SUMMARY OF CALIFORNIA APPELLATE DECISIONS

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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!

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A

INSURANCE COVERAGE; SEXUAL HARASSMENT

Shanahan v. State Farm General Insurance Co.
(2011) 193 Cal.App.4th 780, 122 Cal.Rptr.3d 572 (2011 WL 806385)

FACTS:

Skigin, a woman, sued Shanahan, her employer, for a pattern of sexual harassment. She claimed that he made lewd comments about her, asking her to have intercourse, that he groped her buttocks, that he commented on the firmness of her buttocks, and that this must be the result of horseback riding, and that he entreated her after a trip to leave her husband and spend time with him. Shanahan had a renter's policy with State Farm and an umbrella policy with State Farm. He tendered the complaint, but State Farm refused to defend. Shanahan settled for $700,000, and sued State Farm for the settlement plus more than $1,000,000 in attorney fees.

The trial court granted summary judgment for State Farm.

APPELLATE COURT DECISION:

Affirmed. Under the renter's policy, all emotional distress, mental distress, and humiliation damages are excluded unless tied to an actual physical injury. Skigin only alleged emotional distress and no physical injury. Therefore, there is no coverage and no duty to defend under the renter's policy.

The umbrella policy, on the other hand, does provide coverage for pure emotional distress, but the coverage is dependent upon the happening of an occurrence. None of the incidents alleged by Skigin constituted accidental conduct; they were all willful and intentional and cannot be construed to be "negligent" in any fashion or concept, nor is there a duty to defend because of defamation or invasion of privacy. Comments by Shanahan at a party were issued to plaintiff and were not overheard by anyone, defeating defamation claims; asking plaintiff to leave her husband is no invasion of her pricy. The trial court correctly ruled in favor of State Farm.

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INSURANCE COVERAGE; PROPERTY DAMAGES; LOSS OF USE

Advanced Network, Inc. v. Peerless Insurance Co.
(2010) 190 Cal.App.4th 1054, 119 Cal.Rptr.3d 17 (WL 5030082 2010)

FACTS:

Advanced Network, Inc., (ANI), entered into an arrangement with Mission (a credit union) to take care of their ATM machines that were located in Mission's stores. An employee of ANI developed a scheme to steal $2 million in cash from these machines. Mission first made a claim against its fidelity bond insurer (Cumis) and Cumis paid the claim. Cumis then brought a subrogation action against ANI. ANI had a CGL policy with Peerless. Peerless refused to defend, taking the position that there was no "property damage" suffered. The definition of property damage included "loss of use of tangible property that is not physically injured." ANI took the position that the loss of the cash constituted loss of use under this definition.

ANI settled its claim with Cumis for $1 million and then sued Peerless for bad faith and coverage. In the trial court, Peerless lost and in addition, a jury returned a verdict for $2 million in punitive damages plus *Brandt* fees.

APPELLATE COURT DECISION:

Reversed. A case on point is *Collin v. American Empire Ins. Co.*, (1994) 21 Cal.App.4th 787, in which the Court of Appeal held that when furniture was converted, this was not "loss of use" property damage. Similarly in the present case, "loss of the property" [the cash] is different from "loss of use" of property. The latter occurs when the owner is temporarily deprived of the property, and the owner would be entitled, for example, to the loss of rental income from being deprived of the use of the property.

Furthermore, Peerless is not estopped from raising its loss of use argument simply because it did not raise these arguments in its denial letter. It did so in its motion for summary judgment, and this is sufficient notice.

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INSURANCE COVERAGE; AUTOS; BAD FAITH

Hibbs v. Allstate Insurance Co.
(2011) 193 Cal.App.4th 809, 123 Cal.Rptr.3d 80 (2011 WL 653490)

FACTS:

Hibbs owned a van which was involved in an accident with Brooks, and Brooks was negligent. The van was repaired and was parked outside the Hibbs' house when it was struck by another car. This time, the Hibbs did not want the car repaired, but viewed the car as a total loss. They took that position with their insurer Allstate. The Allstate policy was an unusual one, giving Allstate the absolute right to repair the vehicle rather than paying Hibbs directly. The car was repaired and Allstate paid for it. When the body shop was driving the car back to the Hibbs, there was another accident. More disputes ensued. Ultimately, Hibbs sued Allstate claiming, *inter alia*, bad faith. The trial court ruled in favor of Allstate.

APPELLATE COURT DECISION:

Reversed. Allstate is correct that it had the right to repair rather than paying the Hibbs on their "total loss" claim. But the Hibbs never consented to the repair, and this undermined Allstate's actions in actually repairing the car and proceeding in a subrogation claim to sue Brooks. That action of Allstate in pursuing a subrogation claim against Brooks raised triable issues of bad faith, and, therefore, the trial court is reversed with respect to that part of the decision in favor of Allstate.

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INSURANCE COVERAGE; APPRAISAL PROCESS; FIRE LOSS

Kirkwood v. California State Automobile Assn.
(2011) 193 Cal.App.4th 49, 122 Cal.Rptr.3d 480 (2011 WL 680345)

FACTS:

Kirkwood suffered a fire loss with loss to personal property. He submitted a claim to his insurer, CSAA, and derived the value of his personal property by taking its actual condition less depreciation. CSAA responded with their own depreciation schedule which resulted in a lower value. Kirkwood took the position that the CSAA approach violated Insurance Code provisions having to do with appraisal, and Kirkwood filed a declaratory relief action versus CSAA. CSAA responded with a motion to compel appraisal, saying they were entitled to an immediate appraisal. The trial court in effect denied without prejudice CSAA's request, and indicated that any appraiser could not decide the legal questions and the statutory interpretation questions raised by Kirkwood.

APPELLATE COURT DECISION:

The Appellate Court agreed, saying that the trial court's approach was proper and that the legal questions should be decided first before the appraisal. The Court noted that a determination of "actual cash value," which had to be determined in the appraisal, was an indefinite matter and that guidelines were needed from the Department of Insurance on this subject.

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INSURANCE COVERAGE; HEALTH INSURANCE; STATUTE OF LIMITATIONS

Blue Shield of California Life & Health Insurance Co. v. Superior Court (Kawakita) (2011) 192 Cal.App.4th 727, 120 Cal.Rptr.3d

FACTS AND HOLDING:

Court of Appeal holds that when health insurance policy provides a special statute of limitations period that is broader (more favorable to the insured) than what the statute requires, the policy provision governs. Net result: insured has three years to sue on tortious bad faith cause of action, even though statute and law allow only two years.

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INSURANCE COVERAGE; PILOT WARRANTY

Trishan Air, Inc., v. Federal Ins. Co.
(2011) 635 F.3d 422 (2011 WL 540532) (9th Cir.)

FACTS:

Federal issued an aviation policy to Trishan Air. It contained an endorsement whereby the insured warranted that the aircraft would not be operated by less than a two-person crew, and that each member of the crew had to have had simulator training. There was an aircraft damage claim and one of the pilots, even though he was experienced, had not gone through simulator training. The trial court denied the claim for coverage.

NINTH CIRCUIT DECISION:

Affirmed. Strict compliance is required, and it is irrelevant as to whether the insurer suffered "prejudice" because of the non-compliance. The insurer can expect strict compliance with such fundamental requirements as pilot training and crew size.

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INSURANCE COVERAGE; INTENTIONAL ACTS BY AN INSURED; EFFECT ON INNOCENT CO-INSURED; EXCLUSIONS; FIRE POLICIES

Century-National Insurance Co. v. Garcia
(2011) 51 Cal.4th 564, 120 Cal.Rptr.3d 541 (2011 WL 537627) (California Supreme Court)

FACTS:

Jesus Garcia and his wife Theodora purchased a fire insurance policy from defendant. Their son was also a co-insured. The son intentionally set fire to his bedroom which caused substantial damage to the house. Jesus filed a claim against the insurer which denied the claim. The policy contained an exclusion for any loss arising out of an intentional act by any insured; the policy also had a provision precluding coverage for criminal conduct of any insured. The trial court agreed with the insurer that these provisions precluded coverage; the Court of Appeal agreed.

SUPREME COURT DECISION:

Reversed. This was a fire policy. The issue is whether the intentional conduct of one insured will bar coverage for all other insureds even though they may be innocent. The California Insurance Code statutes that apply to fire policies are 2070 and 2071. These statutes do not refer to any such permitted exclusions. It is true that Insurance Code § 533 precludes coverage for an intentional act committed by the insured (the son). But that would not preclude coverage for innocent insureds who did not set the fire. Accordingly, under this fire policy, the exclusion cannot be applied to the innocent insureds.

COMMENT:

The Supreme Court indicates that its decision is probably limited to the fire insurance policy and, therefore, would arguably not apply in the context of other types of liability or first party insurance. But that issue is now expected to be litigated in many cases where the previous body of law had clearly held that intentional conduct by one insured barred coverage for all other insureds, even though they were not involved in the conduct.

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INSURANCE COVERAGE; ASSIGNMENT; EQUITABLE SUBROGATION

Dobbas v. Vitas
(2011) 191 Cal.App.4th 809, ___ Cal.Rptr.3d ___

FACTS:

Dobbas, the insured, was a rancher. One of his bulls escaped and caused an automobile accident, and the injured parties sued Dobbas. American Guarantee was the insurer of Dobbas, and American Guarantee settled the injured parties' claims. Meanwhile, Dobbas had filed suit against his insurance agent, Vitas, claiming Vitas should have obtained coverage under a Cal Farm insurance policy. The injured parties sought to intervene in Dobbas' suit against Vitas, and American Guarantee also sought leave to intervene. The trial court permitted intervention by the injured parties, but denied intervention on the part of American Guarantee. American Guarantee ultimately obtained an assignment from the injured parties and also had an assignment from Dobbas to proceed against Vitas.

APPELLATE COURT DECISION:

The decision to preclude American Guarantee from intervening was proper. The case is governed by the principles of equitable subrogation, which American Guarantee is trying to employ. But it must demonstrate that its "equities" are superior to those of Vitas. Here, the loss to American Guarantee was not caused by anything Vitas did, but by the accident itself. It makes no difference that American Guarantee had an assignment – the fact that its equities were not superior to those of Vitas still governs.

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INSURANCE COVERAGE; TRADE DRESS; DISPARAGEMENT; ADVERTISING INJURY COVERAGE

Michael Taylor Designs, Inc. V. Travelers Property Casualty Co. of America (2011) 761 F.Supp.2d 904 (2011 WL 221658)

FACTS:

Michael Taylor Designs (Taylor) was a furniture manufacturer. One of Taylor's suppliers brought an action against Taylor under a theory of trade dress infringement. The lawsuit alleged that customers would come into Taylor's showroom, express a desire to see the supplier's wicker products, and that Taylor would steer these customers to cheaper knock-off goods. Taylor tendered to its insured, Travelers. Travelers rejected the defense because the policy precluded coverage for trade dress infringement, although it did provide coverage for disparagement. When the Complaint was amended to allege disparagement, Travelers agreed to defend, but Taylor filed a declaratory relief action anyway and the issue was whether the original Complaint triggered a duty to defend on the part of Travelers.

DISTRICT COURT DECISION:

The U.S. District Court held that there was a duty to defend. Even though the theory of the original Complaint was trade dress infringement (not covered), the facts indicated that the conduct of Taylor in steering the customers to cheaper products hurt the reputation of the suppliers, and the customers would also believe that the cheaper products were marketed by the supplier – all of which would constitute "disparagement." Just because the conduct was labeled trade dress infringement did not eliminate the possibility that disparagement would be present.

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INSURANCE COVERAGE, DUTY TO DEFEND, ADMINISTRATIVE PROCEEDINGS, MEANING OF "SUIT"

Ameron International Corp. v. Insurance Company of State of Pennsylvania (2010) 50 Cal.App.4th 1370, 118 Cal.Rptr.3d 95 [California Supreme Court]

FACTS:

In the case of *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857, and in the subsequent case of *Powering*, the California Supreme Court examined the question of whether insurers have a duty to defend and indemnify when the government initiates an environmental administrative proceeding to make the insured clean up a toxic site. In both cases, the Court ruled that such proceedings do not constitute a "suit" and, therefore, the insurer has no duty to defend. In the present case, we are involved with the Department of Interior Board of Contract Appeal (IBCA) and the Department of the Interior. The insured was the manufacturer of siphons which were installed in aqueducts to assist in the drainage of water. These aqueducts were owned by the Department of the Interior. Over a number of years, the aqueducts malfunctioned because of defects. The Department of the Interior filed a claim against the insured for $40 million in damages for having to replace and repair the aqueducts.

Under Federal procedure, the insured "appealed" to the IBCA. This kind of appeal turned the insured into a claimant, but the nature of the proceeding was similar to an adjudicative procedure whereby the liability of the insured would be determined and the damages, if any, would be decided. The insured settled the $40 million claim for $10 million and then brought suit against its insurer for failure to defend the IBCA claim. The trial court ruled that in light of *Foster-Gardner*, such a proceeding was not a suit and, therefore, there was no duty to defend; the Court of Appeal reversed.

SUPREME COURT DECISION:

Court of Appeal affirmed. The Supreme Court distinguished this proceeding from the environmental proceeding administrative proceeding in *Foster-Gardner* and *Powering* in which the government was simply seeking to force the insured to clean up a particular site. The present proceeding, in which a contractor was accused of manufacturing defective products causing damage to the government, was a functional equivalent of a suit since liability and damages would be adjudicated, the rules of evidence would be the same, and the matter was presided over by an administrative judge. Accordingly, such a proceeding would trigger an insured's duty to defend and indemnify.

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INSURANCE COVERAGE; HEALTH INSURANCE; DUTY TO DISCLOSE; MISREPRESENTATION

Levine v. Blue Shield of California
(2010) 189 Cal.App.4th 1117, 117 Cal.Rptr.3d 262

FACTS:

Michael Levine and his wife brought a lawsuit in their own names and on behalf of the class against Blue Shield, their managed care health insurer. Claims were stated for fraudulent concealment, negligent misrepresentation, bad faith, unjust enrichment and unfair competition. The basis of the claim was that Blue Shield had a duty to disclose to the plaintiff that contractual arrangements could be made between Levine and Blue Shield that would have lowered the premiums that Levine in fact paid for his existing contract. For example, if Michael's wife had been made the primary insurer, and if his children had been placed on a single family policy instead of being insured separately, the premium would have been lower. The claim was that Blue Shield had a duty to disclose this information to Levine.

The trial court sustained without leave to amend defendant's demurrer and dismissed the case.

