Progressive demurred, arguing that *Moradi-Shalal* prohibited a private right of action for violation of the Insurance Code, and that is exactly what Hughes was trying to do. The trial court agreed and dismissed the case.

**APPELLATE COURT DECISION:**

Reversed. A claim for violation of the Unfair Competition Law may be brought for any unlawful conduct. This would include a violation of Insurance Code § 758.5.

**COMMENT:**

The Court clearly endorses the holding of *Moradi-Shalal* that a private right of action for violation of 790.03 of the Insurance Code (unfair settlement practices, unfair claims handling practices, etc.) is not permitted, but that the reasons for that particular bar against private rights of action were multiple and different than the policies behind allowing a private right of action for violation of 758.5 requiring notification to the insured that the insured can pick the repair facility of the insured's choice.

# C

**INSURANCE; BAD FAITH; APPRAISAL; COVERAGE**

*Doan v. State Farm General Insurance Co.*
(2011) 195 Cal.App.4th 1082, 125 Cal.Rptr.3d 793

**FACTS:**

Doan had a homeowners policy with State Farm which covered damages to personal property. The policy provided that State Farm would pay the cost to repair or replace, less depreciation. Doan had a fire at the house which destroyed various personal property. Doan calculated the cash value less depreciation at $174,000. State Farm calculated the loss at $130,000. Doan felt that State Farm's method of calculating the loss was not appropriate. Doan did not demand an appraisal as provided for in Insurance Code § 2071. Instead, Doan filed a class action against State Farm, alleging breach of contract, breach of the implied covenant, violation of the Unfair Competition Law, and the Consumers Legal Remedy Act. The trial court sustained State Farm's demurrer and dismissed the case.

**APPELLATE COURT DECISION:**

Substantially reversed. Doan alleges matters that are outside the appraisal process, and had to do with claims handling by State Farm. His exclusive remedy, therefore, is not appraisal, and he would be entitled to bring these other claims in declaratory relief.

**COMMENT:**

Since the whole dispute has to do with the value of the personal property, why not go through the appraisal process? Perhaps the appraiser would agree with the insured. Requiring that step could, therefore, avoid the protracted declaratory relief litigation. This decision would seem to artificially frustrate the appraisal process.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# C

**INSURANCE; *CUMIS* DISPUTE; BAD FAITH**

*Behnke v. State Farm General Insurance Co.*
(2011) 196 Cal.App.4th 1443, 127 Cal.Rptr.3d 372

**FACTS:**

This is a complicated case involving *Cumis* issues. The insured, Behnke, was sued. State Farm agreed to *Cumis* counsel (English firm). Disputes arose as to the reasonableness of the *Cumis* bills, and State Farm paid most of them. The insured entered into an agreement with English to pay any fees that State Farm did not pay (State Farm was not a party to this agreement.) Ultimately, with respect to bills that had not been paid (some $60,000), State Farm demanded *Cumis* arbitration, and the arbitrator ordered all but $16,000 of the $60,000 to be paid. State Farm did so. In the meanwhile, the insured had given English a promissory note and deed of trust and English foreclosed on the insured's house over the fee dispute. Behnke sued State Farm for fraud and bad faith and promissory estoppel, but the trial court ruled in favor of State Farm. The heart of the insured's claim against State Farm was that in 2004, State Farm made a promise that it would pay all fees of English. Summary judgment was granted in favor of State Farm.

**APPELLATE COURT DECISION:**

Affirmed. The only reasonable construction is that State Farm agreed to pay whatever reasonable *Cumis* fees were decided to be owed by State Farm, and State Farm did so. Therefore, there was no basis for plaintiff's claims of bad faith, or estoppel or fraud. State Farm was not a party to any arrangement that plaintiff made with the English firm. State Farm complied with all of its duties under the *Cumis* obligations.

# C

This page intentionally left blank



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# D

**PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; ATTORNEY-CLIENT PRIVILEGE; DERIVATIVE ACTIONS**

*Reilly v. Greenwald & Hoffman, LLP*
(2011) 196 Cal.App.4th 891, 127 Cal.Rptr.3d 317

**FACTS:**

Plaintiff was 49% owner of a corporation; he filed a derivative action against the 51% owner and the corporation itself, and outside counsel representing the corporation. He sued the outside counsel in the same lawsuit for malpractice. The corporation itself (the 51% owner) refused to waive the attorney-client privilege, which meant that the attorney (outside counsel) who was sued could not communicate any information exchanged between himself and the corporation. This meant that the attorney would have a meaningless ability to defend himself.

The trial court ruled that the plaintiff could not proceed with the lawsuit since the defendant attorney, sued for malpractice, would be deprived the due process because of the inability to defend himself, and that the corporation did have the right to invoke the attorney-client privilege.

**APPELLATE COURT DECISION:**

Affirmed. The corporation holds the privilege, and its failure to waive the privilege means the attorney must remain silent. The attorney would therefore lose the ability to defend himself.

# D

**PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; ARBITRATION AGREEMENTS**

*Desert Outdoor Advertising v. Superior Court*
(2011) 196 Cal.App.4th 866, 127 Cal.Rptr.158

**FACTS:**

Plaintiffs were sophisticated businessmen who owned an advertising company. It became involved in a dispute with the City and hired attorney Murphy to represent them. They signed a fee agreement which contained a binding arbitration clause which embraced any dispute between the two of them having to do with the attorney's services (not limited simply to a fee dispute). Things did not go well with the City, and ultimately plaintiff sued Murphy for malpractice. Murphy petitioned to compel arbitration which was granted by the trial court.

**APPELLATE COURT DECISION:**

The Appellate Court refused to issue a writ, thereby affirming the action of the trial court. The evidence showed that even though the plaintiffs did not read the agreement, they signed it and failure to read is no defense. The policy favors arbitration and under the circumstances, the trial court correctly granted the petition to compel arbitration.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# D

**PROFESSIONAL LIABILITY; HOSPITAL NEGLIGENCE; ELDER ABUSE ACT**

*Carter v. Prime Healthcare Paradise Valley, LLC*
(2011) 198 Cal.App.4th 396, 129 Cal.Rptr.3d 895

**FACTS:**

Plaintiff was the daughter of a deceased patient who had been in the nursing home and in the hospital. The patient went in the nursing home after surgery in the hospital; allegations were mistreatment by nursing home staff, including bathing the patient and leaving him wet and cold; he developed pneumonia and pressure ulcers. When he went back to the hospital for treatment, he developed more pressure ulcers. He then returned to the nursing home facility and died. The nursing home and the hospital were sued for violations of the Elder Abuse Act. The trial court sustained the hospital's demurrer and dismissed the case against the hospital.

**APPELLATE COURT DECISION:**

Affirmed. The allegations against the hospital do not rise to the level of willful misconduct or reckless disregard, which are required to state a cause of action under the Elder Abuse Act. A claim for professional negligence might be stated against the hospital, but is not so stated. Therefore, the present claim was properly dismissed by the trial court.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# D

**PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; ANTI-SLAPP STATUTE**

*Fremont Reorganizing Corporation v. Faigin*
(2011) 198 Cal.App.4th 1153

**FACTS:**

Attorney sued his former employer, arguing that he had been promised to be made general counsel, and then the corporation changed its mind and appointed him as in-house counsel only. When the attorney was terminated, the attorney notified the State Insurance Commissioner that the corporation was planning to sell some artwork owned by an affiliate which was not supposed to dispose of any of its property. When the attorney sued the corporation for wrongful termination, the corporation cross-complained alleging breach of confidentiality and fiduciary duty because of the attorney's report to the Insurance Commissioner. The attorney attempted to have the cross-complaint dismissed pursuant to the anti-SLAPP statute, and the trial court agreed, dismissing the cross-complaint.

