California Appellate Tracker Weekly Digest for Aug. 27–Sept. 2, 2017

Each week, Severson & Werson's appellate practice group tracks, reviews, and analyzes important decisions published by the California state appellate courts, the Ninth Circuit, and the U.S. Supreme Court. We have compiled this weekly newsletter with summaries of those cases, digested in an easy-to-read format for your convenience. For more frequent updates and to view past summaries, please visit our appellate blog at https://californiaappellatetracker.wordpress.com.

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FINANCIAL SERVICES—FORECLOSURE; LANDLORD-TENANT

BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach

California Court of Appeal, Second District, Division 5 (Kriegler, Acting P.J.); August 29, 2017; 2017 WL 3712198

If a tenant's leasehold interest is foreclosed upon, the purchaser at the foreclosure sale succeeds, as assignee, to the tenant's right to occupy the premises and to all covenants of the lease that run with the land, but not to the lease contract itself absent express assumption.

Upon foreclosure of a deed of trust on a tenant's leasehold interest, the purchaser at the foreclosure sale succeeds, as assignee, to the tenant's right to occupy the premises and to all covenants of the lease that run with the land, but absent the purchaser's express assumption of the lease, the purchaser is not bound by the lease as a contract and so has no continuing liability under the lease if it surrenders the premises to the landlord with the intention of terminating the lease. An express assumption requires specific affirmation by the purchaser to bind itself to the lease obligations. This is true even though the lease said that any person taking by foreclosure of a deed of trust in the leasehold estate would assume the lease—as the purchaser did not sign the lease and so is not, absent separate consent, bound by its terms.

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INSURANCE

Montrose Chemical Corp. v. Superior Court

California Court of Appeal, Second District, Division 3 (Edmon, P.J.); August 31, 2017; 2017 WL 3772568

The insured was not entitled to require an excess insurer to pay under its policy just by showing claims remained unpaid after exhausting all underlying policies for the one policy year, as some excess policies' "other insurance" provisions required exhaustion of insurance issued for other policy years if it covered the same loss.

Distinguishing *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, this decision holds that, at least with some of its many excess insurance policies, Montrose was not entitled to "electively stack" excess insurance policies vertically—that is, require the excess insurer to pay under its policy just by showing that all the underlying and lower level excess policies for the policy year had been exhausted and that claims or liabilities yet remained to be paid. Whether such vertical stacking was allowed depended on the wording of each excess insurance policy, and among the 112 policies at issue in this suit, wording varied widely. Some contained "other insurance" clauses that required exhaustion not only of the scheduled primary and underlying excess policies but also all other insurance covering the loss. Policies containing that type of language prohibited the elective vertical stacking that Montrose sought since with a long-tail loss, such as this case involved (liabilities from DDT contamination), policies covering other years were "other insurance" covering the loss.

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INSURANCE

Pulte Home Corp. v. American Safety Indemnity Co.

California Court of Appeal, Fourth District, Division 1 (Huffman, Acting P.J.); August 30, 2017; 2017 WL 3725045

A construction subcontractor's CGL policy did not clearly exclude "completed operations" coverage for an additional insured (here, the developer) or terminate insurance coverage when the subcontractor finished working on the project.

Following *Pardee Construction Co. v. Insurance Co. of the West* (2000) 77 Cal.App.4th 1340, this decision interprets coverage for an additional insured (the developer) under a subcontractor's CGL policy. The policy offered "completed operations" coverage as well as "on-going operations" coverage. The additional insured endorsement granted the additional insured coverage "but only with respect to liability arising out of 'your work' which is ongoing and which is performed by the Named Insured for the Additional Insured on or after the effective date of this Endorsement." The decision holds that this limitation did not clearly exclude "completed operations" coverage for the additional insured since liability for harm caused by "completed operations" could arise from the named insured's work done after inception of the policy. The quoted language did not clearly limit the insurance coverage to liabilities which arose while the named insured was still performing its construction work. Also, the exclusions for damage to the insured's own work did not absolve the insurer of its duty to defend the developer since the underlying suits alleged that the subcontractors' poor construction led to water intrusion damaging other parts of the building. The decision also affirms a finding that the insurer acted in bad faith in denying coverage and a defense. The insurer knew that subcontractors bought the insurance to satisfy subcontract conditions requiring them to provide completed operations coverage, yet routinely denied that coverage whenever an additional insured tried to claim it. Punitive damages roughly equal to contract damages were sustained. But the Brandt attorney fee award was reversed and remanded since it was based on a post-trial modification of the attorney's contract with his client, the insured, changing it from a contingency fee to hourly rate, to the insurer's disadvantage.

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TORTS—ASSUMPTION OF THE RISK

Grotheer v. Escape Adventures, Inc.

California Court of Appeal, Fourth District, Division 2 (Slough, J.); August 31, 2017; 2017 WL 3772580

Because hot air balloon operators are not common carriers, they can take advantage of the primary assumption of the risk doctrine and thus owe no duty of care as to risks inherent in the sport or activity of hot air ballooning—even if an injury is caused by pilot error in failing to adjust altitude properly to account for cross-winds.