APPELLATE COURT DECISION:

Affirmed. No such duty to disclose is imposed on Blue Shield. The duty of good faith and fair dealing imposes no duty on the part of the insurer to disclose the lowest price to the purchaser of health insurance, nor is a duty created by Insurance Code section 332 which deals with the obligation of both parties in good faith to disclose all factors which are material to the contract. There is no claim in this case that there were any misrepresentations about the existing contract that was entered into, and the availability of other contracts that might have been purchased is not embraced by section 332. The trial court correctly dismissed the case.

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INSURANCE COVERAGE; ADVERTISING INJURY COVERAGE; SLOGAN INFRINGEMENT CLAIM

Hudson Insurance Company v. Colony Insurance Company
(2010) 624 F.3d 1264 (9th Cir. 2010)

FACTS:

Insured corporation (Authentic) manufactured football jerseys. Authentic was sued by the NFL because Authentic was selling some jerseys which had written on them "Steel Curtain," a phrase employed by Pittsburgh Steelers' fans. The NFL alleged claims for unfair competition, deceptive acts and practices, trademark infringements, and trademark counterfeiting. Authentic had two insurers (Hudson and Colony). Colony refused to defend; Hudson defended under reservation, and Hudson then sought to recover half of its defense costs from Colony. The Colony policy defined advertising injury coverage, *inter alia*, to include slogan infringement.

The District Court ruled in favor of Hudson, granting summary judgment and holding that there was a potential for coverage under the Colony policy.

NINTH CIRCUIT DECISION:

Affirmed. The Ninth Circuit distinguished the leading case of *Gunderson v. Fire Insurance Exchange*, (1995) 37 Cal.App.4th 1106, which said that in order to create coverage or a defense obligation, the insured cannot "speculate" as to claims that might have been brought by the claimant. In the present case, Colony claims that there was no cause of action for slogan infringement and that, indeed, the attorneys for the NFL did not intend to bring any such cause of action. However, *Gunderson* dealt with the failure to plead facts which would create a potential for coverage under a theory not pled. In the present case, adequate facts were alleged which created a potential for coverage because those facts would have supported a claim for slogan infringement, even though it was not pled.

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INSURANCE COVERAGE; EQUITABLE CONTRIBUTION; ACTION BETWEEN INSURERS; DUTY TO DEFEND/INDEMNIFY; SHIFTING THE BURDEN OF PROOF

Arrowood Indemnity Company v. Travelers Indemnity Company
(2010) 188 Cal.App.4th 1452, 116 Cal.Rptr.3d 559 (2010 WL3896619)

FACTS:

The owner of an apartment building wanted to sell it; seller retained a contractor (the insured) to take care of some dry rot problems. The building was then sold. After the buyer took possession, the buyer discovered various areas of dry rot that had not been remedied. Buyer sued the seller. Seller cross-complained against the contractor who had done the dry rot work. The contractor tendered to its insurer, Arrowhead. The complaint alleged that the dry rot work had been done during the 2002 time period. In the process of doing discovery, Arrowhead discovered that the contractor had also done some dry rot remedial work on the property in the 2000 time period, when Travelers was on the risk. Arrowhead accepted the tender and commenced defending. There was a verdict of over $600,000 against the contractor (jury verdict); however, when the jury answered specific questions, it was ambiguous as to whether the verdict was exclusively based on work done during the 2002 time period and whether it excluded work done during the 2000 time period when Travelers was on the risk. The verdict was for compensatory damages, attorneys' fees awarded to the seller (because of the contract between the buyer and the seller). Arrowhead paid the bulk of the defense fees incurred in defending the contractor. Travelers paid a small portion of the defense fees incurred in defending the contractor and the attorneys' fees awarded to the seller (under the supplementary payment section).

In an equitable contribution action brought by *Arrowhead v. Travelers*, the trial court ruled in favor of Travelers, finding that there was no coverage because of the fact that the underlying verdict was based upon work that was done during the Arrowhead policy.

APPELLATE COURT DECISION:

Reversed. In this case of first impression, we have an action by a participating insurer (the one which defends and indemnifies) against, in essence, a non-participating insurer (Travelers). Under such circumstances, the participating insurer only has the burden of making out a prima facie case of coverage on the part of the non-participating insurer, meaning that Arrowhead simply has to prove that Travelers had a duty to defend. Once that is done, the burden shifts to Travelers to prove that there was no coverage in fact. Travelers could not meet this burden because the jury verdict in this case was ambiguous.

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INSURANCE COVERAGE; AGENTS; BINDERS OF INSURANCE

Chicago Title Insurance Company v. AMZ Insurance Services
(2010) 188 Cal.App.4th 401, 115 Cal.Rptr.3d 707

FACTS:

A title insurance company was involved in the sale of a home. The transaction required that the purchaser buy homeowners insurance. Title insurer arranged for independent agent to handle the insurance. The agent issued a document called EOI (evidence of insurance). As the purchaser never in fact, as required, paid the premium payment, no premium payment was ever received by the insurer. Although the agent did not have written authority to issue binders (and the argument was that the EOI was a binder), custom and practice was that the agent had handled similar transactions in the past in this way, and that the insurer had never objected.

The home burned. When the claim was submitted to the insurer, the insurer denied coverage on grounds it had never received the premium, and that was absolutely required. The title insurer paid the loss and then filed suit for equitable subrogation against the insurer. The court and the jury ruled against the insurer and also found the insurer in bad faith.

APPELLATE COURT DECISION:

Affirmed. The EOI did constitute a binder; the jury's finding of ostensible agency on the part of the agent was supported by the custom and practice as between the insurer and the agent. The jury's finding of bad faith was also correct, and the verdict for the value of the home plus attorneys' fees is therefore affirmed.

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INSURANCE COVERAGE; ACTION BETWEEN INSURERS; MISREPRESENTATION BY POLICYHOLDER; DUTY

Colony Insurance Company v. Crusader Insurance Company
(2010) 188 Cal.App.4th 743, 115 Cal.Rptr.3d 707

FACTS:

A group of tenants brought suit against the apartment house owner on grounds of numerous problems that existed in the building. Colony and Crusader were insurers. Crusader denied coverage and a defense on grounds of misrepresentation by the insured on the application. The application called for the insured to disclose whether there had been any violations of city ordinances, citations by city authorities, etc., and the insured had denied this. In fact, there had been numerous such citations. The internal guidelines of Crusader required that material representations on the application be verified. An employee of Crusader had checked on the web, but there was nothing on the web about such citations. The website was considerably out of date.

Colony defended and later brought suit against Crusader for defense costs. Colony alleged that Crusader was obliged to follow its verification guidelines, had not done so, and therefore was estopped to deny coverage. The trial court ruled against plaintiff Colony.

APPELLATE COURT DECISION:

Affirmed. This issue had not been raised by Colony at trial, and, therefore, was forfeited. However, on the merits, even if forfeiture was not an issue, Crusader is not estopped to deny coverage. In a case such as this, there is no duty owed by Crusader to Colony – and Colony cannot rely upon any alleged failure of Crusader to follow its own internal guidelines in connection with verifying material on the application.

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INSURANCE; REGULATION; PROPOSITION 103

MacKay v. Superior Court (21st Century Insurance Company)
(2010) 188 Cal.App.4th 1427, 115 Cal.Rptr.3d 893

FACTS:

The case arises out of the provision of Proposition 103 which precludes an insurer using "lack of prior coverage" as a factor in setting insurance rates. 21st Century had established a method for setting rates which allegedly took the absence of prior coverage of the insured into account. This particular rate request by 21st Century was approved by the Insurance Commissioner. A lawsuit was then filed against 21st Century for violation of the Business & Professions Code allegedly because of the claimed violation of the Proposition 103 provision.

APPELLATE COURT DECISION:

The Court of Appeal (Justice Crosskey, dean of insurance matters on the Court) held that when the rate has been approved and is then challenged in a lawsuit alleging violations of the Business & Professions Code, the suit must be dismissed; the Insurance Commissioner has exclusive jurisdiction over such matters, subject to review on appeal.

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SUBROGATION; COLLATERAL SOURCE RULE; FIRE LOSS

Garbell v. Conejo Hardwood, Inc.
(2011) 193 Cal.App.4th 1563

FACTS:

The owner was having his house remodeled. Some of the contractor's workers smoked. There was evidence that after their smoked, they tossed cigarette into a garbage can which had some sawdust and paper in it. The garbage can caught on fire leading to a house fire. The total amount of the owner's damages were $822,483. The owner's insurance company paid the policy limit of $424,050. In a jury trial, the jury found that the contractor (and his employees) were 55% at fault and the owner was 45% at fault. The trial court, in calculating the damages, took the $822,00 figure and multiplied it by 55% fault of the contractor, and this amount came to $452,000. From that amount, the trial court subtracted the insurance proceeds that had been paid by the insurer $424,000. The trial court then ruled that the owner was entitled to recover $28,000 from the contractor.

APPELLATE COURT DECISION:

Affirmed. The trial court's method of calculating the recovery was appropriate. Deducting insurance proceeds from the owner's recovery is not a violation of the collateral source rule. The insurer's subrogation claim is allowed to proceed and is not reduced.

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INSURANCE; POLICY LIMITS AND OFFER; INSURER'S ACTION FOR REIMBURSEMENT; INSURER'S DUTY TO NOTIFY INSURED OF SETTLEMENT OFFER

American Modern Home Insurance Co. v. Fahmian
(2011) 194 Cal.App.4th 162, 124 Cal.Rptr.3d 456

FACTS:

Fahmian was an insured under defendant's (American's) homeowner's policy. Fahmian was a contractor and was sued for injuries suffered by an employee on the job site. He tendered to American. Although American has an exclusion for business-related injury or damage (true here), it assumed the defense under reservation of rights. Plaintiff submitted a policy limits demand with a 30-day time limit. American sent the demand to Fahmian, telling Fahmian that Fahmian had the right to assume the defense and use his own counsel, or to waive any complaint that American had accepted the policy offer. Fahmian did not object, but claimed that he did not receive the communications. American accepted the offer and then sued Fahmian for declaratory relief and reimbursement. In that action, the trial judge denied reimbursement on grounds that American had not sent the "advisement of policy limits demand" letter to Fahmian in sufficient time for Fahmian to evaluate as to whether Fahmian wanted to assume his own defense.

APPELLATE COURT DECISION:

Reversed. The definitive case is the Supreme Court case in *Blue Ridge*, 25 Cal.4th at 502. In that case, the Supreme Court indicates that an insurer may preserve its right to reimbursement, when it is defending an action under reservation of rights, if it sends a settlement advisory letter to the insured giving the insured a right to assume his own defense or waiving a right to attack the insurer for accepting a policy limits demand. The Supreme Court did not indicate that the "advisement letter" must be "timely" sent to the insured, although in this case, it was unquestionably sent in a timely fashion. The insurer is entitled to proceed with its reimbursement claim.

COMMENT:

The decision does seem to indicate, however, that if the insurer waits until extremely late (say 28 days after the initial 30-day time limit demand), this could defeat the insurer's right to reimbursement. Therefore, all insurers should very promptly served the insured with a policy limits demand with a *Blue Ridge* type explanation.

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INSURANCE COVERAGE; *CUMIS*; RESERVATION OF RIGHTS; DUTY TO DEFEND

The Housing Group v. PMA Capital Insurance Company
(2011) 193 Cal.App.4th 1150, 123 Cal.Rptr.3d 603 (2011 WL 1087260)

FACTS:

Plaintiff was a real estate developer. Plaintiff was sued in various construction defect cases. He tendered to his insurer for a defense and also contended that *Cumis* counsel was in order. The insurer wrote a reservation of rights letter indicating that it would "investigate its obligation to defend," and whether there was coverage. At the end of the case, the insurer settled and then reimbursed the insured for part of the attorney fees incurred by the insured. The insurer then sought to have a *Cumis* arbitration concerning the *Cumis* dispute. The trial court held that the insurer had in effect breached its duty to defend and, therefore, forfeited its right to seek *Cumis* arbitration.

APPELLATE COURT DECISION:

Affirmed. Substantial evidence supported the trial court's decision that there was a breach of the duty to defend; an insurer cannot be permitted at the end of a case to reimburse the insured for defense costs instead of financing the defense from the outset. The reservation of rights letters sent by the insurer were ambiguous in that they indicated that the insurer would only investigate the duty to defend and would only participate in the defense if coverage was confirmed. This is inadequate. This would be in the equivalent of a denial of a defense.

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INSURANCE; PRODUCTS COMPLETED OPERATIONS COVERAGE; EFFECTIVE TERMINATION OF CONTRACTOR

Clarendon America Insurance Company v. General Security Indemnity Company of Arizona
(2011) 193 Cal.App.4th 1311, 124 Cal.Rptr.3d 1

FACTS:

Hilmor was a general contractor who agreed to build a home in Beverly Hills. The project started, but the owner terminated Hilmor. Several years later, the owner sued Hilmor for defects which caused damage to the owner. Hilmor had a policy with Clarendon. Clarendon defended Hilmor and paid its policy limits. The instant case involves Clarendon's claim for equitable contribution against General Security, an insurer which had issued a CGL policy to Hilmor. That policy provided products completed operations coverage. In that suit, the trial court ruled in favor of General Security, finding that completed operations coverage only applies when the general contractor's project has been "completed," and that when a general contractor is fired, it necessarily means that he did not complete the project.

APPELLATE COURT DECISION:

Affirmed. When a general contractor is fired, the completed operations coverage exclusions are triggered, meaning that the project cannot be deemed to be completed and there would be no coverage. Furthermore, General Security is entitled to rely upon its faulty workmanship exclusion and its "claim in progress" exclusion, since these claims were in progress at the time that the General Security policy incepted.

COMMENT:

Interesting case; could create important gaps in coverage for general contractors since many are indeed fired by owners who are unhappy with the work. The decision in favor of the faulty workmanship and "claims in progress" exclusions is also interesting since such exclusions will frequently be at issue in these types of suits.

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INSURANCE; BROKERS; DUTY TO INSURERS REGARDING REPLACEMENT OF REINSURANCE; FIDUCIARY DUTY

Workmen's Auto Insurance Company v. Guy Carpenter & Company
(2011) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___ (2011 WL 1663068)

FACTS AND HOLDING:

Court of Appeal holds that an insurance broker (Guy Carpenter) only has a duty to place reinsurance for the insurer, and does not owe a fiduciary duty to the insurer to make sure that the reinsurance is obtained at the lowest possible price and that Guy Carpenter does not earn an undue commission.