**APPELLATE COURT DECISION:**
Reversed. The anti-SLAPP statute does not apply to legal malpractice type claims such as this; the attorney is obliged to protect the interest of his former client and not to breach the duty not disclose confidential information gained in the course of the relationship. The corporation has shown that it has a probability of prevailing and, therefore, the anti-SLAPP statute does not apply.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# D

**PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; MICRA; CAP ON NON-ECONOMIC DAMAGES**

*Stinnett v. Tam*
(2011) 198 Cal.App.4th 1412, 130 Cal.Rptr.3d 732 (WL 3862642)

**FACTS AND HOLDING:**

A plaintiff who received a $6 million verdict for non-economic damages had it reduced by the trial court to $250,000, applying the MICRA cap for non-economic damages. Plaintiff made an attack, claiming this was a violation of equal protection, and plaintiff also claimed changed circumstances, namely: that the medical malpractice crisis no longer existed, that there was no adjustment for inflation, and that the purchasing power of $250,000 has markedly declined since the medical malpractice statute was passed in 1975. The Court of Appeal rejects all such arguments, upholding MICRA.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# D

**PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE**

*Johnson v. Chiu*
(2011) 199 Cal.App.4th 775, 131 Cal.Rptr.3d 614

**FACTS:**

Plaintiff went in to see a dermatologist, Dr. Chiu. Chiu submitted plaintiff to a laser treatment. Plaintiff said that she heard a loud noise during the treatment, that this was felt in her ear, and that she lost hearing and had vertigo after the procedure. Plaintiff sued Dr. Chiu for medical malpractice. She had a separate cause of action for negligent repair and maintenance of the laser machine. The trial judge granted summary adjudication to Dr. Chiu on the medical malpractice cause of action on grounds that plaintiff produced no evidence on the standard of care and causation issues. A different judge then heard the third cause of action for negligent maintenance/repair of the laser. That judge ultimately decided that the summary adjudication on the medical malpractice cause of action was dispositive with respect to the negligent maintenance/repair of the laser issue.

**APPELLATE COURT DECISION:**

Reversed. The two causes of action are different. The medical malpractice cause of action involved claims of negligent examination, treatment and follow up. No evidence about the condition of the machine was introduced before the court in connection with the summary adjudication hearing. Plaintiff is entitled to proceed with the third cause of action.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# E

**GOVERNMENTAL LIABILITY AND IMMUNITY; REPORTING OF CHILD ABUSE**

*All Angels Preschool/Daycare v. County of Merced*
(2011) 197 Cal.App.4th 394, 128 Cal.Rptr.3d 349 (WL 2684932)

**FACTS:**

Plaintiff operated a preschool. An employee of the preschool suspected that a parent was abusing a child who was attending the preschool. The employee of the preschool reported this to the County Protective Agency. The County commenced a brief investigation. An employee of the County sent a report of the investigation to the preschool (which was required) but mistakenly sent a copy of this report to the parent who had been accused. The parent withdrew their child from the school, which resulted in a loss of income to the school. The school brought a lawsuit against the County contending that the County had violated the confidentiality provisions of the Child Abuse and Neglect Reporting Act, Penal Code § 11167. This Act provided employees (such as the preschool employee) were obliged to report suspected parental neglect/child abuse to the public authorities.

The trial court sustained without leave to amend the County's demurrer.

**APPELLATE COURT DECISION:**

Affirmed. Although it is true that the statute creates a mandatory duty to report, there is no indication that the Legislature intended to create a cause of action for damages to someone (the parent) who is harmed through negligence in connection with the investigation, such as is claimed here. Indeed, there is indication that the Legislature did address certain kinds of harm by authorizing a civil action for damages to be maintained against someone obliged to report who fails to report. The fact the Legislature addressed such a claim while not addressing those who might be damaged through mishandling of the investigative obligation indicates no intention to create a cause of action for the plaintiff in this case. Furthermore, the employee of the County who made a mistake is immune under Government Code § 821.6 while acting within the course of scope of employment.

# E

**GOVERNMENTAL LIABILITY AND IMMUNITY; UNREASONABLE FORCE BY POLICE**

*Lopez v. City of Los Angeles*
(2011) 196 Cal.App.4th 675, 126 Cal.Rptr.3d 706

**FACTS:**

Pena was the father of 19-month-old Suzie. In a hostage-taking situation, Pena took his daughter and held her outside Pena's auto shop. The police arrived. Pena was threatening to kill Suzie. He shot at the police and hit one of them. One shot was filed at Pena by the police while Pena was outside the shop. Pena then went inside the shop, the police went in after him and some 55 shots were fired. Pena and his daughter Suzie were killed. The mother brought suit claiming unreasonable force on the part of the police. The trial court granted non-suit in favor of the County.

**APPELLATE COURT DECISION:**

Affirmed. Clearly, Pena was a threat to his daughter as well as to the police. In a hostage rescue situation, especially in light of the fact that Pena shot at the police and hit one of them, reasonable force was employed and, therefore, the case was properly dismissed.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# E

**GOVERNMENT LIABILITY AND IMMUNITY; "TRAIL" IMMUNITY**

*Hartt v. County of Los Angeles*
(2011) 197 Cal.App.4th 1391, 132 Cal.Rptr.3d 27

**FACTS:**

The decedent was a retired policeman. He was riding his bicycle on a county-owned trail when he collided with a county vehicle driven by an employee in the course and scope of employment. A wrongful death action was filed and the allegation was dangerous condition of public property. The trial court granted summary judgment based upon Government Code § 831.2, the so-called "trail" immunity.

**APPELLATE COURT DECISION:**

Affirmed. Government Code § 831.2 grants immunity to a public entity for liability for injury caused by a condition of any trail used for recreational purposes. This would include cycling and sports recreation, and it makes no difference that the trail was also used for park maintenance purposes.

# E

**GOVERNMENT LIABILITY AND IMMUNITY; FEDERAL GOVERNMENT; DISCRETIONARY ACTS**

*Myers v. United States*
(2011) 652 F.3d 1021 (WL 2816640) (9th Cir.)

**FACTS:**

A child lived in a home 50 feet from a landfill. The child's school was 200 feet from the landfill. The Navy hired a contractor to clean up Camp Pendleton and to remove soil that was toxic. The soil contained a heavy metal called thallium which was dumped into the landfill. The child filed suit against the United States (Navy) for injuries caused by exposure to the thallium. The District Court dismissed the suit on grounds of discretionary acts immunity.

**NINTH CIRCUIT DECISION:**

Reversed and remanded. There was sufficient evidence that the Navy did not require the contractor to comply with mandatory safety precautions and procedures. There was insufficient evidence to bring the Navy's acts under the discretionary acts immunity, and the District Court also erred in finding no causation.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# E

**GOVERNMENT LIABILITY AND IMMUNITY; EXCESSIVE FORCE**

*Young v. County of Los Angeles*
(2011) 655 F.3d 1156 (WL 3771183) (9th Cir.)

**FACTS:**

Plaintiff was stopped by a policeman for failing to wear seatbelts and some problem with his tail light. Plaintiff delayed and had trouble getting his registration document, found it, and started to get out of the car. The police officer told plaintiff to stay in the car, but plaintiff still got out of the car. The police officer used pepper spray on plaintiff and told him to get back into the car. Instead, plaintiff sat on the curb and ate a snack. The police officer came up from behind and started hitting plaintiff with his baton. Plaintiff sued for excessive force and violation of his Fourth Amendment rights. The trial court granted summary judgment for the defendants.

**NINTH CIRCUIT DECISION:**

Reversed. There are triable issues of fact on the use of excessive force, particularly in light of the fact that the infraction that plaintiff was stopped for was minor in nature, and plaintiff apparently posed no danger to the officer. The lower court correctly dismissed plaintiff's false imprisonment claim, which was founded upon the fact that there was an attempt to confine him in the car. The police officer could legitimately require plaintiff to stay in the car. Plaintiff could not resist this on the contention that this was an act of free speech.

# E

**GOVERNMENT LIABILITY AND IMMUNITY; DANGEROUS CONDITION TO PUBLIC PROPERTY**

*Salas v. California Dept. of Trans.*
(2011) 198 Cal.App.4th 1058, 129 Cal.Rptr.3d 690

**FACTS:**

An elderly couple was crossing the road in a marked crosswalk. The husband got across the road. The wife saw a bag lying in the crosswalk and bent down to pick it up. When she stood up, she started walking in the opposite direction, still in the crosswalk. She was struck and killed by a car. The driver testified that he was not speeding. A wrongful death accident was filed against Caltrans claiming that the intersection constituted a dangerous condition to public property. The trial court excluded plaintiff's expert evidence indicating that several accidents (none involving pedestrians) had occurred at the intersection, and that the intersection should have been better marked. The trial court granted summary judgment for Caltrans.

**APPELLATE COURT DECISION:**

Affirmed. The accident occurred when the weather was clear, the road was straight and level, there were several signs warning of the approaching crosswalk and related intersection, the crosswalk was clearly marked. The trial court correctly excluded plaintiff's expert evidence because he produced no evidence of accidents involving cars and pedestrians. As a matter of law, the intersection/crosswalk was not a dangerous condition of public property and, therefore, summary judgment was properly granted.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# F

**ANTI-SLAPP STATUTE; MEGAN'S LAW(SEXUAL OFFENDERS)**

*Cross v. Cooper*
(2011) 197 Cal.App.4th 357, __ Cal.Rptr.3d___ (WL 2676336)

**FACTS:**

Plaintiff landlord leased a house to defendant tenants. The lease allowed the landlord to show the house if the landlord decided to put it up for sale. The landlord decided to sell the house, but the tenants made it very difficult for the house to be shown, limiting the time available to very narrow periods, on grounds that the baby could not be disturbed. The tenants also told the landlord in an email that they would tell any prospective house purchasers that a registered sex offender lived on the street unless the landlord cut one month's rent obligation off the lease. The landlord refused. The tenants in fact told a prospective buyer, who had entered into a contact with the landlord, of the sex offender living on the street, and the buyer backed out. This prompted a suit by the landlord against the tenant for breach of contract, breach of good faith, interference with the purchase contract, and interference with prospective economic advantage. The tenant filed an anti-SLAPP motion which was denied.

