

# CALIFORNIA CASELAW HIGHLIGHTS

## ARBITRATION

While arbitration is not inferior to litigation in principle, an agreement containing an arbitration clause that does not operate bilaterally may be unfair in its application and thus be unconscionable. **Malone v. Superior Court**, 2014 WL 2735072 (Cal.App. 2014).

## BUSINESS

In ordinary consumer transactions, where consumers have little incentive to seek out alternative deals, the mere theoretical opportunity to have gone elsewhere will not preclude a finding that a commercial contract is unconscionable. **Sabia v. Orange County Metro Realty, Inc.**, 2014 WL 2761555 (Cal.App. 2014).

The party attempting to void a contract as a result of mistake must show that it would suffer material harm if the agreement were enforced, though that need not be a pecuniary loss. **Paramount Petroleum Corporation v. Superior Court**, 2014 WL 2803449 (Cal.App. 2014).

## CIVIL PROCEDURE

Where a plaintiff fails to present direct or circumstantial evidence as to whether an allegedly dangerous condition was obvious and existed for a sufficient period of time for purposes of a premises liability claim, the claim necessarily fails as a matter of law. **Heskel v. City of San Diego**, 2014 WL 2811185 (Cal.App. 2014).

A default does not need to be entered if the court strikes a defendant's answer as a discovery sanction, and the defendant retains the right to litigate damages. **Department of Fair Employment & Housing v. Ottovich**, 2014 WL 2925254 (Cal.App. 2014).

## CONSTRUCTION

The test to determine whether a construction defect is patent, for statute of limitations purposes, is an objective test that asks whether the average consumer would discover the defect during the course of a reasonable inspection; this test generally presents a question of fact, unless the defect is obvious in the context of common experience, and then a determination of whether a defect is patent may be made as a matter of law. **Delon Hampton & Associates, CHTD v. Superior Court**, 2014 WL 2810192 (Cal.App. 2014).

## EMPLOYMENT

There is no common law tort action for wrongful termination based on age discrimination against an employer with fewer than five employees. **Kim v. Konad USA Distribution, Inc.**, 2014 WL 2612087 (Cal.App. 2014).

Under the reasonable expectancy of employment test, when considering whether an employee's subjective belief that his or her participation in an injury-producing activity at home is expected by the employer is objectively reasonable, the focus is on the specific activity in which the employee was involved when the injury occurred, and there must be a substantial nexus between an employer's expectations or requirements

and the specific off-duty activity in which the employee was engaged. **Young v. Workers' Compensation Appeals Board**, 2014 WL 2875839 (Cal.App. 2014).

Perhaps the strongest evidence of an employer's right to control its workers' actions, for purposes of the common law test for determining an employment relationship, is whether the employer can discharge the worker without cause, because the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. **Ayala v. Antelope Valley Newspapers**, 2014 WL 2924954 (Cal.App. 2014).

### GENERAL LIABILITY

A property owner has no duty to protect its workers' family members from secondary exposure to asbestos on the owner's premises while in the course of the property owner's business. **Haver v. BNSF Railway Co.**, 226 Cal.App.4th 1104 (2014).

The Magnuson–Moss Warranty Act (15 U.S.C. Section 2301 et seq.) calls for the application of state laws concerning written and implied warranties for consumer products, not the creation of additional federal laws, except in specific instances in which it expressly prescribes a regulating rule. **Orichian v. BMW of North America, LLC**, 2014 WL 2612079 (Cal.App. 2014).

If an intermediary had actual knowledge of a product's dangers, and the plaintiff's only theory of liability against the product supplier is that the supplier failed to warn the intermediary, then ordinarily the supplier will not be liable under the sophisticated intermediary defense. **Uriarte v. Scott Sales Co.**, 2014 WL 2645288 (Cal.App. 2014).

The probable effect of intoxicants other than alcohol on a plaintiff, in connection with a comparative fault defense, is a topic sufficiently beyond the common experience of most jurors that expert testimony is required to prove it. **Hernandez v. County of Los Angeles**, 2014 WL 2734955 (Cal.App. 2014).

A new car need not be perfect in every detail, but its implied merchantability under the Song–Beverly Consumer Warranty Act requires that a vehicle be reasonably suited for ordinary use. **Brand v. Hyundai Motor America**, 2014 WL 2735207 (Cal.App. 2014).