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INSURANCE; DUTY TO DEFEND; EXPENSES INCURRED BY INSURED PRIOR TO INSURER'S TAKING OVER OF DEFENSE

Richards v. Sequoia Insurance Company
(2011) 195 Cal.App.4th 431, 124 Cal.Rptr.3d 637 (2011 WL 1615407)

FACTS:

The insureds were attorneys. They owed the Jack London Lodge. A 20-year-old patron drank at the bar and then was involved in a car accident. A wrongful death action was filed against the lodge. Sequoia was the liability carrier for the lodge. The policy did provide liquor liability. On the same day that the insureds were served with the complaint, they tendered to Sequoia. Sequoia indicated that it required some time to analyze the coverage issue, but advised the insureds to obtain counsel to respond to the complaint. Sequoia said that it would reimburse the insured for reasonable defense costs in the event the insurer decided it had a duty to defend.. When this letter was received by the insureds, they claim they had no money to hire an attorney. They did retain Brian Charter, and he agreed to represent the insureds, but it was understood that the insureds would do all the heavy work, research, etc. Only nine days after this, the insurer did agree to defend; the insurer then settled the case, paid all of Charter's attorney fees and fees owed to other attorneys who represented the insureds. The insureds, however, demanded that the insurer compensate the insureds for the time that they actually spent in representing themselves. The insurer refused, and the insureds sued for breach of contract and bad faith.

The trial court granted summary judgment for the insurer.

APPELLATE COURT DECISION:

Affirmed. The insureds suffered no recoverable damages for the insurer's conduct. There is a clause in the policy obligating the insurer to pay for expenses incurred at the insurer's request, but not expenses voluntarily taken on by the insureds. The case on point is *Trope v. Katz* (1995) 11 Cal.4th 274, in which the Supreme Court stated that when an attorney represented himself in pro per in a case where the prevailing party gets attorney fees, and the in pro per is the prevailing party, fees are not allowed because the fees were "not incurred." This applies to the insurance context as well. The insurer, therefore, owes no obligation to pay for the fees claimed by the insureds.

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INSURANCE COVERAGE; CONSTRUCTION DEFECTS; DUTY OF SUBCONTRACTORS TO ADD GENERAL AS ADDITIONAL INSURED; SUBCONTRACTOR'S WARRANTY; EXCLUSION FOR WORK DONE BEFORE INCEPTION OF POLICY; PAYMENT OF SIR AS CONDITION OF DEFENSE

Evanston Ins. Co. v. American Safety Indemnity Co.
(2011) 768 F.Supp.2d 1004 (2011 WL 589812) (Northern District, California)

FACTS:

This is an action for equitable contribution between insurers. Evanston took over the defense for a named insured, a developer, in connection with the *Ayala* lawsuit involving many homes. American Safety declined the tender on various arguments. The American Safety policy contained an SIR endorsement which made a condition precedent to coverage the requirement that the insured pay the $50,000 SIR to American Safety; this was also a condition precedent to any obligation of American Safety to defend.

The second main argument of American Safety for no defense obligations was based upon the so-called subcontractor's warranty. The American Safety policy contained a provision stating that all subcontractors for the named insured must provide coverage and a defense for the named insured, and name the named insured as an additional insured with respect to liability imposed upon the named insured arising out of the subcontractor's work. American Safety took the position that this had not been done (admitted by the insured), that this was a condition precedent to coverage under the American Safety policy, and that, therefore, there was no obligation on the part of American Safety to defend.

Thirdly, American Safety relied upon a "total prior work" exclusion. This provision, according to American Safety, provided that if the insured did work in the subdivision which was completed prior to the inception date of the American Safety policy, there would be no coverage whatsoever for any houses in the project which were involved in the lawsuit. It was undisputed that six homes had been completed before the American Safety policy commenced.

U.S. DISTRICT COURT DECISION:

Firstly, with respect to the subcontractor's warranty issue, this is not a total defeat for coverage under the American Safety policy – only coverage for the named insured for liability arising out of the work of subcontractor would be precluded – not coverage for the named insured arising out of his own work or the work of others. None of this was

clear from the complaint and, therefore, there was a potential for coverage and a duty to defend on the part of American Safety.

Secondly, we have the issue of the total prior work exclusion. Such an exclusion only precludes coverage for the six homes which were completed before the inception date of the American Safety policy – not for subsequent homes. In other words, simply because there is a partial completion of the project does not preclude coverage for homes on which the named insured worked after the inception date of the American Safety policy. Since some of the project is therefore potentially covered, there would be a duty to defend.

However, American Safety is entitled to limited relief based upon its SIR provision. This requires the insured to make payment of the $50,000 SIR as a condition precedent to coverage and a defense obligation. The insured did not pay this amount until a year after the tender and, therefore, American Safety is not entitled to defend until it received payment.

COMMENT:

Concerning the subcontractor's warranty, however, see *Scottsdale Insurance Company v. Essex Insurance Company* (2002) 98 Cal.App.4th 86, 119 Cal.Rptr.2d 62. In that case, the insurance policy required that the subcontractor name the general contractor as an additional insured on all general liability policies purchased by the subcontractors. This is a much more general promise, and that case said that the failure of the subcontractors to honor that promise (even some of the subcontractors) voided all coverage under the general contractor's policy.

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INSURANCE; SUBROGATION; INSOLVENCY; CIGA

Fort Bragg Unified School District v. Solano County Roof, Inc.
(2011) 194 Cal.App.4th 891, 124 Cal.Rptr.3d 144

FACTS:

School district hired contractors to do some asbestos removal and roofing work. Roofing contractor promised to protect buildings from water. Rain came into the buildings, damaging them. School district received some payments from a joint powers group (this would be something like self-insurance). School district then filed what was in essence a subrogation action against the contractors. The insurers for the contractors were insolvent, and the matter had been taken over by CIGA (which apparently would cover the claim). The contractors sought dismissal which was denied by the trial court.

APPELLATE COURT DECISION:

Reversed. Insurance Code § 1063.1(c)(5) bars subrogation actions against insureds whose insurers have become insolvent.

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C

BAD FAITH; INSURANCE COVERAGE; SEXUAL MOLESTATION; MULTIPLE INSURERS; FAILURE TO MAKE REASONABLE SETTLEMENT OFFER; GENUINE DISPUTE DOCTRINE

Howard v. American National Fire Insurance Company
(2010) 187 Cal.App.4th 498, 115 Cal.Rptr.3d 42

FACTS:

This was a complicated case arising out of a sexual molestation of two brothers by a priest. A lawsuit was filed against the bishop who was in charge of the diocese and who employed the priest, with allegations of negligent retention. The bishop was covered by various CGL policies. Two insurers accepted the defense under reservation of rights, but one insurer (the defendant) refused to participate. There was a settlement demand of $5 million which was later reduced to $3.7 million. Defendant made only a minimal settlement offer. The demand was within the combined limits of the three insurers' policies. After settlement failed, the case went to trial and the jury awarded $6.35 million in compensatory damages and $24 million in punitive damages to the Howards. The trial judge reduced the award to $5.25 million on comparative fault and reduced the punitives to $6 million. The judgment against the bishop was appealed. The bishop had trouble getting a bond on appeal and personally paid $1 million towards the judgment. Complex settlement negotiations were entered into with the insurers who had defended, and these parties ultimately settled all of their differences and various assignments were entered into. This was a comprehensive settlement including claims for coverage and bad faith.

The instant case involves the bad faith litigation against the non-defending insurer. This claim was handled by a private judge pursuant to an agreement of the parties (including an agreement that his decision could be appealed). There were claims by defendant insurer that there was no coverage because the sexual molestation had occurred after its policy had expired. Defendant insurer also claimed that it could not be in bad faith because the settlement demand exceeded its policy limit. The private judge rendered judgment against the insurer as follows: for its $500,000 policy limit; $75,000 in defense costs; $1.5 million for bad faith to reimburse the bishop for his own settlement payment; $200,000 to reimburse the bishop for out-of-pocket post-judgment attorney fees; $660,000 for attorney fees to compel payment of benefits owed (*Brandt*). This decision was then appealed.

APPELLATE COURT DECISION:

Affirmed in all respects. There was enough evidence to sustain the Court's finding that a duty to defend existed, despite the insurer's claim that the sexual molestation had occurred after its policy had expired. It is no defense that the settlement demand exceeded the

defendant's policy limit. When multiple insurers are involved, you take the settlement demand and measure it against the combined insurance coverage available, and all insurers are required to make reasonable settlement offers. Defendant was in breach of its obligation of good faith in this respect. It is no defense that other insurers had defended the bishop the bishop was still out of pocket for various attorneys fees that he incurred personally, nor can defendant rely upon the "genuine dispute" doctrine to escape bad faith liability. Defendant argues that it had a genuine belief that coverage did not exist and, therefore, there was a "genuine issue" on coverage, negating bad faith liability. This argument is without merit, and the genuine issue defense to bad faith exposure does not apply under such circumstances.

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C

BAD FAITH; DISABILITY COVERAGE; RESCISSION OF SETTLEMENT AGREEMENT; SUMMARY JUDGMENT

Kelly v. Provident Life and Accident Insurance Company
(2010) 734 F.Supp.2d 1085 (WL 3212127 2010) [Unpublished U.S. District Court opinion]

FACTS:

Plaintiff Kelly worked as an insurance broker. In the 1970s, he went through a stressful divorce and filed a disability claim with Provident, his disability carrier. In the 1990s, Provident began questioning whether plaintiff was still disabled and made plaintiff participate in three IMEs; Provident also temporarily stopped paying disability benefits. Provident also reported plaintiff to the FBI and the San Diego District Attorney for insurance fraud. Provident then sued plaintiff claiming fraud and seeking to get back the benefits paid. Plaintiff settled this case, dropping his claim for disability benefits in return for a dismissal of the Provident lawsuit. Plaintiff was mentally ill (weakness of mind) during all these latter events.

In 2004, plaintiff filed the instant lawsuit, seeking to rescind the settlement agreement; he also had causes of action for breach of contract (coverage for disability benefits) and for bad faith. The allegations were that Provident exercised undue influence over plaintiff in connection with the settlement. The U.S. District Court dismissed the case. The Ninth Circuit reversed and remanded the case to the District Court.

On remand, Provident moved for summary judgment.

DISTRICT COURT DECISION:

Summary judgment denied. Triable issues of fact exist as to the issue of undue influence and Provident's bad faith in connection with the way the settlement was accomplished. The course of conduct by Provident could allow a reasonable jury to conclude that Provident was in bad faith for the way that it treated plaintiff, who was afflicted with mental problems. A jury could conclude that Provident took undue advantage of plaintiff under these circumstances. Provident's claim that the Court can only focus on the settlement negotiations themselves, in connection with the claim to rescind, in erroneous; the Court should consider the entire context of the relationship, not just the settlement negotiations. A jury could conclude that Provident's investigation was biased in that it concealed evidence from the doctors conducting the IMEs and sought to control the standard by which such examinations were conducted. (Note: this is an unpublished U. S. District Court decision.)

C

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D

PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; PATENT LITIGATION

E-Pass Technologies, Inc. v. Moses & Singer, LLP
(2010) 189 Cal.App.4th 1140, 117 Cal.Rptr.3d 516

FACTS:

Plaintiff E-Pass retained the Moses law firm to file a patent infringement action against certain manufacturers. The case was dismissed by the U.S. District Court, and the Federal Appellate Court affirmed. E-Pass then used the Moses law firm to sue Microsoft and Hewlett-Packard for patent infringement concerning the same issues, but those suits were also dismissed by the District Court, and that decision was affirmed by the Court of Appeal. A judgment was entered against plaintiff E-Pass for $2.3 million and attorneys' fees.

E-Pass then sued the Moses law firm for legal malpractice, and the suit was filed in State court. The law firm demurred, contending that Federal court had exclusive jurisdiction since the matter concerned patent law. The trial court agreed, dismissing the suit.

APPELLATE COURT DECISION:

Reversed. The issue is the standard of care and whether the attorneys were negligent in the way that they conducted the litigation. Substantive issues of patent law will not be considered and, therefore, there is no exclusive jurisdiction in the Federal court.

D

PROFESSIONAL LIABILITY; REAL ESTATE BROKERS

Holmes v. Summer
(2010) 188 Cal.App.4th 1510, 116 Cal.Rptr.3d 419

FACTS:

Holmes was the potential buyer of a home. The seller's real estate broker was Summer. Holmes offered to buy the house for $700,000; the seller countered with $749,000, which Holmes accepted. In reliance on this, Holmes sold his existing home. It turned out that the property had deeds of trust against it exceeding $1,000,000 – far in excess of the sales price to Holmes. Holmes brought a lawsuit for failure to disclose and negligence against the seller's broker. The trial court sustained the broker's demurrer.

APPELLATE COURT DECISION:

Reversed. Although the broker does not have a fiduciary duty to the buyer, the broker has a duty of care, honesty, good faith, fair dealing and disclosure as set forth in Civil Code section 2079.16, and the broker could be sued for negligence under the circumstances of this case for failure to disclosure, as alleged in the complaint.

COMMENT:

The Court does say that the broker could have fulfilled his duty if he demonstrated knowledge that the seller was going to bring enough cash to the escrow to pay off the existing deeds of trust.

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ANTI-SLAPP STATUTE; LAWSUIT AGAINST ATTORNEY; BREACH OF FIDUCIARY DUTY

Oasis West Realty, LLC v. Goldman
(2011) 51 Cal..4th 811 (California Supreme Court)

FACTS:

In 2004, a developer hired attorney Kenneth Goldman to help the developer get Beverly Hills' approval for a hotel project. Goldman worked on the matter for a couple of years and obtained various pieces of confidential information about the strategy that the developer wanted to employ. In April 2006, Goldman terminated his relationship with the developer. In June of that year, the project went before the city council and was ultimately approved in April 2008. Goldman then joined a Beverly Hills citizen activist group which wanted to put a referendum on the ballot to veto the project. Goldman gathered about 20 signatures in favor of the referendum, and the hotel project was disapproved by the voters in the election.

The developer then sued Goldman for breach of fiduciary duty and for professional negligence. Goldman filed an anti-SLAPP motion under C.C.P. § 425.16. The trial court denied the motion on grounds that the heart of the claim was not Goldman's political activities, but his breach of the duty of loyalty.

The Court of Appeal reversed, finding that no claim was stated for breach of confidentiality because Goldman never retained another client where such information from the developer could be used adversely against the developer.