Hot air balloon operators are not "common carriers" subject to the statutory requirement of operating with the utmost care under Civ. Code 2168 because the operators cannot, without fundamentally altering the nature of hot air ballooning, control anything more that the balloon's elevation. The balloon's horizontal drift is governed by the wind, not the operator, no matter how safely the balloon is operated. Because hot air balloon operators are not common carriers, they can take advantage of the primary assumption of the risk doctrine and thus owe no duty of care as to risks inherent in the sport or activity of hot air ballooning. A balloon's limited steerability creates risks of mid-air collisions and crash landings, and those risks cannot be mitigated except by adding power and steering, which would fundamentally alter the free-floating nature of a balloon, turning it into a dirigible. Injury from a crash landing of a hot air balloon thus falls within the primary assumption of the risk immunity even if due to pilot error in failing to adjust altitude properly to account for cross-winds. However, primary assumption of the risk does not prevent the operator from incurring liability for failure to instruct passengers on how to protect themselves against inherent risks such as crash landings, since those warnings would not fundamentally alter the sport or activity. But in this case, the failure to instruct did not cause plaintiff's injury since the landing was so violent that reasonable precautions would not have prevented the injury she suffered.

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TORTS—PRODUCTS LIABILITY

Major v. R.J. Reynolds Tobacco Co.

California Court of Appeal, Second District, Division 8 (Rubin, Acting P.J.); August 30, 2017; 2017 WL 3725640

Federal law recognizing the legality of tobacco and cigarettes does not preempt state tort law that holds most cigarettes to be a "defective product," thus exposing the manufacturers to substantial tort liability in California.

Wife sued a tobacco manufacturer for her husband's death from lung cancer that he contracted after decades as a heavy smoker of the manufacturer's cigarettes. The decision rejects the argument that federal law recognizing the legality of tobacco and cigarettes preempts state tort law insofar as it holds most cigarettes to be a defective product and thus exposes the manufacturers to substantial tort liability. The manufacturer relied on a Supreme Court decision holding that the FDA lacked authority to ban cigarette sales, but Congress' intent not to allow a federal agency to ban cigarettes said nothing about its intent to preempt state laws imposing liability on cigarette manufacturers for selling defective products. The manufacturer was not entitled to a jury instruction stating that manufacture and sale of tobacco products is legal and cannot be the basis of a finding of liability. The issue in the case wasn't whether all cigarettes were defective and should be banned but rather whether the manufacturer's cigarettes, which had higher levels of tar than some competing brands were defective. The manufacturer was also not entitled to an instruction requiring the jury to find that its cigarettes were the but-for cause of plaintiff's harm. But-for causation is required only when an injury allegedly has only a single cause. "Substantial factor" in causation is the proper legal test when multiple causes concur to produce the injury.

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FAMILY LAW

Direct Capital Corp. v. Brooks

California Court of Appeal, Third District (Duarte, J.); August 30, 2017; 2017 WL 3725649

A spouse is liable for the other spouse's debts incurred for the "necessaries of life" before separation, but only for debts incurred for the "common necessaries of life" after separation and before divorce; the former includes only the basics of food, clothing, and shelter, whereas the latter is a broader category that takes into account the circumstances of the particular marriage such as the spouses' accustomed standard of living.

Fam. Code 914 provides that a spouse (and hence his or her separate property) is liable for the other spouse's debts incurred for the "necessaries of life" before separation, but only for debts incurred for the "common necessaries of life" after separation and before divorce. This decision explains the difference. "Common necessaries of life" are the things all families need (e.g., food, clothing, & shelter). "Necessaries of life" is a broader category governed by the circumstances of the particular marriage, as determined by the "station in life" test which looks to the marital standard and mode of living and what persons of that economic and social position would deem necessary. Here, the wife was a lawyer who used a computer in her law practice, income from which enhanced the marital community property. The trial court did not err in holding that the computer lease was a debt for a necessary of life, and so husband was liable for it because the lease had been entered into before separation.

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LABOR & EMPLOYMENT

Stoetzl v. State of California

California Court of Appeal, First District, Division 4 (Rivera, J.); August 31, 2017; 2017 WL 3772542

Unionized prison guards' pay is governed by the union's memorandum of understanding, which was passed as state legislation, not general state wage and hour laws; but those general laws do apply to non-unionized prison workers.

State prison guards spent time before and after performing their principal guard duties at state prisons with activities including checking out weapons and other equipment, checking them back in, going through security and receiving and giving instructions from and to other guard units coming off or on work. The State and the guards' union negotiated a memorandum of understanding covering pay which the Legislature then passed as state law and the Governor signed. That MOU operated to exempt the unionized workers from the wage and hour provisions of the FLSA as well as state wage and hour laws. However, the other, non-unionized prison workers were not subject to the MOU, and under state law, they were entitled to compensation from the time they came under the employer's control until they left that control, and so were entitled to pay during the preliminary and postliminary activities that the FLSA did not require employers to pay for.