**APPELLATE COURT DECISION:**

Reversed. This matter does affect the public interest. Megan's Law provides that people who live in neighborhoods, or who are about to live in neighborhoods, are entitled to be told that a registered sex offender lives in the neighborhood. This promotes the public interest in protecting children from abuse. Therefore, the public interest requirement of the anti-SLAPP law was shown. Furthermore, defendants were exercising their free speech rights in doing so, and their conduct did not amount to extortion. The anti-SLAPP motion should have been granted by the trial court.

# F

**LIBEL; STATEMENTS OF OPINION**

*Yuin University v. Korean Broadcasting System*
(2011) 199 Cal.App.4th 1098, 131 Cal.Rptr.919

**FACTS:**

Korean Broadcasting System (KBS) did a program stating that Yuin University was a ghost school, was vacant, and was a degree factory. The university sued KBS for libel, but the trial court dismissed the case.

**APPELLATE COURT DECISION:**

Affirmed. The statements in question were attention grabbers and hyperbole. Under the totality of the circumstances, the statements by the defendant were matters of opinion and, therefore, not libelous.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# F

**FALSE CRIMINAL REPORT; ANTI-SLAPP STATUTE**

*Lefebvre v. Lefebvre*
(2011) 199 Cal.App.4th 696, 131 Cal.Rptr.3d 171

**FACTS:**

The underlying dispute was a divorce action. Husband alleged that his wife had read a book that said that a good tactic or strategy in divorce proceedings was to file a criminal accusation against the husband. Husband alleged that wife, conspiring with a friend, did exactly that, telling the sheriff that the husband had threatened to kill the wife and the children. The husband was charged in criminal court; the action went to the jury, but the jury acquitted the husband. The wife and her friend testified. After the criminal trial, the jury read a special statement into the record that it was an affront to justice for the husband to have been indicted. The husband, as a plaintiff, then filed a complaint for malicious prosecution, filing a false criminal charge, and various other causes of action. The wife filed a motion to dismiss under the anti-SLAPP statute, but this was denied by the trial court.

**APPELLATE COURT DECISION:**

Affirmed. Under Penal Code § 52.1, it is illegal for someone to file a false criminal charge. The anti-SLAPP statue does not protect against such illegal acts, and such acts do not involve the Constitutional exercise of free speech. The anti-SLAPP motion was properly denied.

# F

**DEFAMATION; ANTI-SLAPP STATUTE**

*Cabrera v. Alam*
(2011) 197 Cal.App.4th 1077, 129 Cal.Rptr.3d 74

**FACTS:**

Plaintiff had been president of the homeowners association. She went to the annual meeting for the purpose of campaigning for a slate of board members, and to campaign against defendant who was seeking reelection (and plaintiff was advocating that defendant not be reelected). In the course of the meeting, plaintiff stated that defendant had mismanaged the finances of the association, and that money was missing. In response, defendant accused plaintiff of stealing the money and defrauding the association. Plaintiff sued defendant for defamation. Defendant filed a motion to strike under the anti-SLAPP statute. This was denied by the trial court.

**APPELLATE COURT DECISION:**

Reversed. This was a public forum and the matters of a duly authorized homeowners meeting constitute matters of public interest, including matters pertaining to the election of a board of directors. Furthermore, plaintiff, to overcome a motion to strike, must demonstrate a probability of prevailing. Plaintiff was a limited public figure and, therefore, has to demonstrate the defendant's statements were made with malice, which plaintiff failed to do, and defendant had an adequate explanation for his accusations. The trial court should have granted the motion to strike under the anti-SLAPP statute.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# G

**NEGLIGENCE; AIRLINES; MONTREAL CONVENTION; MEANING OF "ACCIDENT"**

*Phifer v. Icelandair*
(2011) 652 F.3d 1222 (WL 3076393) (9th Cir. 2011)

**FACTS:**

Plaintiff was boarding the airline. She reached her seat and bent over to put some luggage under the seat in front of her. As she stood up, she struck her head on a television monitor which had been left in the down position. She sued the airline. The trial judge granted summary judgment in favor of the airline on grounds that plaintiff had not produced any evidence that FAA regulations or requirements had been violated.

**NINTH CIRCUIT DECISION:**

Reversed. Plaintiff seeks to recover under the Montreal Convention which will allow recovery for an injured passenger provided that an "accident" has occurred. It is not necessary for the plaintiff to prove an FAA violation in order for there to be an accident. The U.S. Supreme Court has defined accident to be an unexpected or unusual event.

# G

**NEGLIGENCE; HIRER'S LIABILITY; LANDOWNER LIABILITY; CAL-OSHA; DELEGATION OF SAFETY REGULATIONS; PRIVETTE DOCTRINE**

*SeaBright Ins. Co. v. US Airways, Inc.*
(2011) 52 Cal.4th 590, 129 Cal.Rptr.3d 601 (WL 3655109) (California Supreme Court)

**FACTS:**

This is an important post-*Privette* decision involving whether the hirer of an independent contractor can escape liability by delegating Cal-OSHA safety requirements to the contractor who is hired, in circumstances where an employee of the contractor is injured. US Airways was "in charge" of the baggage conveyor belt at the San Francisco airport. It had hired the contractor (Aubry) to maintain the conveyor. In doing so, US Airways delegated Cal-OSHA safety regulations to Aubry. Aubry's employee was working on the conveyor and got his arm caught in the belt; there was no guard or shield which was a violation of Cal-OSHA safety regulations. The employee did collect workers' compensation. In a suit by the employee, the trial court granted summary judgment in favor of US Airways. The Court of Appeal reversed, finding that the Cal-OSHA regulations were non-delegable, and that US Airways could not escape liability by delegating them.

**SUPREME COURT DECISION:**

The Court of Appeal was reversed. Such Cal-OSHA regulations, though termed "non-delegable" can be delegated by the hirer to the contractor. Under those circumstances, the hirer does not "contribute affirmatively" to the circumstances leading to the injuries to the contacted employee (plaintiff herein). The employee received workers' compensation, and the general principles of the *Privette* rule should apply in cases such as this.

**COMMENT:**

Thanks to the Supreme Court for clarifying what has been a very confusing area of the law, namely, whether a major loophole continues to exist in *Privette* cases whereby the hirer or landowner remains exposed to liability when a Cal-OSHA safety violation causes the injury to the contractor's employee. Routinely, such safety regulations are delegated by the hirer to the contractor, and that practice would now appear to be a successful vehicle to ensure non-liability on the part of the hirer.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# G

**NEGLIGENCE; ASSUMPTION OF THE RISK**

*Nalwa v. Cedar Fair, LP*
(2011) 196 Cal.App.4th 566, 126 Cal.Rptr.3d 341

**FACTS:**

Plaintiff went to Great America amusement park with her kids. They participated in the "bumper car" rides, with one of plaintiff's children driving and plaintiff as a passenger. At one point, the bumper car in which plaintiff was riding was hit head-on and then immediately rear-ended. Plaintiff attempted to brace herself with her arm pushing against the dashboard, and plaintiff fractured her wrist. She sued Great America for negligence.

The trial court granted summary judgment on grounds of assumption of the risk.

**APPELLATE COURT DECISION:**

Reversed. There are extensive regulations applying to amusement parks, with a high duty of care owed by the owners. The policies governing patrons of amusement parks are different than the policies underlying those who participate in active sporting events. Riding bumper cars in an amusement park is not a sport. Accordingly, assumption of the risk does not apply.

**COMMENT:**

Question: Will this decision undermine the viability of the assumption of the risk doctrine in recreational activity, which is not technically "sporting activity" (involving competition, exertion or physical effort, skill, etc.).