CALIFORNIA SUPREME COURT DECISION:

Court of Appeal reversed. The developer has demonstrated a probability of prevailing and, therefore, the anti-SLAPP motion should have been denied by the trial court. The Court relied upon the 1932 case of *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 573-574, 15 P.2d 505 (1932), in which the Supreme Court stated that an attorney is precluded from doing two things after terminating an attorney-client relationship: the attorney cannot do anything to injure his former client in any way; nor may the attorney use against the client confidential information that he has obtained. It is no defense for the attorney to say that he did not secure another client and then use the confidential information in connection with representing that client. There are multiple ways in which information learned by Goldman could be used adversely against the developer.

D

PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; STATUTE OF LIMITATIONS

Callahan v. Gibson, Dunn & Crutcher, LLP
(2011) 194 Cal.App.4th 557

FACTS AND HOLDING:

Court of Appeal rules that statute of limitations in a legal malpractice action arising out of the preparation of a partnership agreement does not commence to run until a drafting error in the partnership agreement actually causes harm.

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LEGAL MALPRACTICE; TRYING THE CASE WITHIN THE CASE; BREACH OF FIDUCIARY DUTY ATTORNEY

Gutierrez v. Girardi
(2011) 194 Cal.App.4th 925, 125 Cal.Rptr.3d 210

FACTS:

The client sued the attorney for misappropriation of settlement proceeds in connection with litigation against Lockheed. The attorney had been able to obtain the settlement despite the fact that Lockheed had a good statute of limitations defense and the attorney sought to use that fact to support his motion for summary judgment in the legal malpractice action. The trial court agreed and granted summary judgment for the attorney.

APPELLATE COURT DECISION:

Reversed. When a client sues an attorney for legal malpractice in connection with the way litigation was handled, the client must conduct a "trial within a trial," namely, prove that the attorney mishandled the litigation and could have obtained a more favorable result than the result that was obtained. In the present, the client is not complaining about the amount of the settlement or that the attorney did not obtain enough. Instead, the client is complaining about post-litigation conduct; namely, misappropriation of the settlement proceeds. The "trial within a trial" concept is therefore irrelevant. Summary judgment should have been denied.

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E

ABUSE OF PROCESS; ANTI-SLAPP STATUTE

State Farm Mutual Automobile Insurance Company v. Fue Lee
(2011) 193 Cal.App.4th 34, 122 Cal.Rptr.3d 183 (2011 WL 288306)

FACTS:

State Farm was involved in an uninsured motorist arbitration with its insureds who had been treated by Lee (a chiropractic clinic). State Farm took the deposition of Lee; in the process of taking the deposition, State Farm inquired into the corporate/partnership/ownership structure of the Lee chiropractic clinic. No objections were made. Then, allegedly based on information obtained during the deposition, State Farm sued Lee, claiming unlawful business practice violating Business & Professions Code § 17200, in that the ownership structure was illegal. State Farm sought to recover money that it had paid to Lee for treatment of its insureds.

Lee cross-complained for abuse of process; State Farm filed a motion to dismiss under the anti-SLAPP statute, which was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. Simply because information may be obtained in discovery during an uninsured motorist arbitration does not mean that that information cannot be used in another proceeding. Indeed, this information was somewhat relevant to State Farm's economic situation, having paid the chiropractic clinic for its treatment of the uninsured motorist plaintiffs. Therefore, it cannot be claimed that the State Farm deposition tactics were unlawful or willful so as to support an abuse of process claim. Therefore, plaintiffs had no probability of success with their abuse of process claim, and it was therefore proper to dismiss the cross-complaint pursuant to State Farm's anti-SLAPP motion.

E

PRIVACY; ANTI-SLAPP STATUTE; ATTORNEYS

Gerbosi v. Gaims, Weil, West & Epstein
(2011) 193 Cal.App.4th 435, 123 Cal.Rptr.3d 73

FACTS:

Gerbosi and Finn sued the Gaims law firm. This all arose from the Pellicano private investigator scandal in which there were multiple wiretappings and eavesdropping on confidential conversations. In Finn's case, he claimed that he was illegally and criminally wiretapped and eavesdropped upon. The law firm countered that it was representing Finn's adversary, that all of this was in the context of litigation, that this was a protected petition activity, and therefore subject to an anti-SLAPP motion. Gerbosi's claim had no relationship to such litigation.

After the law firm was sued, they filed a motion to dismiss under the anti-SLAPP statute which was denied by the trial court.

APPELLATE COURT DECISION:

Affirmed. With respect to the Finn claim, even though it arose out of litigation in which the law firm was representing Finn's adversary, what Finn alleges is criminal conduct, and that is not protected by the anti-SLAPP statute. Gerbosi's claim does not have the litigation-related feature, and it was proper to deny the anti-SLAPP motion there as well.

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E

ANTI-SLAPP STATUTE; ATTORNEYS; INSURANCE COVERAGE COUNSEL

Coretronic Corp. v. O'Connor
(2011) 192 Cal.App.4th 1381, 121 Cal.Rptr.3d 254 (2011 WL 653644)

FACTS:

Coretronic was engaged in the manufacture of plasma TVs. E&S was suing Coretronic, and Coretronic tendered to its insurer, INA. INA hired Cozen for a coverage opinion. The law firm already represented E&S in an unrelated suit. The conflict was discovered and Cozen got out of the E&S suit. Coretronic then sued Cozen and the insurer. The law firm sought to have the suit dismissed by filing an anti-SLAPP motion which was denied by the trial court.

APPELLATE COURT DECISION:

Affirmed. The law firm is accused of unethical conduct and this is not protected by the anti-SLAPP provisions. The allegation against the law firm is that they obtained confidential information and documents from Coretronic which could be used to assist E&S. The trial court correctly denied the anti-SLAPP motion.

E

GOVERNMENT LIABILITY AND IMMUNITY; NEGLIGENCE PER SE; ILLEGAL ALIENS; MANDATORY DUTY

Bologna v. City and County of San Francisco
(2011) 192 Cal.App.4th 429, 121 Cal.Rptr. 406 3d

FACTS:

Ramos was an illegal alien who had lived in San Francisco for years. He shot and killed Bologna and two of his sons while the Bolognas were stopped in traffic in San Francisco. A wrongful death action was filed against the City. The allegation was that the City provided sanctuary to illegal aliens instead of reporting them to Federal authorities (and, indeed, the City prohibited such reporting), and that this was a cause of the incident. The trial court dismissed the case after sustaining the demurrer.

APPELLATE COURT DECISION:

Affirmed. Health and Safety Code § 11369 is a State statute that provides that when there is reason to believe that a person arrested for any one of 14 specified drug offenses may be an illegal alien, then the arresting agency has to notify the United States Immigration Service. The Federal statute in question is 8 U.S.C. § 1373(a) which provides that all State statutes or restrictions on the voluntary exchange of information regarding the presence of illegal aliens is invalidated. Plaintiff relies upon the violation of these statutes to support a negligence per se argument, and also to support an argument that the City violated a mandatory duty. However, plaintiff's claim fails because these statutes were not specifically designed to prevent violent crimes such as occurred here, but were designed to facilitate immigration enforcement and to prevent narcotics abuse. Therefore, San Francisco's "sanctuary policy," although arguably in violation of the Federal law, could not serve as a basis for a cause of action.

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DEFAMATION; LIBEL; ANTI-SLAPP MOTION

Wong v. Jing
(2010) 189 Cal.App.4th 1354, 117 Cal.Rptr.3d 747

FACTS:

The defendant in this libel action brought by a dentist was the father of a child treated by the dentist. The defendant went to a website called "Yelp" and criticized the treatment of his son in various respects, including that the dentist had acted negligently; had improperly used cavity fillings containing mercury and silver; had improperly used laughing gas which is not designed to be used on children. The dentist sued for libel, negligence and intentional infliction of emotional distress. The defendant filed an anti-SLAPP motion under C.C.P. § 425.16. The trial court denied the anti-SLAPP motion.

APPELLATE COURT DECISION:

Affirmed in part, reversed in part. With respect to the libel claim, the complaint in a public forum (the web) of professional incompetence is a proper subject for an anti-SLAPP motion; but in this case, the dentist demonstrated a probability of success in his libel claim. He indicated that he had told the boy's mother about the material that he planned to use in the fillings, and had also told her about the use of laughing gas in the contemplated proceeding. He indicated that laughing gas was preferable for children since they were afraid of needles.

However, with respect to the negligence and intentional infliction of emotional distress claims, the anti-SLAPP motion should have been granted since the dentist had not demonstrated serious emotional distress.

E

GOVERNMENT LIABILITY AND IMMUNITY; VICARIOUS LIABILITY; SEXUAL MOLESTATION BY SCHOOL DISTRICT EMPLOYEE

C.A. v. William Hart Union High School District
(2010) 189 Cal.App.4th 1166, 117 Cal.Rptr.3d 283

FACTS:

A high school male student was sexually molested by a guidance counselor. He sued the school district on the theory of vicarious liability, alleging that the acts of the guidance counselor had taken place in the course and scope of employment; he also sued for direct negligence on the part of the school district in its hiring and its supervising activities concerning the guidance counselor. The trial court sustained the defendant district's demurrer without leave to amend and dismissed the case.

APPELLATE COURT DECISION:

Affirmed. As a matter of law, sexual molestation by the guidance counselor did not occur within the course and scope of employment. Under Government Code section 815, a public entity is not liable except as provided by statute, and one of the bases of liability is when an employee commits a tortious act within the course and scope of employment, but such did not occur here. Nor can the district be sued for direct negligence since there is no statutory basis for such a claim.

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GOVERNMENT LIABILITY AND IMMUNITY; FIREFIGHTING; USE OF VEHICLE AS EXCEPTION

Varshock v. California Department of Forestry and Fire Protection
(2011) 194 Cal.App.4th 635, 125 Cal.Rptr.3d 141

FACTS:

Varshock and his wife and son lived in a remote area. There was a wildfire in the area. Varshock ran into a group of State firefighters and insisted that they come and protect his property. They did so, with Varshock and his son following in their own vehicle. The Varshock vehicle broke down. The captain invited Varshock and his son to get into the fire engine. The fire was intense. The windows of the fire engine shattered. The captain told them to get out, but they could not. Varshock died and his son was injured. Suit was filed for wrongful death and personal injuries. Defendant was the Department of Forestry (CAL-FIRE). The trial court granted summary judgment on the grounds of immunity under Government Code § 850.4.

APPELLATE COURT DECISION:

Affirmed. Section 850.4 provides immunity to those engaged in firefighting. However, Vehicle Code § 17001 creates an exception to that immunity for accidents having to do with the negligent operation of a motor vehicle (the fire engine). But the exception applies only when the fire engine is traveling from another location to a location of the fire. Here, the fire engine was already at the fire and was actively engaged in combating the fire. The exception does not apply, and the immunity of Government Code § 850 does apply.

E

GOVERNMENT LIABILITY; CLAIM STATUTE

E.M. v. Los Angeles Unified School District
(2011) 194Cal.App.4th 736, 125 Cal.Rptr.3d 200 (2011 WL 1496508)

FACTS:

Plaintiff, a minor, claims to have been sexually molested by a basketball coach who worked for the school district. Nine months after the last molestation, plaintiff filed a claim with the district, which denied the claim because it was not filed within six months. The district did advise plaintiff of her rights to file an application for permission to file a late claim. Plaintiff did so within one year of the last act of sexual molestation. The application was denied.

APPELLATE COURT DECISION:

Reversed. The claim statute provides that when the initial claim is not presented within six months, a plaintiff may present the district with an application for leave to file a late claim; this is supposed to be done within one year from the accrual of the cause of action (true here), and if the plaintiff is a minor, the district must grant the application. The application for leave to present a late claim was filed within one year of the injury and, therefore, the district was required to accept it. Plaintiff's lawsuit is therefore reinstated.

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F

ARBITRATION; DEFAMATION; RETRACTION; EQUITABLE RELIEF

Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert
(2011) 194 Cal.4th 519, 125 Cal.Rptr.3d 83

FACTS:

An owner and an architect got into a dispute concerning a particular project. Suit was filed. There was an arbitration agreement between them, and the matter went to arbitration under rules of the AAA. The architect claimed that the owner had defamed the architect. The arbitrator ultimately ruled in favor of the architect, and further ordered the owner to issue a formal retraction to all people to whom the owner had communicated his [the owner's] false statements about the architect. The arbitrator ordered the owner to do this in writing pursuant to a letter; the letter recited the false statements such as: the architect had stolen property from the owner's house; the architect had lied; the architect was a crook, etc. The arbitrator also ordered the owner to apologize. The trial court in orders to confirm ruled that the arbitrator had exceeded his powers by requiring this retraction, and that this violated the First Amendment rights of the owner.

APPELLATE COURT DECISION:

Reversed. Under the American Arbitration rules, the arbitrator has the power to grant equitable relief, including specific performance. No First Amendment rights attach to claims that are false and defamatory. The only error that the arbitrator made was to order that the owner apologize to the architect. Striking that portion of the order does not affect the award (which was $100,000 in compensatory damages and $250,000 in punitive damages).

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NEGLIGENCE; HERPES TRANSMISSION

Behr v. Redmond
(2011) 193 Cal.App.4th 517 (2011 WL 857163)

FACTS:

Thomas contracted herpes in the mid-1970s; Thomas and Patricia started going together in 2003, and started having sex. Thomas told Patricia that he had had herpes, but that he was not having an outbreak. In one episode of sexual relations, Thomas had told Patricia that he was having an outbreak and they would have to forego sex, but then he shortly thereafter said it was "okay," and they had sex. Patricia contracted herpes and she sued Thomas. She recovered a total verdict of compensatory and punitive damages of over $6.6 million.

APPELLATE COURT DECISION:

Substantially affirmed, but the award of $2.5 million for future medical treatment was reduced to $72,000. The award was excessive. The evidence indicated that the medication and treatment called for Patricia's herpes for the rest of her life would not exceed $72,000 and, therefore, that element of the jury's award for future medical expenses was reduced.

COMMENT:

Most of the $2.5 million was derived from Patricia's argument that since she now had herpes, she would be uninsurable for health insurance. The Court of Appeal rejected this argument.

G

NEGLIGENCE; LANDOWNER LIABILITY; CAL-OSHA VIOLATION

Iversen v. California Village Homeowners Ass'n
(2011) 194 Cal.App.4th 107, 123 Cal.Rptr.3d 360 (2011 WL 1034261)

FACTS:

The condominium owner hired Iversen to work on air conditioners. Iversen was a one-man shop with no employees, and was therefore an independent contractor vis-à-vis the condominium owner. Iversen fell from a ladder attached to a roof and he sued the condominium association, claiming Cal-OSHA violations. The trial court dismissed the suit.