LABOR & EMPLOYMENT; CIVIL PROCEDURE—STATUTE OF LIMITATIONS

Aviles-Rodriguez v. Los Angeles Community College Dist.

California Court of Appeal, Second District, Division 4 (Manella, J.); August 29, 2017; 2017 WL 3712199

The Fair Employment and Housing Act's one year statute of limitations starts to run from the date of termination of employment of a faculty member, rather than the earlier date on which he was denied tenure for allegedly discriminatory reasons.

Following *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, this case holds that FEHA's one-year statute of limitations starts to run from the date of termination of employment of a faculty member rather than the earlier date on which he was denied tenure, allegedly for discriminatory reasons, even though by law denial of tenure required the defendant to terminate plaintiff's employment.

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CLASS ACTIONS; ARBITRATION; LABOR & EMPLOYMENT

Cortez v. Doty Bros. Equipment Co.

California Court of Appeal, Second District, Division 7 (Perluss, P.J.); August 15, 2017 (published September 1, 2017); 2017 WL 3484719

A collective bargaining agreement explicitly requires arbitration of wage and hour claims by referencing a wage order; so long as a Private Attorney General Act claim survives, decertification of a class is not immediately appealable.

Following *Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, this decision holds that an order dismissing class action allegations from a worker's wage and hour lawsuit upon entry of an order compelling arbitration is not immediately appealable under the "death knell" doctrine when the plaintiff has also alleged a PAGA claim that the trial court did not order to arbitration but rather stayed pending the outcome of the arbitration. A collective bargaining agreement may require arbitration of statutory claims, but to do so, the CBA must be explicit, clear and unmistakable in doing so. In this case, the CBA required arbitration of any dispute arising under Wage Order 16. Even though ordinarily to meet this standard, the CBA must identify the particular statutes, claims under which are to be arbitrated, this provision was sufficient to require arbitration of claims under Labor Code sections that deal with the same subjects as portions of Wage Order 16. That is because, the only way a worker can enforce the Wage Order is by bringing a claim for violation of the associated Labor Code section. Thus, plaintiff's claims for overtime pay, meal and rest break violations, issues covered by the Wage Order, were properly ordered to arbitration. However, the Wage Order does not address prompt pay on termination, so the worker's claim for waiting time penalties under Lab. Code 202 and 203 was not arbitrable. The trial court correctly ruled that the CBA did not allow classwide arbitration. Absent language in the arbitration provision itself or extrinsic evidence establishing the parties' agreement to arbitrate classwide claims, only individual claims may be arbitrated. Silence on the issue may not be construed as agreement. While the federal circuits are split over whether a ban on classwide arbitration violates the NLRA's protection of concerted activity by employees, the California Supreme Court upheld a ban on classwide arbitration against attack on this ground in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.

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CIVIL PROCEDURE—STATUTE OF LIMITATIONS

Rubenstein v. Doe No. 1

California Supreme Court (Chin, J.; Werdegar, Liu, & Cuellar, JJ., dissenting); August 28, 2017; 2017 WL 3691550

The last act in a series of sexual abuses remains the date of accrual of the claim for purposes of Gov. Code 901 and 905 requiring, as a condition of suing a government entity, that a claim be filed within 6 months of the accrual of the cause of action.

Following *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, this decision holds that while CCP 340.1 (b), as amended in 2002, extended the statute of limitations on a claim for childhood sexual abuse, it did not provide that the claim accrues later than the last act of sexual abuse at least in the sense that the claim is then ripe to be sued upon. Hence, the last act of sexual abuse remains the date of accrual of the claim for purposes of Gov. Code 901 and 905 requiring, as a condition of suing a government entity, that a claim be filed within 6 months of the accrual of the cause of action. Going forward this will not be a problem for persons who are sexually molested by government employees or agents since effective Jan. 1, 2009, Gov. Code 905(m) now exempts childhood sexual abuse claims from the claims-filing requirement. But that statute operates only prospectively and so does not save this case which was based on wrongful conduct in 1993 and 1994.

TAXATION

California Cannabis Coalition v. City of Upland

California Supreme Court (Cuellar, J.; Kruger & Liu, JJ., concurring in part & dissenting in part)
August 28, 2017; 2017 WL 3706533

The California Constitution does not restrict the voters' ability to impose or increase taxes by initiative measures, even though some restrictions do apply to local governments seeking to do the same.

Cal. Const. Art. XIII C, enacted by Prop. 218 in 1996, restricts the ability of local governments to impose, extend, or increase any general tax. This decision holds that the provision does not restrict the voters' ability to impose or increase taxes by initiative measures. While the voters could restrict by initiative their own power to enact future types of legislation by initiative, that sort of measure would be unusual. The Court will not find that the voters intended to limit their own powers unless the initiative they enact clearly expresses that intention. Prop. 218 contained no such expression of voter intent.