# G

**NEGLIGENCE; COMPARATIVE FAULT; VICARIOUS LIABILITY; NEGLIGENT ENTRUSTMENT/HIRING**

*Diaz v. Carcamo*
(2011) 51 Cal.4th 1148, 1216 Cal.Rptr.3d

**FACTS:**

In 1954, the California Supreme Court decided the case of *Armenta v. Churchill*, 42 Cal.2d 448, 267 P.2d 303 (1954). At that time, when contributory negligence was a total bar to recovery, the court ruled that when an employee was negligently driving and was in the course and scope of employment, and when the employer admitted to vicarious liability for the employee's negligent driving, plaintiff would be precluded from introducing evidence on theories of negligent entrustment against the employer. In the present case, the issue was whether the abandonment of contributory negligence as a total bar and the adoption of comparative fault should change that result. Diaz, the plaintiff, was driving south on 101. Carcamo, an employee of Sugar Transport, was driving north. Karen Tagliaferri was driving behind Carcamo. Tagliaferri pulled to the left to go around Carcamo and then cut back in front of Carcamo – too quickly – striking Carcamo's car (a pickup) and causing it to spin in a circle and go across the dividing line, crashing into Diaz. Diaz sued Carcamo, Tagliaferri and Sugar Transport. Diaz also alleged many acts of negligent entrustment, negligent hiring, negligent retention against Sugar Transport. Diaz introduced evidence that Carcamo had been involved in two prior accidents; that he had a bad driving record; that he was an illegal alien; that he used a false Social Security number; that he had lied on his employment application; and that when Sugar Transport made inquiries of prior employers, negative recommendations had come back. The trial court allowed evidence of all this work history and driving history. Sugar Transport admitted that it was vicarious liable for Carcamo's negligent driving. The jury returned a verdict of $17.5 million in economic damages for plaintiff and $5,000,000 in non-economic damages. Forty-five percent fault was allocated to Tagliaferri; 35% to Sugar Transport; and 20% to Carcamo. This meant that Tagliaferri and Sugar Transport were jointly liable for all of the economic damage, and severally liable for the non-economic damage. Sugar Transport was liable for 55% of the non-economic damage (35% of its own plus 20% of Carcamo). The trial court felt that the abolition of contributory negligence and the adoption of the comparative fault doctrine should change the holding of *Armenta, supra*. The Court of Appeal agreed.

**CALIFORNIA SUPREME COURT DECISION:**

Reversed. The adoption of comparative fault does not change the *Armenta* result. When an employer admits vicarious liability, plaintiff is precluded from introducing evidence of negligent entrustment, negligent hiring, negligent retention, or any similar theory of direct


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

liability against the employer. The admission of such evidence obviously prejudiced the defendants. It probably resulted in a larger verdict because of the inflammatory nature of the evidence, and probably resulted also in a higher allocation of fault to Carcamo because of jury anger.

**COMMENT:**

In most cases, therefore, the employer would be wise to admit vicarious liability, unless there is a serious question about course and scope of employment on the part of the employee, or unless there is a total absence of evidence of negligent hiring, entrustment, retention, etc.

# G

**NEGLIGENCE; ASSUMPTION OF THE RISK; MOTORCYCLE RACE**

*Amezcua v. Los Angeles Harley-Davidson*
(2011) 200 Cal.App.4th 217, 132 Cal.Rptr.3d 567

**FACTS:**

Every year, Harley-Davidson sponsors a motorcycle ride for the benefit of children in hospitals (to raise money for toys). Plaintiff had participated in these rides before, and had signed a release beforehand (agreeing to assume the risk). On the occasion of this particular ride, plaintiff did not sign the document. The ride involved about 100 motorcyclists riding along a freeway to a given destination. They all rode in the right-hand lane, single file. At a particular location on the freeway where another freeway intersected with the freeway on which plaintiff was riding, a van struck the plaintiff, causing injury. Plaintiff sued Harley-Davidson, the sponsor of the race. The trial court granted summary judgment on grounds of assumption of the risk.

**APPELLATE COURT DECISION:**

Affirmed. The event does not have to be a sport; this particular event clearly involves risk, including the risk that third party vehicles can strike the motorcycles. It makes no difference that plaintiff did not sign the agreement. Harley-Davidson did nothing to increase the inherent risk in the activity. Assumption of the risk applies.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# G

**NEGLIGENCE; RESPONDEAT SUPERIOR**

*Vogt v. Herron Construction*
(2011) 200 Cal.App.4th 643, 132 Cal.Rptr.3d 683

**FACTS:**

The defendant was a framing contractor. The framing contractor's employee drove a pickup truck to work. This was his personal choice alone, and the truck was not used at work. He parked the truck in a certain location. A cement truck pouring concrete on the job asked the employee to move the truck so that the concrete truck could get past it and to avoid getting concrete on the employee's truck. The framing contractor's employee moved the truck and in the process, ran over the cement company's employee, causing injury. An action was filed against the framing contractor, contending that the employee was acting within the course and scope of employment. The trial court granted summary judgment in favor of the framing contractor.

**APPELLATE COURT DECISION:**

Reversed. Triable issues of fact exist on the course and scope of employment issue. While it is true that the activities of the employee appear to be personal in nature, they do have some bearing on the successful completion of pouring concrete on the work site which has an incidental benefit to the framing contractor himself.

**COMMENT:**

This case is a very broad construction of the respondeat superior doctrine when the employee is clearly engaged in personal activity, and when his operation of his own truck has nothing to do with his employment duties and was only meant to serve his own personal convenience.

# G

**NEGLIGENCE; LANDOWNER LIABILITY; SIDEWALK; TRIVIAL DEFECT**

*Cadam v. Somerset Gardens Townhouse HOA*
(2011) 200 Cal.App.4th 383, 132 Cal.Rptr.3d 617

**FACTS:**

Plaintiff lived in a townhouse development. One day, she was walking on the way to meet a gardener. She tripped over an elevated portion of the sidewalk while she was looking at the gardener. She fell and was injured. The day was clear, the sidewalk was dry, and the elevation was about three-quarters of an inch. The trial judge denied the motion for non-suit (from the contention being that it was a trivial defect as a matter of law). The jury returned a verdict of $1.3 million. The trial judge granted JNOV.

**APPELLATE COURT DECISION:**

Affirmed. As a matter of law, this was a trivial defect and there is no liability on the part of the defendant. Furthermore, the plaintiff was not looking where she was walking at the time that she fell.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# K

**DAMAGES; INJURIES TO ANIMAL; PUNITIVE DAMAGES**

*Kames v. Grosser*
(2011) 195 Cal.App.4th 1556, 126 Cal.Rptr.3d 581

**FACTS:**

Plaintiff owned a cat. The cat was perched on a fence between plaintiff's property and the neighbor's property. The neighbor deliberately shot the cat with a pellet gun. Plaintiff spent $6,000 in emergency surgery on the cat and then spent $30,000 caring for the cat. Plaintiff brought suit against the neighbor seeking compensatory and punitive damages. The defendant filed a motion in liming seeking to limit plaintiff's evidence, contending that for an incident such as this, the measure of damages was simply the diminution in market value of the property (the cat), and the cat had little market value, justifying no damages. The trial court granted defendant's motion in liming. Plaintiff proceeded to trial but presented no additional evidence and the trial court ultimately dismissed plaintiff's case.

**APPELLATE COURT DECISION:**

Reversed. Defendant relies upon CACTI (jury instructions) No. 3903J which concerns the measure of damages for injury to personal property and states that the owner is entitled to the lesser of the diminution of value or the reasonable cost of repairing the injury, but this does not apply where the property has no market value. In this situation, the plaintiff under Civil Code § 3333 is entitled to the amount that would compensate for all the detriment proximately caused by the acts of the defendant. Accordingly, plaintiff can recover the surgery costs and the cost of care provided that plaintiff proves they are reasonable and necessary. Plaintiff is also entitled to recover punitive damages under Civil Code § 3340 which states that for wrongful injury to animals which are the property of a claimant, punitive damages may be awarded when the defendant acts willfully or in gross negligence.

# K

**DAMAGES; PLAINTIFF LIMITED TO DISCOUNTED MEDICAL BILLS**

*Howell v. Hamilton Meats & Provisions, Inc.*
(2011) 52 Cal.4th 541, 129 Cal.Rptr.3d 325

**FACTS AND HOLDING:**

This case has previously been reported on. But the above is the official citation. It is a significant win for the defense, since a personal injury plaintiff will in most cases be limited to introducing evidence of the medical bills as discounted by the health care provider rather than the full amount of the medical bills originally charged.



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# K

**DAMAGES; PUNITIVE DAMAGES; CIGARETTE; DUE PROCESS**

*Bullock v. Philip Morris, USA, Inc.*
(2011) 198 Cal.App.4th 593, 131 Cal.Rptr.3d. 382

**FACTS:**

Plaintiff had smoked since she was 17. She died of lung cancer. In an action brought against the cigarette company, the jury rendered a compensatory award of $850,000, and initially handed down a punitive award of $28 billion. The trial court cut the punitive award to $28 million. A new trial on punitive damages was ordered because of improper jury instructions. That jury trial resulted in a punitive damage award of $13.8 million.