APPELLATE COURT DECISION:

Affirmed. If Cal-OSHA regulations are violated, it may create the presumption of negligence, but this doctrine only applies to employees of, for example, a general contractor. An independent contractor who has no employees is not permitted to sue the owner for Cal-OSHA violations and negligence per se.

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NEGLIGENCE; DUTY; VEHICLE ACCIDENTS

Cabral v. Ralph's Grocery Company
(2011) 51 Cal.4th 764, 122 Cal.Rptr.3d 313 (2011 WL 677396) (California Supreme Court)

FACTS:

Defendant truck driver pulled over onto the shoulder of a road and parked to eat a snack. There was a sign indicating that parking should occur on the shoulder only for emergency reasons. The decedent's vehicle went off onto the shoulder and collided into the rear of the tractor-trailer. Experts indicated that the decedent may have fallen asleep or had a medical emergency. In a jury trial, the jury assigned 10% responsibility to the tractor-trailer driver and 90% to the decedent. On appeal, the Appellate Court entered judgment notwithstanding the verdict, finding no duty on the part of the tractor-trailer driver.

SUPREME COURT DECISION:

Jury verdict reinstated. There was enough evidence for the jury to find duty and percentage liability based upon the parking activity by the defendant.

G

NEGLIGENCE; DUTY; DUTY OF PARENTS TO CONTROL ADULT CHILDREN FROM VIOLENT CONDUCT

Smith v. Freund
(2011) 192 Cal.App.4th 466, 121 Cal.Rptr.3d 427

FACTS:

William Freund was 19 years old and lived with his parents. William suffered from Asperger's Syndrome, which apparently caused rages and sometimes violent acts. Away from home, he shot and killed two people and then committed suicide. The heirs sued the parents for wrongful death, claiming that they had a duty and that they negligently supervised their son. The plaintiffs sought discovery of doctors who had treated William, but the trial court denied discovery and granted summary judgment to the parents. The Court of Appeal reversed and remanded to allow discovery. The discovery indicated that William was subject to rages and had attacked his own parents and attempted suicide. This discovery also indicated that he was on medication which could cause violence and that he needed to be closely monitored and supervised. The trial court adhered to its former ruling and granted summary judgment for the parents.

APPELLATE COURT DECISION:

Affirmed. There was no duty on the part of the parents. Even though William had committed violent acts against the parents themselves, there was only one remote instance of violence towards third parties and that was several years ago at school when he struck somebody who had karate-chopped him. This was not enough to create a duty.

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NEGLIGENCE; DUTY; ASSUMPTION OF THE RISK; GROSS NEGLIGENCE; RELEASES

Rosencrans v. Dover Images, Ltd.
(2011) 192 Cal.App.4th 764, 122 Cal.Rptr.3d 22 (2011 WL 523364)

FACTS:

Plaintiff was an experienced adult motorcycle rider. The defendant sponsored a motorcycle racing event. Plaintiff, with his motorcycle in the back of his truck, lined up and was presented a clipboard with a release on it releasing liability and acknowledging assumption of the risk. Plaintiff signed it immediately. Plaintiff started riding in the race. He fell off near a platform. The location of plaintiff's fall was a place where it was difficult for other riders to see that he had in fact fallen, and standard practice was that in such locations, there should be a "flagger" present to warn other motorcyclists that someone had fallen. Such a flagger was not present. Plaintiff was hit twice and was seriously injured. He filed suit.

The trial court granted defendant's motion for summary judgment on grounds of the release, that the defendant's conduct did not rise to the level of gross negligence, and that plaintiff assumed the risk.

APPELLATE COURT DECISION:

Reversed. Trial court was correct in finding that the release barred claims of ordinary negligence. But plaintiff sufficiently presented triable issues of fact which raised the possibility that gross negligence could be present, since failure to provide a flagger under such circumstances could be deemed to be egregious conduct. Furthermore, there are triable issues of fact on assumption of the risk since the defendant has a duty under such circumstances to minimize the risk.

G

NEGLIGENCE; CONSTRUCTION DEFECTS; RIGHT TO REPAIR STATUTE

Anders v. Superior Court
(2011) 192 Cal.App.4th 579, 121 Cal.Rptr.3d 465

FACTS:

This case concerns the right to repair act and construction defects (Civil Code § 895-945.5). This statute was passed in 2002. The builder in this case sold a home with a limited warranty. The warranty bound the buyer and all successors. The warranty recited that the promises made in the warranty were the exclusive rights of the buyer and any subsequent purchasers. The trial court found that this warranty, which sought to limit the rights of the buyer, was unconscionable. The buyer sued, but the builder then sought to compel the buyer to go through the preliminary steps under the Right to Repair Act, namely notice of the problems and giving the builder the right to repair. The trial court agreed.

APPELLATE COURT DECISION:

Reversed. The builder has in essence employed "alternate remedies" to the remedies afforded in the statute; namely, the builder has attempted to provide remedies limited to the warranty. When that is found to be unconscionable, this releases the buyer from the obligation to comply with the pre-litigation procedures, and the buyer is entitled to go ahead and sue.

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NEGLIGENCE; ASSUMPTION OF RISK; EQUESTRIAN EVENTS

Eriksson v. Nunnink
(2011) 191 Cal.App.4th 826, 120 Cal.Rptr.3d 90

FACTS:

The decedent was a 17-year-old girl who died while participating in a competitive equestrian event. Her parents brought suit against the girl's coach. The girl had ridden the horse before. The girl's mother knew that the horse had been injured and she initially told the decedent not to enter the event; however, the coach concealed from the mother the seriousness of the injury. When the mother found out that the girl would indeed participate in the event, she did not intervene to prevent it. The horse was hesitant several times before the decedent fell. In the lawsuit against the coach for negligence, the trial court ruled that the suit was barred by assumption of the risk and granted summary judgment.

APPELLATE COURT DECISION:

Reversed. In this case, assumption of the risk does not apply because the coach, through his misrepresentations and concealment, increased the risk inherent in this sport. Furthermore, the release signed by the decedent and her mother is not binding since it does not apply to gross negligence, and the conduct by the coach constitutes gross negligence.

G

NEGLIGENCE; DUTY; TRUCK DRIVERS

Lawson v. Safeway, Inc.
(2010) 191 Cal.App.4th 400, 119Cal.Rptr.3d 366

FACTS:

The defendant was a truck driver for Safeway. He parked alongside Highway 101 near Crescent City and he was legally parked. A motorcycle was traveling in the same direction on 101 and passed the Safeway truck. The motorcycle collided into a pick-up vehicle which was turning left on 101 in front of the motorcycle. The vision of the pick-up truck driver was obstructed by the Safeway truck, and he did not see the motorcycle coming. Plaintiffs were riding on the motorcycle and were injured and brought suit. The jury apportioned fault 35% to Safeway, 35% to the State, and 30% to the pick-up truck.

APPELLATE COURT DECISION:

Affirmed. Even though the Safeway truck driver was parked legally, there could still be liability; he was driving a huge truck and he was professionally trained and realized that placement of his truck could block the view of other drivers; there were alternative places where he could have parked.

COMMENT:

This seems to be an erroneous decision. Parking legally under the Vehicle Code should exonerate the Safeway driver. Watch for this case either to be depublished or for the Supreme Court to grant review.

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NEGLIGENCE; CAL-OSHA; HOMEOWNERS ENGAGED IN REMODELING

Cortez v. Abich
(2011) ____ Cal.App.4th ___, ___Cal.Rptr.3d ___ [California Supreme Court]

FACTS:

A homeowner decided to undertake an extensive remodeling project involving adding rooms, demolishing walls, reroofing, modernizing a bathroom and kitchen and other work. The homeowner decided to be his own general contractor, and he applied for various permits and had an architect as well. The homeowner hired various contractors, including Ortiz who was unlicensed (not known to the homeowner). Ortiz in turn hired plaintiff as a laborer. Plaintiff went up on the roof which was half remodeled and fell through the roof, injuring himself. Plaintiff sued the homeowner, and one of the allegations was that the homeowner was subject to Cal-OSHA violations. The Court of Appeal held that Cal-OSHA did not apply, and that the "household domestic service" exception to Cal-OSHA applied.

SUPREME COURT DECISION:

Court of Appeal reversed. The "household domestic exemption" provision which would exempt the homeowner from Cal-OSHA obligations does not apply when the homeowner engages in substantial remodeling project. Such is different from ordinary "maintenance" of the house, in which event those categories of employees are not permitted to sue for violation of Cal-OSHA.

COMMENT:

This decision will open a can of worms for the many California homeowners who act as their own general contractor in remodeling their homes. What constitutes "substantial" remodeling is, of course, a factual question to be decided on a case-by-case basis, and this could create considerable difficulties for homeowners. Case law is split in California as to whether a Cal-OSHA violation can then be introduced into evidence as "negligence per se" when the injured worker sues the homeowner.

G

NEGLIGENCE; ALCOHOL; SOCIAL HOST/IMMUNITY LIABILITY; CHARGING ADMISSION TO A PARTY WHERE ALCOHOL IS SERVED

Ennabe v. Manosa
(2010) 190 Cal.App.4th 707, 118 Cal.Rptr.3d 260

FACTS:

Manosa was 20 years old. Her parents had a vacant rental property, and she decided, along with some of her friends, to host a party there. Most of the attendees were minors. Manosa and some of her friends put together over $100 and purchased beer, rum and tequila. Manosa instructed her friends to collect $3 to $5 from most of the attending guests, and most of them were minors. The alcohol was available to everyone. Ennabe attended, and he was intoxicated when he arrived. Garcia, another minor, was also intoxicated when he arrived. Garcia behaved belligerently and was asked to leave, and Ennabe escorted him out. As Garcia drove away, his car struck Ennabe, killing him. The parents of Ennabe filed a wrongful death action against Manosa. Manosa contended that she was entitled to social host immunity under Civil Code § 1714(c). The plaintiffs contended that under Business and Professions Code § 25602, Manosa was engaged in the sale of alcoholic beverages, and was therefore not entitled to social host immunity.

The trial court granted summary judgment for Manosa.

APPELLATE COURT DECISION:

Affirmed. Manosa was not "selling" alcoholic beverages to the attendees at the party. She was simply charging them admission to a party. Therefore, she was entitled to social host immunity and would not be considered to be a seller of alcoholic beverages under the Business and Professions Code, nor would Manosa be required to obtain a license for the sale of alcoholic beverages under such circumstances. The trial court correctly decided that social host immunity applied.

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NEGLIGENCE; GAS UTILITY COMPANY; EXPLOSION; FAILURE TO WARN

Huitt v. Southern Calif. Gas. Co.
(2010) 188 Cal.App.4th 1586, 116 Cal.Rptr.3d 453

FACTS:

School district had a problem – no hot water. They summoned plaintiff plumber. He looked briefly at the water heater, but did not read any instructions because he had worked on similar heaters before. He then proceeded to bleed the line. He knew that something was coming out of the pressure valve and thought it was normal air. In fact, it was natural gas which exploded, burning the plaintiff.

The defendant gas company followed a practice of putting an odorant into the gas line because natural gas has no odor otherwise. However, when natural gas is in new steel piping, a condition occurs known as "odor fade" which means that the odorant placed in the line by the gas company will not work. however, this phenomenon of disappearance of the odor when associated with new steel piping was not known to the gas company until this incident, after which incident the gas company sent out various warnings to various groups and customers.

In the jury trial, the jury returned a verdict for the plaintiff and found compensatory and punitive damages.

APPELLATE COURT DECISION:

Reversed. As a matter of law, plaintiff did not demonstrate a warning would have been observed by him and, therefore, plaintiff failed on the causation issue. Questions arise as to how a gas company would warn of such a phenomenon, what customers were to be warned, and how this information would ever have reached the plaintiff had he bothered to read it (and he had not read any of the instructions on the water heater, and some of them said to wait several minutes before commencing certain procedures, and plaintiff had not done this).

COMMENT:

Watch this case closely; it might be depublished or taken up by the Supreme Court.

G

SEXUAL HARASSMENT; UNRUH ACT; LANDLORD LIABILITY

Ramirez v. Wong
(2010) 188 Cal.App.4th 1480, 116 Cal.Rptr.3d 412

FACTS:

Plaintiffs were tenants in an apartment house. While plaintiffs were gone, the manager, without plaintiffs' permission, came into plaintiffs' apartment, opened the drawers, removed plaintiffs' underwear (plaintiffs were women) and sniffed it. Plaintiffs brought suit for violation of the Unruh Civil Rights Act and for sexual harassment (Civil Code section 51). The trial court sustained defendant's demurrer and dismissed the case.

APPELLATE COURT DECISION:

Affirmed. Plaintiffs cannot state a cause of action for threat of violence based upon sex because the conduct in question did not rise to that level, nor can plaintiffs state a claim for sexual harassment: this was an isolated incident and was not pervasive or severe enough to support a claim under Civil Code section 51.9. The trial court correctly dismissed the case.

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NEGLIGENCE; PRIVETTE RULE; GENERAL CONTRACTOR; RETAINED CONTROL; CAL-OSHA VIOLATIONS; DUTY

Tverberg v. Fillner Construction, Inc.
(2011) 193 Cal.App.4th 1121, 128 Cal.Rptr.3d 213

FACTS:

A subcontractor on a job hired Tverberg as an independent contractor. Tverberg was expected to help the subcontractor's own employees in connection with the erection of a canopy. Adjacent to the area in which this canopy work was to be done was another subcontractor (under the control of the same general contractor). That subcontractor had dug various holes, put stakes around them and tape around the stakes (for warning purposes). Nonetheless, Tverberg asked for the holes to be covered by the general contractor, but the general contractor said that he did not have the necessary equipment to do so. The next day, Tverberg renewed his request, but received no response. When Tverberg was walking to his car, he stepped into one of the holes and was injured. Tverberg brought suit against the general contractor. The contractor moved for summary judgment under the *Privette* doctrine. The trial court granted the contractor's motion, finding that an independent contractor could not sue under *Privette*. The Court of Appeal reversed. The California Supreme Court reversed the Court of Appeal, saying that an independent contractor could not sue under *Privette*, but that the case was remanded to the Court of Appeal to see whether Tverberg had established a triable issue of fact under other theories advanced.

COURT OF APPEAL DECISION AFTER REMAND:

Following remand from the Supreme Court, the Court of Appeal held that, indeed, Tverberg had established various triable issues of fact sufficient to survive a summary judgment motion by the contractor. Tverberg had the right to proceed under the retained control doctrine, and there was abundant evidence that the general contractor had exercised control over the site in question and had not delegated the safety matters to others. Under the retained control doctrine, the injured party may recover if the general contractor makes an "affirmative contribution" to the injury, and there are triable issues of facts in this case as to that claim. Furthermore, the plaintiff has the right to sue under Cal-OSHA claiming that various administrative rules were violated, and that there was a non-delegable duty to comply with these rules.