The owners of a home where their daughter's minor friend died from alcohol poisoning after consuming alcohol from their liquor cabinet had social host immunity, even if they failed to prevent her from drinking the alcohol available in their home. **Allen v. Liberman**, 2014 WL 2761261 (Cal.App. 2014).

A large department store's common law duty of reasonable care to its patrons does not include an obligation to acquire and make available an automatic external defibrillator for patrons' use in a medical emergency. **Verdugo v. Target Corporation**, 2014 WL 2808965 (Cal. 2014).

Releases in a health club's membership agreement which pertain to injuries arising from alleged premises liability, rather than arising directly from the member's fitness or other recreational activities, are enforceable if they are sufficiently conspicuous. **Naser v. Lakeridge Athletic Club**, 2014 WL 2922405 (Cal.App. 2014).

## HEALTHCARE

The Mental Health Parity Act (Health & Safety Code Section 1374.72) requires a health care service plan to provide residential treatment for eating disorders when medically necessary, even where such treatment is not set forth in the plan. **Rea v. Blue Shield of California**, 2014 WL 2584433 (Cal.App. 2014).

Evidence of a hospital's costs in providing post-stabilization emergency medical services is irrelevant to the issue of the reasonable and customary value of those services when a non-contracted hospital files a quantum meruit action against a health care service plan for breach of an implied-in-fact contract for reimbursement. **Children's Hospital Central California v. Blue Cross of California**, 2014 WL 2590823 (Cal.App. 2014).

An agreement whereby a pharmacy company agreed to release its monograph suppliers from liability and to indemnify them for supplying abbreviated five-paragraph versions of eight-paragraph drug monographs was sufficient to assert a claim that the monograph suppliers assumed a duty of care to warn the pharmacy's customers by undertaking to render services to the pharmacy company of a kind they should have recognized as necessary for the protection of its customers. **Haesin v. PDX, Inc.**, 2014 WL 2768863 (Cal.App. 2014).

## INSURANCE

The contents of an insured's product catalogue were reasonably known to its liability insurer and thus were considered in determining whether a competitor's underlying action set forth a possible claim of product disparagement giving rise to a duty to defend under the insurer's policy, where the new product catalogue was produced by the competitor in the underlying action and was referenced in the competitor's complaint. **Hartford Casualty Insurance Company v. Swift Distribution, Inc.**, 59 Cal.4th 277 (2014).

A claim for conspiring to assist a mother in kidnapping her son from his father is not an occurrence which triggers coverage under a CGL policy, even if the complaint asserts causes of action for negligence arising out of the same set of intentional acts. **Upsani v. State Farm General Insurance Company**, 2014 WL 2885928 (Cal.App. 2014).

Even if an insurer's interpretation of its policy's terms and conditions is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim. **Regional Steel Corporation v. Liberty Surplus Insurance Company**, 2014 WL 2643242 (Cal.App. 2014).

A complaint adequately state a claim for insurance bad faith when it allege that an insurer, when presented with evidence of a valid claim, fails to investigate or evaluate the claim, insisting instead that its insured proceed to arbitration. **Maslo v. Ameriprise Auto & Home Insurance**, 2014 WL 2918866 (Cal.App. 2014).

For the assessment of monetary penalties (but not the imposition of other available remedies), Insurance Code Section 1871.7 requires proof of resulting claims that are in some manner deceitful, though not necessarily containing express misstatements of fact; that causation may be established under the "standard substantial-factor" test, not the "but-for" test. **State of California v. Superior Court**, 2014 WL 2918872 (Cal.App. 2014).

## PROFESSIONAL LIABILITY

An attorney billing \$1,000 per hour who sues his client for the reasonable value of legal services performed without a professional services agreement is not entitled to an enhanced fee because his hourly rate meant there was no contingent risk factor that he would receive no compensation if the client recovered nothing in the underlying litigation. **Chodos v. Borman**, 2014 WL 2761733 (Cal.App. 2014).

## NEVADA CASELAW HIGHLIGHTS

### CIVIL PROCEDURE

A plaintiff is required to hold an early case conference, where the parties must confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement. **Dornbach v. Tenth Judicial Court**, 324 P.3d 369 (Nev. 2014).

### EMPLOYMENT

Nevada's unemployment statutes should be liberally construed in order to advance the protective purposes of Nevada's unemployment compensation system of providing temporary assistance and economic security to individuals who become involuntarily unemployed. **Anderson v. State of Nevada Employment Security Division**, 324 P.3d 362 (Nev. 2014).

**CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.**