**APPELLATE COURT DECISION:**

Affirmed. The conduct of the defendant in its marketing and sales and advertising was especially reprehensible, not to mention its failure to warn over the years. The award meets Constitutional due process because of the reprehensibility, even though the award of punitives was 16 times higher than the compensatory. Although the court conceded that a 1:1 ratio might be proper where compensatory damages are substantial, in this case the court found that compensatory award was relatively small when compared to defendant's financial condition.

**COMMENT:**

There was a dissenting opinion. Watch for this case to be taken up by the California Supreme Court, or by the U.S. Supreme Court. The reasoning appears erroneous: first, an $850,000 wrongful death award is not "small." And, you do not compare the punitive award with the defendant's financial condition – instead, you compare the award to the amount of the compensatory damages that are claimed. The award in this case also appears to violate the *Campbell* test that even in cases of high reprehensibility, the punitive award should not exceed nine times compensatory.

# K

**DAMAGES; CAUSATION; FRAUD**

*Bank of American Corp. v. Superior Court*
(2011) 198 Cal.App.4th 862 130 Cal.Rptr.3d 504

**FACTS:**

Plaintiffs alleged that their homes had declined in value, and that Countrywide's fraud entitled them to damages. Countrywide demurred. The demurrer was overruled.

**APPELLATE COURT DECISION:**

Writ issued to compel the granting of Countrywide's demurrer. What plaintiff is alleging is that Countrywide should have disclosed to the plaintiff borrowers its intent to defraud another group, namely, the investors to whom Countrywide was planning to sell the pooled mortgages. No such duty exists. Furthermore, there is no causal relationship between any fraud committed against the investors and the decline in equity value on the part of the plaintiffs when home values for everyone are declining across the country.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# K

**DAMAGES; STANDING; DEVELOPERS LIABILITY**

*Maya v. Centex Corp.*
(2011) 658 F.3d 1060 (WL 4381864) (9th Cir.)

**FACTS:**

This is a very interesting case from the Ninth Circuit, and a case of first impression. The plaintiffs are numerous homeowners who purchased their homes between 2004 and 2006. They sued some of the nation's largest developers. They allege that they suffered a loss in value of their homes because of marketing activities by the developers; that the developers created a buying frenzy by, among other things, agreeing to finance 65% of the homes' purchase price. This inflated the value of the homes. Plaintiffs then allege that the developers sold homes to unqualified buyers who could not afford to meet the mortgage payment. This resulted in numerous foreclosures which brought down the value of the neighborhood, caused blight, increased crime, and decreased the value of plaintiffs' properties. They also allege that some of the homes were sold to outside investors who had no stake in keeping the homes when they declined in value and simply let them go back to the bank. Plaintiffs also sought rescission of their purchase contracts and restoration of the money paid for the homes. None of the plaintiffs had sold their homes in fact.

The District Court dismissed the case on grounds that plaintiffs had no standing. One of the arguments was that plaintiffs had to have sold their homes in order to establish what their injuries in fact were.

**NINTH CIRCUIT DECISION**

Reversed. Plaintiffs had shown sufficient injury in fact to establish standing. Allegations of improper marketing techniques causing inflated value of the home and resulting in plaintiffs paying too much established injury in fact. It was not necessary for plaintiffs to sell their homes in order to establish damage and injury. The District Court was correct in ruling that simply because more foreclosures resulted in this neighborhood because of sales to unqualified buyers, this would not necessarily establish injury in fact and standing. However, plaintiffs should be allowed on remand the opportunity to present other evidence on this point. Simply because the national real estate market constituted a bubble which burst, does not mean that plaintiffs could not establish special circumstances in their own neighborhood to indicate decrease in value and injury in fact.

**COMMENT:**

This case should cause a lot of consternation to major developers because it opens the door

for many claims by purchasers when real estate markets decline. The facts of the case sound fairly typical of the way large housing developments are handled and marketed.



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# K

**DAMAGES; MEDICAL EXPENSES; HOWELL PRINCIPLE**

*Sanchez v. Strickland*
(2011) 200 Cal.App.4th 758, 13 Cal.Rptr.3d 342

**FACTS:**

Plaintiff was in a serious automobile accident, was in the hospital for several months, and then died. His medical bills were over $1,000,000. MediCare and Medi-Cal paid for some of the bills, but not the full amount. Plaintiff recovered for past medical expenses, but the trial judge reduced those damages by 30%, representing the "discounted" payment by MediCare and Medi-Cal.

**APPELLATE COURT DECISION:**

In the unpublished portion of the opinion, the Appellate Court upheld this reduction for the payments made by MediCare and Medi-Cal. The hospital had further gratuitously reduced the bill by $7,000, and the Appellate Court held that that amount could constitute recoverable past medical expenses, and that would be permitted by the collateral source rule.

# K

This page intentionally left blank



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# M

**PRIVACY; RECORDING TELEPHONE CONVERSATIONS**

*Kight v. CashCall, Inc.*
(2011) 200 Cal.App.4th 1377, 133 Cal.Rptr.3d 450

**FACTS AND HOLDING:**

Appellate Court holds that it is an invasion of a customer's privacy to record the customer's call to the corporation (supervisor was listening in on a call by the customer to someone else who worked for the corporation) and it is no defense that preliminary to the customer's conversation, a recording comes on which says "this call may be recorded for quality control purposes." This violates Penal Code section 632.

# M

This page intentionally left blank



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# N

**PRODUCTS LIABILITY; SUV ROLLOVER**

*Mansur v. Ford Motor Company*
(2011) 197 Cal.App.4th 1365, 129 Cal.Rptr.3d 200

**FACTS:**

The case involves a Ford SUV rollover; the roof collapsed, plaintiff's decedent died, and a strict liability/products defect lawsuit was filed against Ford. The trial court instructed the jury on the risk benefit analysis, but refused to instruct on the consumer expectations test. A defense verdict was return.

**APPELLATE COURT DECISION:**

Affirmed. The trial court was correct; the consumer expectations test should only be used when the jury can analyze the quality of the product without the assistance of expert testimony.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# N

**PRODUCTS LIABILITY; TOXICS, FRAUDULENT CONCEALMENT**

*Jones v. ConocoPhillips*
(2011) 198 Cal.App.4th 1187, 130 Cal.Rptr.3d. 571 (WL 3805483)

**FACTS:**

Jones died allegedly from diseases of the liver, heart, kidneys, because of exposure to numerous toxics. Suit was filed by his children and wife against 19 manufacturers, and the Complaint listed 34 chemical products. Strict liability was the claim, and plaintiff also sued for fraudulent concealment of the dangers of the products, including claims against Dow Chemical. The trial court sustained demurrers of the defendants.

**APPELLATE COURT DECISION:**

Reversed. Plaintiff is not required to list the specific chemical components of each product. The Complaint is adequate under the Supreme Court test set forth in *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 86 Cal.Rptr.2d 846 in light of the fact that plaintiff has alleged long-term exposure to various toxic chemicals, that his specific illness was caused, and that defendant's product was a substantial factor contributing to the illness. Plaintiff's Complaint is adequate in this respect; also plaintiff adequately pleaded fraudulent concealment of the dangers.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# N

**PRODUCTS LIABILITY; STRICT LIABILITY; NEGLIGENCE**

*Hennigan v. White*
(2011) 199 Cal.App.4th 395, 130 Cal.Rptr.3d. 856 (WL 4359976)

**FACTS:**

Plaintiff went into a spa. She wanted to have a special tattoo treatment which would apply permanently a cosmetic to her eyebrows and her eyelashes. White was the person at the spa who was doing the work. The cosmetic manufacturer's recommendation was that a "patch" test should be done first. This was not done. The process was completed. Three months later, plaintiff developed a severe allergic reaction, which resulted in various injuries. She sued White for negligence and the manufacturer and others for strict liability. The trial court dismissed the case.

**APPELLATE COURT DECISION:**

Affirmed. White is not negligent for failing to render a patch test since the patch test would have made no difference in light of the fact that the allergic reaction did not appear for three months. The other defendants could not be used for strict liability because what plaintiff was purchasing was a service, not a product, and there is no evidence that the product was defective.