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COMMENT:

This decision will now create considerable confusion as to whether a general may be sued for Cal-OSHA violations for injuries on the construction site. Courts of Appeal in California are split on this subject; it is quite easy for injured plaintiffs to claim that some OSHA violation has been committed. An OSHA violation, if pertinent, can be used to establish negligence per se. Note, however, that generally, claims of OSHA violations will not lie unless a general duty of care already exists from the general contractor to the injured employee (not so under the typical *Privette* case). The case could be read for the proposition that if recovery can be justified under the "retained control" (general contractor affirmatively contributing to the injury), then this establishes a duty, and a Cal-OSHA violation can be introduced as supplementary evidence.

G

NEGLIGENCE; DUTY; LANDOWNER LIABILITY

Tucker v. CBS Radio Stations, Inc.
(2011) 194 Cal.App.4th 1246, 124 Cal.Rptr.3d 245

FACTS:

Plaintiff Tucker signed up for an off-road vehicle event. This had been organized by a radio station and the landowner. Participants in the event had the opportunity to attend a concert and win a prize. They were instructed to go to a base camp located on the other side of some railroad tracks, and were told to go through a tunnel underneath the tracks. The tunnel became congested and Tucker went outside the tunnel to cross the tracks. There he saw Kendle, a non-participant, who was trying to attend the event free of charge. Kendle and his car were stuck on the tracks and Tucker tried to rescue them. A train came along and hit the car, and Tucker was injured. Tucker sued the radio station and the landowner, but the trial court threw the case out on lack of duty.

APPELLATE COURT DECISION:

Affirmed. Under the traditional approach to analyzing duty, there would be no foreseeability of this accident. The landowner and the radio station would not be required to foresee that non-participants would arrive and put themselves in a position where they would have to be rescued. Under all the circumstances, no duty of care is owed to Tucker.

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DAMAGES; SPOLIATION OF EVIDENCE

Rosen v. St. Joseph Hospital of Orange County
(2011) 193 Cal.App.4th 453, 122 Cal.Rptr.3d 87

FACTS:

Rosen was injured in an auto accident with a Los Angeles City bus. She claims that injuries caused in that accident led her shortly thereafter to have a stroke. She went to the hospital and had an angiogram. She then charged that lawyers for the City Bus Authority stole the angiogram, and when she went to trial against the MTA, she was deprived of the ability to develop the evidence that the stroke was caused by the bus accident. In the lawsuit against the Bus, the jury found no liability on the part of the MTA. Rosen then sued the lawyer and medical people who allegedly had stolen the angiogram. The trial court dismissed the case.

APPELLATE COURT DECISION:

Affirmed. Claims of spoliation of evidence are no longer valid in California. Furthermore, the jury in the MTA case never even reached the question of damages or injury since they found no liability on the part of the MTA.

K

DAMAGES; ELDER ABUSE; COLLATERAL SOURCE RULE

Conservatorship of Estate of McQueen
(2011) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___ (WL 117653 2011)

FACTS:

McQueen's father died and in his will, left the family home to McQueen as a life estate. The rest of the property in the estate was to be used to take care of her during her lifetime. After McQueen died, the family home and the estate that was left were to go to the six remaining children who survived. McQueen was elderly and disabled. Her attorney and some family members arranged to sell the home without her consent. Ultimately, a conservator brought suit alleging, *inter alia*, elder abuse on the part of the attorney and family members. The trial court handed down a compensatory judgment for $99,000, and also a judgment of over $300,000 in attorney fees against the attorney.

APPELLATE COURT DECISION:

Affirmed. The SSI (Social Security) benefits that McQueen was receiving could not be used to offset the compensatory damages; these were a collateral source. Furthermore, it was not an abuse of discretion for the trial court to award attorney fees against the attorney; he had sold the home without McQueen's authorization, which was required, and the trial court correctly found liability for elder abuse.

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DAMAGES; RES JUDICATA; ISSUE PRECLUSION; DISSOLUTION ACTION VERSUS TORT ACTION FOR DOMESTIC VIOLENCE

Boblitt v. Boblitt
(2010) 190 Cal.App.4th 603, 118 Cal.Rptr.3d 788

FACTS:

Linda and Steven Boblitt were getting a divorce. Linda filed a statement in the dissolution proceeding indicating that Steven had committed domestic violence upon her which interfered with her ability to work and also caused her to incur medical bills and emotional distress. Three days after this statement in the dissolution proceeding was filed, Linda filed a separate tort lawsuit against Steven for damages, alleging domestic violence, assault, intentional infliction of emotional distress, etc. The family law judge in the dissolution proceeding found in Linda's favor and awarded her support. It was not clear as to whether he, in fact, found that domestic violence had been committed by Steven, although Linda was permitted to testify as to all acts constituting such.

In the tort lawsuit, Steven moved for summary judgment, contending that Linda had raised the issue of domestic violence, or could have raised the issue of domestic violence, in the dissolution proceeding, and that the judgment in her favor constituted res judicata/issue preclusion in the tort action. The trial judge agreed, granting summary judgment for Steven.

APPELLATE COURT DECISION:

Reversed. California follows the "primary right" theory, focusing on the damage sought, not necessarily the theory of the case. In the dissolution proceeding, the primary right was the right to support, whereas in the tort action, the primary right was damages and to be free from domestic violence. The two primary rights were different, and therefore issue preclusion did not apply and it was error to grant summary judgment.

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MALICIOUS PROSECUTION; ANTI-SLAPP MOTION; DEFAMATION

Mendoza v. Wichmann
(2011) 194 Cal.App.4th 1430 , 123 Cal.Rptr.3d 823

FACTS:

Mendoza filed a malicious prosecution action against Wichmann. The subject matter of this case is Wichmann's motion to strike the malicious prosecution action under the anti-SLAPP statute. Wichmann owned a business and was sued by an employee for wrongful termination. While that action was pending, a trial judge summoned everyone to a conference during which a police report was examined. The police report indicated that Wichmann was unstable, had engaged in threats and had vandalized vehicles owned by the law firm that represented the terminated employee. Wichmann filed a defamation suit against Mendoza, who was the attorney for the terminated employee. Ultimately, the defamation action was dismissed, which prompted Mendoza to file a malicious prosecution action. Wichmann filed a motion to strike under C.C.P. § 425.16. The motion was denied by the trial court.

APPELLATE COURT DECISION:

Reversed. The motion to dismiss the malicious prosecution action under the anti-SLAPP statute should have been granted because Mendoza has no probability of success in the malicious prosecution action in light of the fact that there was sufficient evidence in the underlying defamation action that defamatory statements had indeed been made.

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N

PRODUCTS LIABILITY; FEDERAL PREEMPTION

Bruesewitz v. Wyeth LLC
(2011) ___ U.S. 131, S.Ct. 1068 (2011 WL 588789) (U.S. Supreme Court)

FACTS AND HOLDING:

The U.S. Supreme Court holds that the National Childhood Vaccine Injury Act preempts a California State tort action claiming that vaccines were defectively designed and that a safer alternative could have been provided.

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PRODUCTS LIABILITY; ROLLOVER

Pannu v. Land Rover North America, Inc.
(2011) 191 Cal.App.4th 1298, 120 Cal.Rptr.3d 605 (WL 149963 2011)

FACTS:

Plaintiff was injured when his SUV went up an embankment and then rolled over three times; the roof was crushed; plaintiff was rendered a quadriplegic. Expert testimony conflicted as to whether plaintiff's injuries were caused before the roof collapsed. Nevertheless, the jury ruled in favor of plaintiff and awarded a verdict against the manufacturer of the SUV for $21 million.

APPELLATE COURT DECISION:

Affirmed. The evidence supported the liability of the manufacturer on a "risk benefit" basis, even though the consumer expectation test might not be relevant. The defect could have been taken care of with a small expenditure.

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PRODUCTS LIABILITY; DRUGS; FEDERAL PREEMPTION

Gaeta v. Perrigo Pharmaceuticals Company
(2011) 630 F.3d 1225 (WL 198420 2011)

FACTS:

Plaintiff was a child. He underwent surgery and was administered an anesthetic. After surgery, he took generic ibuprofen. There was an interaction between the ibuprofen and the anesthetic, and plaintiff suffered severe injuries. Suit was filed against the manufacturer of the generic ibuprofen (this interaction caused liver damage). The U.S. District Court granted summary judgment for the manufacturer on grounds that the claim was preempted by Federal law; namely, the labeling laws of the FDA.

NINTH CIRCUIT DECISION:

Reversed. After *Wyeth v. Levine*, 129 S.Ct. 1187 (2009), preemption does not necessarily apply to a State action against a brand name drug manufacturers; generic drug manufacturers are required to provide the same warnings as brand name manufacturers, and there is nothing to prevent them from having done so in the present case. When they learn of problems, they are supposed to alert doctors and patients to the extent possible.

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PRODUCTS LIABILITY; AUTOMOBILE; FEDERAL PREEMPTION

FACTS:

In the 1988-1989 time period, Federal law allowed auto manufacturers to a choice of whether to install lap belts only or lap and shoulder belts in the rear seat. Decedent was in the rear seat wearing a lap belt only and was killed in a vehicle collision. Two other occupants of the rear seat with lap and shoulder belts survived. A wrongful death action was filed in State court, but the trial court and the Court of Appeal held that the action was preempted.

U.S. SUPREME COURT DECISION:

Reversed. Preemption did not apply because the State court action did not frustrate the regulatory purpose of the Federal law, which was directed to entirely different purposes.

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PRODUCTS LIABILITY; STRICT LIABILITY; OCCASIONAL SELLER OF USED PRODUCTS

Garcia v. Becker Bros. Steel Co.
(2011) 194 Cal.App.4th 474, ___ Cal.Rptr.3d ___

FACTS:

This case deals with the "occasional" seller of used products, when a plaintiff far down the line, many years later, is injured. Does the doctrine of strict liability apply? The Court answers no. Becker, in 1973, bought a machine called a "slitter" meant to cut steel so that it could be put into rolls. Becker used the machine for 26 years and there was only one accident. In 1999, Becker sold the machine to Columbia Steel. In 2001, Columbia stopped doing business and the slitter fell into the hands of the bank which sold it to Lexwest. In 2004, plaintiff, an employee of Lexwest, had his finger severed by the slitter. He sued, among others, Becker, contending that strict liability applied. The trial court granted Becker's motion for summary judgment on the strict liability claim.

APPELLATE COURT DECISION:

Affirmed. Strict liability will not apply to the occasional seller of used products, although the theory of negligence will apply. There is no duty on the part of Becker to the plaintiff. The key factor in finding no duty is the remoteness of Becker down the chain of custody.

N

TOBACCO; PRODUCTS LIABILITY; STATUTE OF LIMITATIONS; MULTIPLE INJURIES FROM SINGLE WRONG

Pooshs v. Philip Morris USA, Inc.
(2011) 51 Cal.App.4th 788, 123 Cal.Rptr.3d 578 (California Supreme Court)

FACTS:

Plaintiff smoked for 35 years, from 1953 to 1987. In 1989, plaintiff was diagnosed with chronic obstructive pulmonary disease (COPD) caused by smoking. No lawsuit was filed. In 1991, plaintiff was diagnosed with periodontal disease, also related to smoking, but no lawsuit was filed. In 2003, plaintiff was diagnosed with lung cancer. She sued and the case was removed to U.S. District Court, and the preliminary issue was whether the suit was barred by the statute of limitations. The U.S. District Court held that the statute barred plaintiff's claim and found that the California rule that when a single wrong results in multiple injuries, the statute of limitations commences to run when the first injury occurs. There can be but one claim for damages from a single wrong. The case was then appealed to the Ninth Circuit. The Ninth Circuit certified questions to the California Supreme Court, which the California Supreme Court undertook to answer. As the Supreme Court phrased it, the question would be this: When multiple distinct personal injuries arise from smoking, does the earlier injury trigger the statute for all claims, including those based on the later injury?

CALIFORNIA SUPREME COURT HOLDING:

When separate physical injuries arise from the same wrong (tobacco), in some cases these injuries can be considered qualitatively different, and the statute of limitations will commence to run at different times. The lung cancer was alleged to be separate and distinct from the COPD, (although the Court indicated this was a question of fact to be decided by the District Court).

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JURISDICTION; FEDERAL DIVERSITY JURISDICTION; INSURERS; LIFE INSURANCE

Salkin v. United Services Automobile Assn.
(2011) 767 F.Supp.2d 1062 (2011 WL 554079) (Central District)

FACTS:

Mr. and Mrs. Salkin bought a life insurance policy on Mr. Salkin. He had a medical exam and the policy was issued. The next year, Mr. Salkin was diagnosed with advanced cancer. Mrs. Salkin tried to get accelerated death benefits. The insurer who had issued the policy (USAA Life) did an investigation and then rescinded the policy. The Salkins sued USAA Life and its parent, USAA, in California State Court. The claims were for breach of contract and bad faith. Defendants removed the case to Federal Court, contending that plaintiffs had fraudulently joined USAA (the parent company) as a defendant in order to defeat Federal diversity jurisdiction. Such a claim will lie if plaintiffs have no cause of action against the parent company.

U.S. DISTRICT COURT DECISION:

The U.S. District Court, on a motion by plaintiff to remand the case to State Court, ruled in favor of USAA. The case stays in Federal Court. For plaintiffs to prevail, plaintiffs would have to show that USAA and USAA Life were one and the same, and that USAA was the alter ego of USAA Life. USAA Life was a wholly owned subsidiary of USAA. A parent is liable for the conduct of its subsidiary in California only if the subsidiary is the alter ego of the parent. Plaintiffs totally failed to prove that fact.

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WORKERS' COMPENSATION; EXCLUSIVE REMEDY; LAWSUIT BROUGHT BY EMPLOYER/OWNER

Edward Carey Construction Company v. State Compensation Insurance Fund (2011) 194 Cal.App.4th 657, 122 Cal.Rptr.3d 892 (2011 WL 1102808)

FACTS:

Carey owned a construction company (ECCC). He had workers' compensation insurance through State Compensation Insurance Fund (SCIF). Carey himself suffered a work-related injury on the job and submitted a claim to SCIF. SCIF denied coverage on grounds that the policy was not in effect and had been cancelled. ECCC itself had to pay Carey $25,000 for his medical expenses. In a binding arbitration proceeding, ECCC also had to incur attorney fees to establish that the SCIF policy was, in fact, in effect, which the arbitrator so found. ECCC then sued for breach of contract and bad faith. SCIF demurred, contending that only employees, not the owner of a company, had the right to sue. The trial court agreed.

APPELLATE COURT DECISION:

Reversed. The owner of a business who is injured has the right to sue outside the workers' compensation proceeding; however, the recovery may be limited to economic damages. The court indicated that with respect to the medical expenses, ECCC might be limited to the workers' compensation proceeding themselves.

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T

SETTLEMENT; RELEASE; JOINT TORTFEASORS

Ming-Ho v. Verdugo Hills Hospital
(2011) 193 Cal.App.4th 780, 126 Cal.Rptr.3d 65 (2011 WL 1032192)

FACTS:

Plaintiff was a child who suffered serious brain injury allegedly as a result of malpractice by the pediatrician in the hospital. Plaintiff proposed to enter into a settlement with the pediatrician for $1,000,000 from his malpractice policy. They scheduled a good faith settlement hearing under C.C.P. § 877, but the trial court rejected the settlement on grounds that the pediatrician was not paying his fair share. Then, plaintiff and the pediatrician decided to settle anyway. They did so, and plaintiff gave the pediatrician a release. Plaintiff then proceeded to trial against the hospital and obtained a verdict of many millions of dollars for future lost income and future medical damages and other economic damages.

APPELLATE COURT DECISION:

Reversed. When plaintiff released the pediatrician, this triggered the common law rule that the release of one joint tortfeasor constitutes a release of all. The hospital, therefore, faced no liability exposure. The plaintiff could have prevented this from happening by going through and obtaining approval of the settlement pursuant to C.C.P. § 877, but the trial court rejected that.

COMMENT:

The Court of Appeal was very reluctant to render this harsh decision, and they invited the Supreme Court to grant review and eliminate the "release of one, release of all" common law rule.

T

SETTLEMENT; SUBROGATION; EFFECT OF FAILURE TO APPORTION SETTLEMENT

Essex Insurance Company v. Heck
(2010) 186 Cal.App.4th 1513, 112 Cal.Rptr.3d 915

FACTS:

A laborer working at a restaurant stepped on a nail and was injured. He was treated but complications later resulted and he had to have his leg amputated. He filed a lawsuit against the restaurant owner. The restaurant owner later cross-complained against the physician saying that part of the laborer's injuries were caused by the physician's malpractice. The insurer of the restaurant defended, but denied there was any coverage. A verdict of over $800,000 was rendered in favor of the laborer. The insurer refused to pay the judgment. This resulted in a claim by the laborer for bad faith.

The entire matter went to mediation. There was an agreement to settlement for a flat figure of $700,000, and this was to be a settlement of the personal injury claim of the laborer, the bad faith claim, and the insurer's declaratory relief claim. The restaurant owner and the insurer were to obtain complete releases. Thereafter, the insurer, having paid the settlement, sought to proceed against the physician for equitable subrogation. The trial court dismissed the case.

APPELLATE COURT DECISION:

Affirmed. When the $700,000 settlement was entered into, there was no apportionment of the three cases that were being settled (personal injury, declaratory relief, and bad faith). The only claim on which subrogation could be based was the amount attributable to the personal injury settlement. The absence of an apportionment is fatal to the insurer's right to proceed with a subrogation action.

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SETTLEMENT; GOOD FAITH SETTLEMENT

Cahill v. San Diego Gas & Elec. Co.
(2011) 194 Cal.App.4th 939, 124 Cal.Rptr.3d 178

FACTS:

The owner of a condominium complex put a Jacuzzi on the roof. This was done in 1999. In 2008, Cahill, an employee of a window washing company, was electrocuted when he was using a long pole which came into contact with a nearby high-voltage pole owned by San Diego Gas & Electric Company (SDGE). Cahill filed an action against SDGE alleging that it was negligent per se for placing its electrical pole too close to the condominium property. The owner was not used. However, the owner was concerned, retained an attorney and wanted to "buy its peace." A settlement was therefore entered into with plaintiff for $25,000. Later, SDGE filed an equitable indemnification claim against the owner. The owner then filed a motion to have the settlement determined to be a good faith settlement. The trial court agreed. SDGE petitioned for a writ (allowed under C.C.P. § 877), but the writ was summarily denied. The owner then moved for summary judgment on the equitable contribution cross-complaint of SDGE. That was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. Preliminarily, although C.C.P. § 877 does say that a party may petition for a writ following the trial court's good faith settlement determination, that is not the exclusive remedy. SDGE is therefore entitled to raise the matter on appeal on the summary judgment decision.

The standard for review of the summary judgment matter on good faith settlement is abuse of discretion. The test is to look at the state of the evidence at the time the settlement was entered into. At that time, there was no evidence that the owner had any exposure whatsoever. The owner simply sought to "buy his peace." There is no requirement that the plaintiff do an investigation before entering into a settlement to make sure that the plaintiff is obtaining enough money and to ascertain the theories of liability against the settling defendant. This would frustrate the public policy to encourage prompt settlements and to avoid the expense of litigation. It is true that a couple of years after the settlement, a survey was done which indicated that the Jacuzzi was placed too close to utility poles. However, this information was unknown at the time of the settlement and is therefore irrelevant. Under all of the circumstances, the trial court did not abuse its discretion in determining that $25,000 was a good faith settlement.

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CONSUMER TORTS; PRIVACY; MERCHANTS ASKING FOR ZIP CODE INFORMATION

Pineda v. Williams-Sonoma Stores, Inc.
(2011) 51 Cal.4th 524, 120 Cal.Rptr.3d 531 (2011 WL 446921) (California Supreme Court)

FACTS:

Plaintiff went into Williams-Sonoma to purchase an item. When she used her credit card, the clerk requested information from plaintiff about her ZIP code. Plaintiff provided it, thinking this was necessary to complete the credit card transaction. Plaintiff subsequently sued under a class action pursuant to Civil Code § 1747.08. That section prohibits businesses from requesting "personal identification information" in credit card transactions. The statute specifically refers to "addresses and telephone numbers." The trial court and the Court of Appeal both ruled against plaintiff, holding that requesting ZIP code information did not constitute a request for an address.

SUPREME COURT DECISION:

Reversed. ZIP code information would be personal information prohibited by the statute. The word "address" would not only include the complete address, but also a component of the address which would be the ZIP code.

COMMENT:

Although on its surface one wonders what the real damage could be from this kind of conduct, consider this: there is a statutory penalty of $250 for the first violation and up to $1,000 for each subsequent violation. So with thousands of customers suing in a class action, the damages could be significant. The Supreme Court rejected Williams-Sonoma's due process arguments, saying that these are maximum only, and that the trial court has discretion to award much less per violation. Although Williams-Sonoma attempted to make the decision prospective only, the Supreme Court rejected this effort. One can therefore expect that numerous class actions will be filed across the State against merchants.

QUESTION:

Will this lead to binding arbitration clauses being inserted into sales transactions between customers and merchants, with a waiver of class-wide arbitration? See new U.S.S.C. decision in *A.T.&T. v. Concepcion* (April, 2011).

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PRIVILEGE; MEDIATION PRIVILEGE; LEGAL MALPRACTICE; CONFIDENTIALITY

Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson LLP)
(2011) 51 Cal.4th 113, 119 Cal.Rptr.3d 437 (WL 102710 2010) [California Supreme Court]

FACTS:

Cassel was involved in a licensing dispute. The matter was scheduled for mediation. Cassel and his attorney met together to plan mediation strategy. Cassel indicated he was willing to take less than $2 million and would accept some assignment arrangements to sweeten the pot. Cassel claimed that his attorney forced him to accept $1.25 million in settlement during the mediation, that he could have achieved a total settlement worth $750,000 more, and that his attorney was accordingly guilty of malpractice.

When the malpractice action was filed against the law firm, the defendant firm moved to exclude all evidence of communications between attorney and client during the mediation and in preparation for the mediation. The trial court agreed.

The Appellate Court issued a writ of mandate, however, holding that communications outside the mediation between the attorney and the client were not privileged.

SUPREME COURT DECISION:

Court of Appeal reversed. The mediation privilege is broad and applies to all communications during the mediation and outside the mediation. The communications in this case were close in time to the actual mediation. Evidence Code § 1119 creates a broad confidentiality privilege and in balancing the need for confidentiality against a client's right to sue for legal malpractice, the legislature came down on the side of the mediation privilege.

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ARBITRATION; WAIVER

Burton v. Cruise
(2010) 190 Cal.App.4th 939, 118Cal.Rptr.3d 613

FACTS:

A patient and a doctor signed a binding arbitration agreement; the patient filed suit for medical malpractice. The case went on for 10 months with substantial discovery. Two months before trial, the patient demanded arbitration. The physician resisted, claiming that arbitration had been waived. The trial court agreed.

APPELLATE COURT DECISION:

Affirmed. There was unreasonable delay in demanding arbitration; there is no requirement that the burden of showing prejudice is imposed upon the physician (although actual prejudice exists in the sense of unnecessary attorney fees). The trial court was correct in finding that the patient had waived the right to arbitrate.

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STATUTE OF LIMITATIONS; SEXUAL MOLESTATION; DELAYED DISCOVERY

Doe v. Roman Catholic Bishop of Sacramento
(2010) 189 Cal.App.4th 1423, 117 Cal.Rptr.3d 597

FACTS:

In the 70s, plaintiff's sons were molested by two Catholic priests. When these priests were suspected of such conduct, both fled the country. In 2008, plaintiff mother filed suit against the diocese, claiming delayed discovery. The trial court granted summary judgment on grounds on the statute of limitations.

APPELLATE COURT DECISION:

Affirmed. Plaintiff had reason to suspect that the priests were responsible. She was closely associated with the parish and these priests, and everyone knew why they had fled. This put plaintiff on notice and plaintiff had a duty to investigate further. Plaintiff could not recover in any event for her emotional distress because she had not witnessed the molestation when it occurred.

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CIVIL RIGHTS; FAILURE TO TRAIN PROSECUTORS

Connick v. Thompson
(2011) ___ U.S. __ 131 S.Ct 1350 (U.S. Supreme Court)

FACTS:

Plaintiff was charged with attempted robbery; he was convicted. Later, he was convicted of murder in an unrelated charge. Plaintiff was in prison for 14 years. During that time, he pursued his cases. An investigator concerning the robbery conviction revealed that the actual robber's blood was Type B and plaintiff's was Type O. The District Attorney asked for a vacation of the conviction, and that was done. Subsequently, plaintiff's murder conviction was also set aside. Plaintiff then sued for violation of civil rights, alleging that the District Attorney had failed to properly train the prosecutor who should have disclosed, for example, the blood type information, but had not done so. In this trial, plaintiff won a $14 million judgment from the jury and that was affirmed by the Fifth Circuit.

U.S. SUPREME COURT DECISION:

Reversed. In a 5-4 decision, the Supreme Court ruled that a single violation, which is all that existed in this case, was not enough to establish a civil rights violation. Instead, a plaintiff had to show that a policy of poor training existed, meaning that there existed indifference to the rights of people like plaintiff had a pattern and practice of violation of such rights. This did not exist and, therefore, no civil rights violation was shown.

U

ARBITRATION, CLASSWIDE ARBITRATION; U.S. SUPREME COURT OVERRULES CALIFORNIA SUPREME COURT

AT&T Mobility LLC v. Concepcion
(2011) ___ U.S. ___, 131 S.Ct. 1740 (2011 WL 1561956) (U.S. Supreme Court)

FACTS:

This is one of the most important decisions in many years on consumer rights. The U.S. Supreme Court, in a 5-4 decision, comes down on the side of businesses and not consumers. Concepcion bought a cell phone from AT&T. It was represented that the phone would be free, but Concepcion was charged $30 in sales taxes for the phone. The cell phone agreement provided that any disputes would be submitted to binding arbitration, and that the dispute had to be handled on an individual basis, and that classwide arbitration was prohibited. Therefore, arbitration was the remedy, litigation was prohibited, and no classwide arbitration was permitted to be conducted by the arbitrator.

Nonetheless, Concepcion filed suit in the U.S. District Court against AT&T, and that suit was then consolidated with a putative class action alleging false advertising and fraud on the part of AT&T. AT&T then moved to compel arbitration.

The U.S. District Court followed California common law in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), which held that such prohibitions on classwide arbitration were against public policy and unconscionable. Under *Discover Bank*, many such consumer suits are for small amounts of money, and if classwide arbitration is prohibited, then in many cases, the consumers will not pursue their rights, and the corporations will get away with improper conduct. The Ninth Circuit affirmed.

U.S. SUPREME COURT DECISION:

Reversed. The California common law rule, and the *Discover Bank* case, are preempted by the Federal Arbitration Act which is designed to encourage arbitration and the freedom of contract. The contract was unambiguous and prohibited classwide arbitration. The *Discover Bank* case is directly designed to discourage arbitration and is therefore displaced by Federal law.

COMMENT:

As many consumer contracts do indeed involve small amounts of money (credit card disputes, cell telephone disputes, installment sales disputes, etc.), some would argue that the only meaningful hammer is to have classwide treatment. But this has now been condemned

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by the U.S. Supreme Court in the *Concepcion* case. After this decision was rendered, the press reported that many corporations were revising all manner of contracts so as to insert binding arbitration provisions, including a prohibition against classwide arbitration. For example, many corporations are revising employment contracts to require binding arbitration and to prohibit classwide arbitration treatment. There are many other categories of contracts that could similarly be modified. (There is no prohibition against binding arbitration of employment contracts, including discrimination and civil rights claims.) Therefore, this decision is of immense importance. The only way that it can probably be changed is by statute (changing the FAA itself). The last Congress had this matter under consideration, but never got around to it, and there is little likelihood that the present Congress would entertain such a change. However, it will be interesting to watch whether the always innovative claimants' Bar develops ways around the *Concepcion* decision.

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CIVIL RIGHTS; UNRUH CIVIL RIGHTS ACT; FELONS

Semler v. General Electric Capital Corp.
(2011) 196 Cal.App.4th 1380, 127 Cal.Rptr.3d 794

FACTS:

Plaintiff Semler had been invited to invest in a limited liability company which was going to purchase real estate. Plaintiff intended to buy $250,000 worth of units. General Electric Capital (GE Capital) was going to lend part of the money to the venturer, but when they found out that Semler was going to be an investor, they told the venturer that they would not lend money unless he was precluded from investing. Semler was accordingly disinvited. He sued GE Capital for Unruh civil rights violations. The trial court threw the case out on grounds that it had not been filed within the statute of limitations (two years).