# N

**PRODUCTS LIABILITY; EQUITABLE INDEMNITY**

*Bailey v. Safeway, Inc.*
(2011) 199 Cal.App.4th 206, 131 Cal.Rptr.3d 41

**FACTS:**

Plaintiff was installing a champagne display in Safeway. The champagne was manufactured by Saint-Gobain. One of the champagne bottles exploded, injuring plaintiff's eye. Plaintiff filed suit for strict liability and negligence against Saint-Gobain and Safeway. Saint-Gobain filed an equitable indemnity cross-complaint against Safeway. Plaintiff then settled for $1,000,000 with Saint-Gobain. Plaintiff took an assignment from Saint-Gobain of Saint-Gobain's equitable indemnity action against Safeway, and plaintiff then went to trial against Safeway. The verdict indicated Safeway was not negligent, but that Safeway was liable for the accident. The trial judge then entered judgment for Safeway (since plaintiff's verdict was founded on the equitable indemnity cause of action).

**APPELLATE COURT DECISION:**

Affirmed. The only basis for Safeway's liability was that it was as a retailer in the chain of distribution of a product which was defectively manufactured by Saint-Gobain. Saint-Gobain was the only party at fault; Safeway was free from fault. The principles underlying equitable indemnity would be defeated otherwise.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# U

**INSURANCE; CLASS ACTION; LIFE INSURANCE; SALES PRACTICES**

*Fairbanks v. Farmers New World Life Ins. Co.*
(2011) 197 Cal.App.4th 544, 128 Cal.Rptr.3d 888 (WL 2714173)

**FACTS:**

Plaintiff sought class certification status arising out of the sale by Farmers of life insurance policies. Plaintiff alleged common sales and marketing practices. The trial court denied certification, finding that alleged misrepresentations could have varied from customer to customer, together with no commonality with respect to whether the misrepresentations were material, depending upon the customer.

**APPELLATE COURT DECISION:**

Affirmed. Furthermore, there would be no commonality as to whether each customer relied upon the misrepresentations. However, plaintiff alleged new theories to justify class certification and the case is remanded to the trial court, and plaintiff will be allowed to present such new theories upon class certification.

# U

**FEDERAL CIVIL RIGHTS VIOLATIONS; EXCESSIVE FORCE**

*Hunter v. County of Sacramento*
(2011) 652 F.3d 1225 (WL3077266) (9th Cir.)

**FACTS:**

This is a case of alleged excessive force used on inmates in the County jail. Over a period of four years, some 50 incidents of excessive force had occurred, according to plaintiff's expert. Plaintiff requested a jury instruction that a custom and practice/policy could be established by showing that the County failed to investigate such incidents and failed to discipline those officers involved in such incidents. The trial court refused to give this instruction, but instead gave a model instruction. There was a defense verdict.

**NINTH CIRCUIT DECISION:**

Reversed. The U.S. Supreme Court has indicated that pure vicarious liability (on the County) is an insufficient basis for civil rights exposure under U.S.C. § 1983. Instead, plaintiffs must show that a custom and practice or policy exists regarding excessive force. To show the existence of such a custom or policy, plaintiff can show a failure to investigate such incidents and a failure on the part of the County to discipline the officers involved in such incidents. This was the subject of plaintiff's proposed instruction and, therefore, the trial court should have given this instruction.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# U

**CIVIL RIGHTS VIOLATIONS; EXCESSIVE FORCE; UNLAWFUL SEIZURE UNDER THE FOURTH AMENDMENT**

*Torres v City of Madera*
(2011) 648 F.3d 1119 (9th Cir.)

**FACTS:**

The plaintiff's decedent had been arrested, handcuffed, and placed in a van. He was shouting and kicking. Defendant police officer intended to use a Taser gun on decedent, but mistakenly drew her real gun, and shot and killed decedent. An action was brought under 42 U.S.C. § 1983 (civil rights) for Fourth Amendment violation for unreasonable seizure. The District Court ultimately granted defendant's motion for summary judgment on the basis of mistake and qualified immunity.

**NINTH CIRCUIT DECISION:**

Reversed. There is a material issue of fact as to the mistake issue and the use of unreasonable force in light of the circumstances. They should be left to the jury to decide. Furthermore, a claim for "continuing seizure" was stated in light of the facts of the shooting, and, therefore, the matter could not be determined as a matter of law, which the District Court did.

# U

**ARBITRATION; ENFORCEABILITY**

*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group*
(2011) 197 Cal.App.4th 1146, 128 Cal.Rptr.3d. 330

**FACTS:**

Plaintiff sued the insurer for bad faith, among other claims. The policy contained a binding arbitration clause. The insurer sought to compel arbitration, but the trial court denied the motion.

**APPELLATE COURT DECISION:**

Reversed. The insured in this case claims that it did not read the policy, nor was the insured aware that it contained an arbitration provision. Failure to read a contract is no defense. Here, the arbitration provision was conspicuous, plain and clear. It was conspicuously set out in the table of contents and separately in the policy itself. It makes no difference that arbitration was not referred to in the policy application. The trial court incorrectly denied the motion to compel.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# U

**CIVIL RIGHTS; CONSTITUTIONAL LAW; FALSE CHARGE**

*Kerkeles v. City of San Jose*
(2011) 199 Cal.App.4th 1001, 132 Cal.Rptr.3d 143

**FACTS:**

Plaintiff's neighbor called the police department of the City of San Jose and reported that plaintiff had raped the neighbor's developmentally disabled daughter. This resulted in charges being brought against plaintiff for oral copulation. A police officer (Christian) falsified some lab reports, and the false reports indicated that semen from plaintiff was found on the victim. Plaintiff was incarcerated briefly and was prosecuted, but the prosecutor ultimately dismissed the case upon ascertaining the false lab report. Plaintiff then sued the police officer and the City for violation of civil rights (42 U.S.C. § 1983). The trial court granted summary judgment for the City.

**APPELLATE COURT DECISION:**

Reversed. A plaintiff can sue for a violation of civil rights and deprivation of due process for prosecutions and incarcerations which are the result of a false lab report. Furthermore, plaintiff had adequately alleged the City violated training policies and custom (no training to guard against false evidence). Plaintiff had adequately stated a civil rights violation.

# U

**ARBITRATION; UNCONSCIONABILITY**

*Sanchez v. Valencia Holding Company, LLC*
(2011) 201 Cal.App.4th 74, 135 Cal.Rptr.3d 19 (2011 WL5027488)

**FACTS:**

This is an interesting arbitration case. The plaintiff went to the car dealer to buy a certified used car. Plaintiff later filed suit alleging that the car dealer violated numerous California statutes by making false representations about fees, payments due, etc. The sales contract had a binding arbitration clause in it, and that clause also contained a waiver of the right for class-wide arbitration. The dealer sought to compel arbitration, but the trial court refused on grounds that the class action waiver was unenforceable because it violated plaintiff's remedies under the Consumers Legal Remedies Act.

**APPELLATE COURT DECISION:**

Affirmed, but for different reasons (preliminary, it would have been difficult for the Appellate Court to affirm because of the *AT&T v. Concepcion* decision from the U.S. Supreme Court, which says that class action waivers in binding arbitration agreements are valid). The Appellate Court ruled that the specific provisions of the arbitration agreement were procedurally and substantively unconscionable. The arbitration agreement, for example, had numerous provisions in it having to do with appeal; for example, appeals were allowed to a three judge arbitration panel for any award over $100,000; but no appeal was allowed for injunctive relief; arbitration was not permitted for repossessions; if a party received nothing, the party could appeal, but had to pay the costs of the other side unless they won the appeal. The Appellate Court found that such provisions rendered the arbitration agreement adhesive, too favorable to the dealer, and too potentially unfair to the consumer.

**COMMENT:**

These were indeed unusual provisions to put into the arbitration agreement. A simple provision requiring binding arbitration of all disputes arising out of the sales transaction, and including a waiver of the right to class-wide arbitration, would probably have worked.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# U

**CONSUMER TORT; FALSE ADVERTISING**

*Hill v. Roll International Corp.*
(2011) 195 Cal.App.4th 1295, 128 Cal.Rptr.3d 109

**FACTS:**

Defendant manufactured bottle water called Fiji. Plaintiff brought a class action alleging false advertising and violation of the Consumers Legal Remedies Act. Plaintiff claimed that the label on the water bottle contained a green drop, implying that the product had been endorsed by third party organizations as environmentally sound. Plaintiff contended that this was "green washing" (a play on whitewashing) and constituted false advertising of a product as being environmentally friendly – similar to a seal of approval by environmental organizations. The trial court dismissed the complaint.

**APPELLATE COURT DECISION:**

Affirmed. Plaintiff has not met the test or burden with respect to a false advertising claim. This was simply a green drop, and drops do relate to the product itself (water). The drop was placed next to the web address which was "fijigreen.com," and the drop was green. The trial court correctly dismissed the case.

# U

**HEALTH CARE INSURANCE; ANTITRUST**

*In re Wellpoint, Inc. Out-of-Network "UCR" Rates Litigation*
(2011) *652* F.Supp.2d 1375 (2011 WL 35557610) (Central Dist., Cal.)

**FACTS:**

Plaintiffs were various doctors, patients and medical associations. They brought a Sherman Antitrust action against defendant, the largest health care provider in the country. Another defendant was a database used by Wellpoint. Other insurers were likewise sued and actions were consolidated. The basic charge was that the insurers and defendant database conspired to drive down reimbursement rates for doctors and health care providers; they did this, for example, by not submitting higher billings to defendant database, which tended to drive the average reimbursement rate down.

The U.S. District Court ruled that plaintiffs had standing and had stated a cause of action under the Antitrust Act, although the Court allowed plaintiffs only limited rights to sue under ERISA and threw out plaintiffs' RICO claim.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; ARBITRATION; FEDERAL PRE-EMPTION**

*Brown v. Ralphs Grocery Co.*
(2011) 197 Cal.App.4th 489, 128 Cal.Rptr.3d 854 (WL 2685959)

**FACTS:**

Plaintiff was an employee of Ralphs Grocery in Southern California. She claimed that Ralphs was guilty of various Labor Code violations, including unpaid meal periods, unpaid rest periods, late payment of wages, etc. She brought a class action on behalf of herself and all others similarly situated employees. She also brought a Private Attorney General Act (PAGA) action pursuant to 2004 Cal. Labor Code §§ 2698-2699.5. Plaintiff's employment contract contained a binding arbitration clause requiring binding arbitration of all employment-related disputes. The clause also contained a waiver of the right of the employee to bring a class-wide arbitration. It further included a waiver of the employee's right to bring a PAGA claim in arbitration. The trial court held that the arbitration agreement was unconscionable and ruled that plaintiff could proceed to jury trial.

**APPELLATE COURT DECISION:**

Affirmed in part, reversed in part. With respect to the class-wide arbitration, plaintiff had really presented no evidence to indicate the unfairness/unconscionability of the class-wise arbitration waiver. The case is remanded to the trial court to allow plaintiff to present such evidence.

With respect to the PAGA waiver, this is not pre-empted by the Federal Arbitration Act. The issue here is whether the *AT&T v. Concepcion* U.S. Supreme Court case is determinative. That case indicated that class-wide arbitration provisions are valid. However, the PAGA provision is meant to promote California public policy, namely, to allow individual employees to prosecute Labor Code violations because the Department of Labor is too busy to adequately handle all such claims. These PAGA claims are brought on behalf of the employee and all others similarly situated and they do have the characteristics of a class-wide arbitration claim or class action litigation claim. Since PAGA promotions important issues pertaining to California law enforcement, these claims are not pre-empted.

A dissenting justice disagreed, holding that *Concepcion* requires arbitration of the PAGA claims.

**COMMENT:**

In this writer's opinion, the dissent is correct. The *Concepcion* case from the U.S. Supreme

W

is extremely broad and allowing PAGA claims to be treated as outside the binding arbitration clause would emasculate the Concepcion holding, since PAGA claims are virtually identical to class action claims – exactly the type of claim the U.S. Supreme court indicated could be waived and that such a waiver would not be unconscionable. Therefore, watch for this case to either be reviewed by the California Supreme Court or by the U.S. Supreme Court itself.



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; BINDING ARBITRATION; UNCONSCIONABILITY**

*Zullo v. Superior Court*
(2011) 197 Cal.App.4th 477, 127 Cal.Rptr.3d 461 (WL 2453482)

**FACTS:**

Plaintiff was a former employee. Plaintiff filed a lawsuit in court for wrongful termination. She claimed race discrimination by her supervisor, and that she was also fired because she complained of such discrimination (retaliation). The employer moved to compel arbitration under a binding arbitration agreement which was contained within the employee handbook which the employee had received. It required arbitration of all wrongful termination disputes. Plaintiff resisted the motion to compel. The trial court ruled in favor of binding arbitration. Plaintiff petitioned for a writ of mandate.

**APPELLATE COURT DECISION:**

Writ granted in favor of plaintiff. The arbitration agreement is unconscionable. It is a contract of adhesion with the employee being required to "take it or leave it." It contained more remedies available to the employer than were available to the employee, and put more restrictive time limits on the employee rather than the employer. There was no mutuality.

**COMMENT:**

Watch for this decision to either be decertified or hearing granted by the California Supreme Court. Almost all binding arbitration agreements are on a "take it or leave it" basis, and that no longer, after the U.S. Supreme Court's *Concepcion* decision, appears to be a basis for invalidating such agreements. The other arguments made by the Court of Appeal likewise do not appear to overcome the dictate of *Concepcion*.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; FEDERAL PRE-EMPTION; OFFICERS OF BANK**

*Dunn v. U.S. Bank, NA*
(2011) 196 Cal.App.4th 168, ___ Cal.Rptr.3d ___

**FACTS:**

Plaintiff was a senior officer of a bank. Plaintiff was fired by his supervisor. He sued the supervisor and the bank claiming disability discrimination (he had type 2 diabetes). Under the Federal National Bank Act, bank officers could be terminated at the bank's pleasure (at will). The trial court granted summary judgment for the bank on the basis of the National Bank Act.

**APPELLATE COURT DECISION:**

Reversed. What the trial court did was to hold that plaintiff's right to sue under the California FEHA (for disability discrimination) was pre-empted by the National Bank Act. But the National Bank Act is impliedly amended by the Americans With Disabilities Act (ADA) which allows all employees to sue if the discrimination falls under the ADA. Therefore, the National Bank Act is impliedly repealed by the ADA, and plaintiff will be allowed to sue.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; SEX DISCRIMINATION; WAL-MART DECISION**

*Wal-Mart Stores, Inc. v. Dukes*
(2011) ___ U.S. ___, 131 S.Ct. 2541

**FACTS AND HOLDING:**

This is the famous class action case recently decided by the U.S. Supreme Court. After plaintiff won in the District Court and the Ninth Circuit, the U.S. Supreme Court reverses, holding that the Wal-Mart claim could not be handled as a class action. Wal-Mart had more than 3,500 stores, and more than 1,000,000 employees. The action was brought by women employed starting around 1998. The claims were sex discrimination and promotion and pay. Plaintiff sought to prove her case with social scientists and statistical evidence, and some anecdotal evidence as between men and women on promotion and pay. Wal-Mart largely left promotion and pay matters to local managers. The Supreme Court held plaintiffs' certification on liability issues was not proper because plaintiffs had not met their burden of proving a system-wide/company-wide policy of discrimination, and that the proof they submitted was simply insufficient. Therefore, plaintiffs were unable to show a pattern and practice. Finally, the claims were too individualized to merit class action treatment.

**COMMENT:**

This, of course, is a very significant decision on class actions. Particularly interesting is the Supreme Court's rejection of the sociological studies, anecdotal evidence, statistical studies, meant to demonstrate a pattern and practice of discrimination. This will make it much more difficult for plaintiffs in large corporate class action cases to justify class action treatment.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; RETALIATION; SEXUAL HARASSMENT**

*Kelley v. Conco Companies*
(2011) 196 Cal.App.4th 191, 126 Cal.Rptr.3d 651

**FACTS:**

Plaintiff was a union worker and worked as an ironworker. He was on this particular job for one week when the supervisor made vulgar sexual and suggestive remarks to plaintiff. Plaintiff complained to the manager who spoke with the supervisor. Later on and on the same day, co-employees taunted plaintiff; this taunting continued and even when plaintiff was assigned to another job site, those employees taunted him for being a "snitch." When plaintiff complained to his supervisor, the supervisor told the employees to stop. Plaintiff filed suit against the employer and first supervisor, claiming sexual harassment and violation of the FEHA (retaliation)

The trial court threw the case out.

**APPELLATE COURT DECISION:**

Affirmed with respect to the sexual harassment, reversed with respect to the retaliation claim. With respect to the sexual harassment, the comments must be sexual in nature and must be based upon sexual desire or intent. The supervisor was not homosexual and, therefore, the required sexual desire was not present. An additional reason why no claim for sexual harassment was stated is because this was a single incident by the supervisor, and not pervasive and ongoing. Concerning the claims for retaliation, the employer can be sued if co-employees retaliate against a plaintiff for making legitimate complaints about conditions in the workplace. If the employer knew about it and failed to take corrective action to stop it, a claim can be stated against the employer. Therefore, plaintiff has the right to proceed on that particular claim.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; SEXUAL HARASSMENT; TREATMENT OF OTHER EMPLOYEES; DISCRIMINATION**

*Pantoja v. Anton*
(2011) 198 Cal.App.4th 87, 129 Cal.Rptr.3d 384

**FACTS:**

Plaintiff worked as a secretary in defendant law firm. Plaintiff brought an action under the FEHA for sexual harassment and discrimination based on gender and race. She alleged that defendant insulted her using crude language (including calling her "bitch"); that defendant touched plaintiff inappropriately; that plaintiff was fired because she was a woman; that defendant frequently criticized job performance of "Mexicans" whom he had hired. The trial court granted the defense motion to exclude evidence as to how other employees were being treated by the employer (Evidence Code § 1101). Plaintiff was therefore prevented from introducing testimony from other women who would have testified that they were badly treated also. Reference to "Mexicans" was also excluded. Ultimately, the trial court granted non-suit on the race discrimination claim, but allowed sexual harassment and sexual discrimination to go to the jury. The jury returned a defense verdict.