APPELLATE COURT DECISION:

Affirmed, but for different reasons. The Appellate Court, not ruling on the statute of limitations, held that the action was properly dismissed because plaintiff failed to state a claim for Unruh Act violations. To sue under the Unruh Act, a plaintiff must show discrimination based upon various personal characteristics. Being a felon is not one of those characteristics, nor is being a felon "protected" from the alleged conduct. Secondly, the defendant had a legitimate business reason for not investing. The plaintiff had been convicted of customs fraud and IRS fraud – exhibiting dishonesty, and defendant could legitimately, as a business reason, conclude that this would harm the attractiveness and viability of the real estate venture. The defendant is in a better position than the court to assess such matters. The trial court correctly dismissed the suit.

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CIVIL RIGHTS: UNCONSTITUTIONAL CONDUCT; FEDERAL PLEADING REQUIREMENT

Starr v. Baca
(2011) 633 F.3d 1191 (2011 WL 477094) (9th Cir.)

FACTS:

Plaintiff was an inmate in the Los Angeles County jail. He claimed that he was seriously abused by deputy sheriffs in that facility, and that the sheriff himself was knowledgeable about this conduct, acquiesced in it, and was deliberately indifferent to what was going on. A suit was brought under 42 U.S.C. § 1983, a civil rights claims. The District Court dismissed the suit, largely on the basis of the U.S. Supreme Court decision in *Iqbal* which imposed stringent pleading requirements on Federal cases.

NINTH CIRCUIT DECISION:

Reversed. The claim adequately pleaded supervisorial liability on the part of the sheriff with the allegations of acquiescence and deliberate indifference to unonstitutional conduct. He is not barred by the *Iqbal* rationale.

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V

CONSUMER RIGHTS; UNFAIR COMPETITION LAWS; PROPOSITION 64; STANDING OF PLAINTIFFS

Kwikset Corporation v. Superior Court
(2011) 51 Cal.4th 310, 120 Cal.Rptr.3d 741 (WL 240278 2011))

FACTS AND HOLDING:

In 2009, the California Supreme Court decided *In Re Tobacco II* cases, and held that California consumers suing under Proposition 64 (unfair competition law) must show "actual reliance" to establish standing to sue for fraud and false advertising. In the present case, the allegations were that the defendants distributed a product representing that it was "made in the USA" when it fact it was not, and that plaintiffs were induced to purchase the product based upon that representation. The evidence indicated that there was nothing wrong with the product, and it functioned as it was supposed to function. There was no loss in market value simply because it had not been made in the USA. Nevertheless, the Supreme Court said plaintiffs having standing and the test was their subjective motivation for purchasing the product (because it was made in the USA) and for purposes of Proposition 64, they were sufficiently "injured" even though the product functioned appropriately. They established injury in fact under Proposition 64 because they lost money or property.

V

FALSE ARREST; QUALIFIED IMMUNITY; PROBABLE CAUSE

Garcia v. County of Merced
(2011) 639 F.3d 1206 (2011 WL 1680388, 9th Cir.)

FACTS:

Plaintiff Garcia was a lawyer. He had a client in jail for drug violations. Plaintiff was arrested by defendant police officers for smuggling meth to his client. An informant had told the police that there was a practice of smuggling drugs into the jail using a tobacco pouch, and that when the pouch was open, the presence of the drugs would be obvious. The police and the informant worked together to put meth in the pouch, and the informant gave the pouch to Garcia who opened the pouch in informant's presence. Garcia sued, claiming that he was falsely arrested. After the arrest, Garcia had claimed in court that he had no knowledge that meth was in the pouch. The District Court apparently accepted Garcia's testimony and found that there was no probable cause and denied defendant's motion for summary judgment.

NINTH CIRCUIT DECISION:

Reversed. Probable cause was established, and the officers are entitled to qualified immunity. The self-serving statement of Garcia denying that he knew meth was in the pouch is insufficient. There is abundant evidence to support the arrest of Garcia by the officers.

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W

EMPLOYMENT TORTS; STATUTE OF LIMITATIONS; RIGHT TO SUE LETTER

Hall v. Goodwill Industries of Southern California
(2011) 193 Cal.App.4th 718, 123 Cal.Rptr.3d 274

FACTS:

Hall filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging that he had been fired by Goodwill Industries because he gave support to a co-worker who had been sexually harassed. An attorney helped Hall with the administrative proceeding, and on December 24, 2004, the DFEH issued a "right to sue letter." This was not received until December 31, 2004. Hall did not file suit until more than one year had expired from December 24, 2004. He contended that the one-year statute of limitations contained in Government Code § 12965(b) did not start to run until he had received the right to sue letter, as distinguished from when it was issued. The trial court agreed, denying the defendant's motion for summary judgment.

APPELLATE COURT DECISION:

Writ issued to compel granting of summary judgment for defendant. The statute says that the statute of limitations runs from the date of the right to sue letter, which means the date that the right to sue letter was issued, not the date that the letter was received by the plaintiff.

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EMPLOYMENT TORTS; DISCRIMINATION; DRUG TESTING

Lopez v. Pacific Maritime Association
(2011) 636 F.3d 1197 (2011 WL 711884)

FACTS:

In 1997, plaintiff Lopez was a drug addict. He applied to defendant for a longshoreman's job. The defendant administered their standard drug test and plaintiff tested positive for marijuana and was turned down. Defendant had a one-strike rule, meaning that if you tested positive for drugs, you were permanently barred from employment forever. In 2002, Lopez had recovered had became rehabilitated, and was clean and sober from alcohol and drugs. He applied once more to be a longshoreman and his application was rejected on the basis of the prior test. Plaintiff sued for discrimination, claiming that a protected class was composed of recovered and rehabilitated drug addicts, and that the defendant was unlawfully discriminating against them.

The trial court ruled in favor of defendant.

NINTH CIRCUIT DECISION:

Affirmed. There is nothing unlawful or discriminatory about defendant's one-strike rule, which is employed for workplace safety. It applies to recovered drug addicts as well as casual drug users.

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EMPLOYMENT TORT; RETALIATION; STANDING OF THIRD PARTY TO SUE

Thompson v. North American Stainless
(2010) ___ U.S. ___, ___ S.Ct. ___ (WL 197638 2011) [United State Supreme Court]
1/24/11 6th Cir. Judgment reversed and remanded. Official opinion not yet published.

FACTS:

Plaintiff Thompson and his fiancée were employed by defendant corporation. Thompson's fiancée filed a discrimination claim against defendant and was authorized by the EEOC to sue. A short time later, the corporation fired Thompson himself. He was then authorized by the EEOC to sue for violation of Title VII of the 1964 Civil Rights Act, with Thompson claiming that he was fired to retaliate against his fiancée.

The District Court granted summary judgment for the employer, and the Sixth Circuit affirmed, saying that Thompson was not included in the class of people Congress intended to allow to sue for retaliation.

UNITED STATES SUPREME COURT DECISION:

Court of Appeal reversed. Thompson falls within the zone of interest protected by Title VII; he is a third party, but would be allowed to sue for what the corporation did to his fiancée. The intent of the corporation was to harm his fiancée by firing Thompson. Congress intended that such persons would have the right to pursue a Title VII claim.

W

EMPLOYMENT TORT; ANTI-SLAPP STATUTE; SUSPENSION OF PHYSICIAN

Smith v. Adventis Health System/West
(2010) 190 Cal.App.4th 40, 117 Cal.Rptr.3d 805

FACTS:

In a complex procedural case, a hospital suspended a physician from staff privileges. The physician filed a mandamus proceeding and was reinstated for a year with the right to reapply just as any other physician when the year expired. Just before the year expired, the physician reapplied; hospital refused to consider his application and said that the hospital bylaws precluded him from reapplying until three years had passed. The physician filed a lawsuit. The hospital filed an anti-SLAPP motion which was denied.

APPELLATE COURT DECISION:

Affirmed. The matter is of sufficient public interest and relates to judicial or other proceedings and is, therefore, embraced by the anti-SLAPP statute. However, the physician has demonstrated a probability of prevailing; the hospital is not protected by the litigation privilege associated with the peer review procedure which is designed to insulate peer review proceedings from examination in the context of other types of claims. If the litigation privilege applied in this case, it would mean that a physician wrongfully suspended by a hospital would never have a claim against the hospital.

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EMPLOYMENT TORT; SEXUAL HARASSMENT

Turman v. Turning Point of Central California, Inc.
(2010) 191 Cal.App.4th 53, 119 Cal.Rptr.3d 166

FACTS:

Plaintiff worked in defendant facility, which was a halfway house for federal and state prisoners. Plaintiff was a woman and was assigned to the night shift. She was responsible for administering urinalysis tests to inmates, including male inmates. Plaintiff claimed that lewd comments were made to her frequently by the inmates; that she complained of such harassment; but that her supervisor told her to be nicer to the inmates and not to write up so many complaints about them. Ultimately, plaintiff was terminated by defendant on grounds that they would have to have men administer urinalysis tests to men, and that plaintiff should not work alone during the night shift and that reduction of force required her termination. Plaintiff sued for sexual harassment. The jury found that there was sexual harassment, but that plaintiff's employer had made a reasonable accommodation in an effort to cure the problem quickly.

APPELLATE COURT DECISION:

Reversed. The employer presented absolutely no evidence that corrective action or accommodation was made, despite the jury's finding. There was no instructional error having to do with the difference between disparate treatment and disparate impact – the employer would have been justified in requiring same sex urinalysis administration.

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DISCRIMINATION; DISABILITY; POLICE OFFICERS

Cuiellette v. City of Los Angeles
(2011) 194 Cal.App.4th 757, 123 Cal.Rptr.3d 562 (WL 1522390)

FACTS:

Plaintiff was a police officer on regular duty. He was injured. He wanted to return to light duty work, and the department arranged for him to become assigned to a courthouse, but they removed him eight days later. He sued for disability discrimination. After several rounds of litigation and appeals, plaintiff ultimately recovered a verdict of $1.5 million.

APPELLATE COURT DECISION:

The verdict for disability discrimination is affirmed. Plaintiff demonstrated that he had the ability to perform this light duty work. The defendant had not adequately accommodated the plaintiff, but had defendant removed from the light duty job. The verdict was supported.

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DISCRIMINATION; EMPLOYER'S LIABILITY FOR ACTS OF SUPERVISOR

Staub v. Proctor Hospital
(2011) ___ U.S. ___, ___ 131 S.Ct. 1186 (U.S. Supreme Court)

FACTS:

Plaintiff Staub worked as a technician at a hospital. Plaintiff was in the military reserve. He had to perform duties at some times during the year. Staub's supervisor was biased against the military. The supervisor imposed unreasonable duties on Staub, including a requirement that Staub report to the supervisor's office every day after work. The supervisor prepared a report indicating that Staub was in violation of work duties, and this report was passed on to Linda Buck (who was above the supervisor). Based upon this report, Linda Buck terminated plaintiff. Plaintiff sued for disability discrimination and recovered a verdict of over $1.5 million. This verdict was reversed by the Court of Appeals, on grounds that the ultimate decision maker (Linda Buck) had not made her decision influenced by bias herself and, accordingly, the employer would not be liable.

U.S. SUPREME COURT DECISION:

Court of Appeals reversed. Buck relied upon the biased report of the supervisor. Without doing any independent investigation of her own, the bias of the supervisor would be imputed to her and to the employer up the line, and the employer would be subject to liability.

COMMENT:

The Court indicates that this decision may be applicable to other kinds of discrimination cases as well (racial, disability, etc.). If so, it will be easier to fasten liability upon the ultimate employer even though the decision maker (Buck in this case) was free from bias herself. The Court hints, however, that independent investigations by the decision maker (Buck) can operate to prevent liability from attaching.

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EMPLOYMENT TORTS DISCRIMINATION; RETALIATION; ORAL VERSUS WRITTEN COMPLAINTS; FEDERAL LAW

Kasten v. Saint-Gobain Performance Plastics
(2011) ___ U.S. ___, ___ 131 S.Ct. 1325 (U.S. Supreme Court)

FACTS:

Plaintiff issued a series of oral complaints to his employer complaining that a time clock at work did not allow employees to receive adequate credit for the time they spent in putting on protective clothing which was required at work. Plaintiff was terminated, and he filed suit claiming that he was terminated in retaliation for his complaint. The U.S. District Court entered summary judgment in favor of the defendant employer, ruling that the Federal Fair Labor Standards Act only applied to retaliation against an employee for "filing any complaint," and that this referred to written complaints, not oral complaints. The Seventh Circuit Court of Appeals agreed.

U.S. SUPREME COURT DECISION:

Reversed. The statute applies to both written and oral complaint.

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EMPLOYMENT TORTS; DISABILITY DISCRIMINATION

Wills v. Superior Court
(2011) 194 Cal.App.4th 143, 125Cal.Rptr.3d 1

FACTS:

Wills worked as a county court clerk. She had bipolar disorder. Over the course of many months, she assaulted and threatened co-workers with violence. She was ultimately terminated by her employer. She filed suit, which was dismissed on summary judgment by the trial court.

APPELLATE COURT DECISION:

Affirmed. The employer legitimately terminated Wills because of the misconduct, even though it may have been caused by her disability. The misconduct in question violated the written procedures and policy manuals of the employer.

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DISCRIMINATION; ALTER EGO DOCTRINE; WHO IS AN EMPLOYER

Leek v. Cooper
(2011) 194 Cal.App.4th 399, 125 Cal.Rptr.3d 56

FACTS:

Plaintiff was an employee of a car dealership which was solely owned by Cooper. Plaintiff sued the corporation and Cooper for age discrimination in violation of the Family Rights Act. The trial court granted summary judgment for Cooper on grounds that only the corporation can be liable for employment discrimination, and that plaintiff had not sued Cooper under an alter ego theory whereby the sole shareholder can be treated as the actual employer. The trial court granted attorney fees to Cooper on grounds that the discrimination claim was frivolous and meritless.

APPELLATE COURT DECISION:

Affirmed in part and reversed in part. The trial court was correct that Cooper could not be considered as the employer; the corporation was the employer. Plaintiff did not plead an alter ego theory and, therefore, Cooper was properly dismissed. It is not a proper test as to whether Cooper exercised control over plaintiff, the question is whether Cooper is the actual employer, and failure of plaintiff to plead an alter ego theory was fatal to this claim. The trial court is, however, reversed on the attorney fee question; the discrimination claim was not frivolous and meritless.

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