**APPELLATE COURT DECISION:**

Reversed. It was error for the trial court to exclude the evidence in question as it tended to show discriminatory intent. It was also relevant as a source of impeachment of the defendant himself. The trial court should also have allowed in evidence the use of the term "Mexicans."

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; AFTER-ACQUIRED EVIDENCE DOCTRINE; UNCLEAN HANDS**

*Salas v. Sierra Chemical Co.*
(2011) 198 Cal.App.4th 29, 133 Cal.Rptr.3d 392 [Not Citable. Superseded by grant of review.]

**FACTS:**

Defendant Sierra Chemical used seasonal workers to manufacture its chemical products. Plaintiff Salas was hired and worked for several years for Sierra. Plaintiff suffered several work-related injuries, injuring his back, and plaintiff received workers' compensation benefits. Plaintiff was laid off with other employees a couple of times, but was rehired. After one of his injuries, plaintiff talked to a manager about accepting an offer to be rehired. The manager asked him if he was 100% recovered from his injury; plaintiff indicated that he probably wasn't. Plaintiff wasn't rehired and he sued for disability discrimination.

During the trial, evidence came out that plaintiff had, when initially applying for employment, submitted a false Social Security card (from some man in North Carolina). Defendant demonstrated that it was corporate policy never to hire anybody who submitted false documents in connection with the employment application. Defendant sought an immediate dismissal of the suit, but the trial court refused. The Court of Appeal, pursuant to a writ, then ordered the trial court to grant summary judgment for the defendant. The trial court did so, and plaintiff took an appeal.

**APPELLATE COURT DECISION:**

Summary judgment for defendant affirmed. Under the after-acquired evidence doctrine, the defendant, even though guilty of discrimination, could rely upon evidence subsequently obtained when that evidence would have supported an initial refusal to hire or rehire the plaintiff. Secondly, plaintiff's conduct is demonstrative of the doctrine of "unclean hands." What he did went to the essence of the employment relationship, and plaintiff is therefore barred from recovery.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**TORTS; SEXUAL HARASSMENT**

*Brennan v. Townsend &O'Leary Enterprises, Inc.*
(2011) 199 Cal.App.4th 1336, 132 Cal.Rptr.3d 292 (2011 WL4924256)

**FACTS:**

Plaintiff worked for an advertising agency. She brought a suit for sexual harassment and wrongful termination against her employer. One of the incidents which occurred was plaintiff's receipt of an email actually addressed to others but inadvertently sent to the plaintiff. The email referred to the dismissal of a male employee, and then referred to plaintiff, by implication, as the next "big-titted airhead" who should go. Plaintiff complained to her supervisor who said he would take care of it. Ultimately, the trial judge dismissed the wrongful termination case on non-suit. The judge allowed the sexual harassment case to go to the jury, and the jury ruled for the plaintiff. The judge then granted judgment notwithstanding the verdict in favor of the defendant.

**APPELLATE COURT DECISION:**

Affirmed. A claim of sexual harassment must be supported by evidence of pervasive and severe conduct. This did not exist, as a matter of law, in this case. The claims were isolated, not multiple, and some of the claims were even directed at parties other than plaintiff. The trial judge correctly ruled in favor of defendant.

# W

**EMPLOYMENT TORTS; AGE DISCRIMINATION; PRETEXTUAL FIRING**

*Earl v. Nielsen Media Research, Inc.*
(2011) 658 F.3d 1108 (2011 WL4436250) (9th Cir.)

**FACTS:**

Plaintiff went to work in 1994 for the Nielsen company, the company that gets permission from customers to install devices in their television sets that will track the viewing habits of the viewer. Plaintiff was 47 when she commenced work. In the early 2000s, plaintiff violated several of the company's policies, including leaving gifts at the homes of absent Nielsen participants and also failure to carry a map with her. Plaintiff was ultimately let go; she sued for age discrimination in addition to other claims. The District Court dismissed her claim for age discrimination and granted summary judgment for the defense.

**NINTH CIRCUIT DECISION:**

Reversed. Triable issues of fact exist. Plaintiff produced evidence that many younger employees had just as many violations which were of a comparable nature, and yet the employer was more lenient toward them. Plaintiff had adequately stated a claim for age discrimination.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; REFUSING TO RE-HIRE MILITARY PERSONNEL; INDIVIDUAL LIABILITY OF SUPERVISOR**

*Haligowski v. Superior Court*
(2011) 200 Cal.App.4th 983, 134 Cal.Rptr. 3d 214

**FACTS:**

Pantuso was called to active military duty in Iraq while Pantuso was working for Safeway. Six months later, he returned to the United States and asked for his job back, but was turned down by the supervisor and by the manager. He filed suit for discrimination and retaliation against Safeway and the supervisor and the manager. The manager and supervisor demurred on grounds that they were not subject to individual liability. The suit was brought under California Military and Veterans Code section 394, which does say that a person returning from the military may not be discriminated or retaliated against by any person. The trial judge overruled the demurrer.

**APPELLATE COURT DECISION:**

Writ issued to compel the sustaining without leave to amend of the demurrer filed by the supervisor and the manager. There is no individual liability for discrimination or retaliation in the military code; this follows the principles set forth the Fair Employment and Housing Act, which likewise refuses to impose individual liability.

# W

**EMPLOYMENT TORT; SEXUAL HARASSMENT**

*Fuentes v. AutoZone, Inc.*
(2011) 200 Cal.App.4th 1221, 133 Cal.Rptr.3d 409

**FACTS:**

Plaintiff Marcella Fuentes worked for AutoZone, an auto parts store. She alleged various acts of sexual harassment over a multi-week period, including: that the acting manager accused her of having herpes; of having an affair with a co-worker; that he tried to get her to position herself in the store so the customers would see her buttocks; that she could make more money as a stripper or by posing in a bikini. Ultimately, plaintiff was transferred to another store, but she brought suit for sexual harassment and ultimately recovered a jury verdict of $160,000, with the jury finding the manager 50% responsible and with the entire verdict handed down against the employer. She also recovered nearly $700,000 in attorney's fees and $23,000 in costs.

**APPELLATE COURT DECISION:**

Affirmed. There were inconsistencies in the evidence, but these were resolved by the jury. The evidence of sexual harassment was pervasive and severe, and the jury verdict is therefore supported.


MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

**EMPLOYMENT TORTS; CHURCHES; MINISTERIAL FUNCTION EXCEPTION**

*Henry v. Red Hill Evangelical Lutheran Church*
(2011) 201 Cal.App.4th 1041, 134 Cal.Rptr.3d 15

**FACTS:**

Plaintiff was a female teacher in a church preschool. When she was employed, she signed a book indicating that she understood that she had to abide by church rules and that she would be a Christian role model to the children. When she started employment, she was married. She subsequently divorced and starting living with her boyfriend, with whom she had a child. She did not get married to him, although she did tell the church that those were her plans. Because of her lifestyle, she was terminated. She brought suit for violation of public policy and discrimination because of marital status, claiming statutory violations and Constitutional violations. She also sued for violation of Title VII (Federal and State). The trial court dismissed the case.

**APPELLATE COURT DECISION:**

Affirmed. Under the FEHA, a church is not considered "an employer," and is therefore not bound by the laws imposed on employers. Therefore, no claims could be brought for violation of public policy based on the FEHA. In addition, the church is exempt under Title VII, nor can claims for wrongful termination based on violation of public policy be brought, since churches are allowed to discriminate when employees violate church policy, as was done here. On the Title VII claims, the statute expressly exempts religious institutions from its reach; as far as Constitutional claims are concerned, the ministerial exception applies, not only to direct ministers, but to those who act to promote the church's policies while being employed by the church or its institutions.

MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063

# W

This page intentionally left blank



MICHAEL J. BRADY
ROPERS, MAJESKI, KOHN & BENTLEY
1001 MARSHALL STREET, STE. 500
REDWOOD CITY, CA 94063