# RPLS Real Property Law Section E-Bulletin

March 2013 Edition

**IN THIS ISSUE**



## Upcoming Programs

### Sign Up Now For the Real Property Law Section Retreat to be Held April 26 – 28, 2013, at the Silverado Resort & Spa!

The RPLS will soon be hosting its 32nd Annual Real Property Retreat, featuring a total of 27.75 hours of MCLE credits in a wide variety of real property topics and related legal areas, wine tasting, dinners and other social events. The Retreat will be held at the beautiful Silverado Resort in Napa, CA, from

## Recent Legal Developments

### Legal Update: The Parol Evidence Rule Gets Clipped: Contract Fraud Cases are Expected to Spike

In a contract law decision with far-reaching implications for the business community, *Riverisland Cold Storage v. Fresno-Madera Production Credit Association*, the California Supreme Court has reversed course after 75 years and held that evidence of oral promises or agreements at variance with the terms of a written contract may be considered to determine if the contract should be invalidated as having been procured by fraud.

Previously, in *Bank of America etc. Assn. v. Pendergrass*, decided in 1935, the Supreme Court had specifically limited the fraud exception to California's version of the "parol evidence rule" (Code of Civil Procedure section 1856 and Civil Code section 1625) to preclude introduction of such evidence to challenge the validity of a written contract. The result was that written contracts were routinely upheld by the courts and enforced according to the terms set forth in the contract. That sanctity of contract so heavily relied upon in business (particularly in California's very litigious environment) may now be threatened as aggrieved contracting parties will likely attempt to avoid their obligations by claiming that the written contract was not the intended deal. This decision has potentially far-reaching negative implications for the business community, and it will almost assuredly result in a significant spike in contract fraud litigation.

The case may be an example of "bad facts make bad law" as the Court was dealing with a situation involving alleged misrepresentations by a lender made to relatively unsophisticated borrowers. The borrowers, Pamela and Lance Workman and their operating entities, were in default on agricultural loans from their local production credit association (PCA). The Workmans and the PCA entered into a fairly typical written forbearance agreement pursuant to which the Workmans pledged 8 additional parcels of property as collateral, and the PCA agreed to forbear from enforcement action for approximately 3 months as long as specified payments were timely made. The forbearance agreement contained the customary integration clause confirming that all prior or contemporaneous discussions and agreements were integrated into and superseded by the written contract. Although most of the pages of the forbearance agreement had been initialed by the Workmans, they apparently never read the agreement and simply signed the documents presented to them.

After the Workmans failed to make the payments required pursuant to the terms of the forbearance agreement, the PCA began enforcement of the loans by recordation of a notice of

April 26, through April 28, 2013. Come meet other practitioners from around the state at an educational, informal and fun event. Space is limited, so be sure to sign up right away. For more information look HERE.

## Announcing the Fifth Annual Fair Housing and Public Accommodations Symposium on April 19, 2013

Please join us for the Fifth Annual Fair Housing and Public Accommodations Symposium on April 19, 2013 at the Golden Gate University School of Law. Panels include discussions on "ADA, FFHAA, FEHA--Disability Accommodations and Modifications Under State and Federal Law from Plaintiff/Defense Perspective," "CHALLENGES TO FAIR HOUSING FROM ROOMMATES.COM: Are internet service providers ever liable for any discriminatory advertising? Do fair housing laws even apply to shared living situations?" and "HOUSING FOR PERSONS WITH DISABILITIES: Legitimate Neighborhood Concerns Versus Prejudice and Unlawful Discrimination." Ilona Turner of The Transgender Law Center will provide a keynote speech. A flyer with additional information can be found HERE.

## Upcoming CEB Programs for April 2013

**Residential Unlawful Detainers (3 hours MCLE)**

Whether representing landlords or tenants, residential unlawful detainer actions are challenging and demanding. The fast pace, special statutes and rules, and constantly evolving case law provide many traps for the inexperienced or unwary litigator. What seems at first glance to be a matter of simply filling in the Judicial Council forms can result in many an unpleasant surprise for attorney and client, no matter which side of the counsel table they are seated on.

Presented in San Francisco (April 12) and in Los Angeles (April 19)
http://ceb.com/progUrl.asp?prodno=RE08181

**Commercial Landlord-Tenant Disputes (3 hours MCLE)**
California is bouncing back from a period of sharply rising vacancies and declining rents, which, when accompanied by extremely tight credit markets, resulted in more defaults on commercial leases and loans. While some of these situations are still making their way through the system, the strengthening new economy brings new types of business models into the market. For example, many new economy tenants want more workers in less space, 24-hour access to building services, and may use greater electrical and other building resources than in the past. All of these scenarios can lead to disputes between landlord and tenant. It makes sense to try to resolve these lease disputes, where possible, to help preserve the landlord and tenant relationship.

Presented in San Francisco (April 12) and in Los Angeles (April 19)
http://ceb.com/progUrl.asp?prodno=RE08067

**Mastering the Map Act (6 hours MCLE)**

This program will acquaint you with the scope and implications of the Subdivision Map Act and the different roles played by attorneys in the mapping and development

default. The Workmans eventually paid off the loan and filed an action against the PCA for fraud, negligent misrepresentation, rescission and reformation. The action was predicated on their claim that the PCA's vice president had previously, and at signing, told the Workmans that the forbearance would be for a term of two years and that only 2 additional properties would be required as collateral.

The trial court applied *Pendergrass* to exclude evidence of the claimed conflicting contract terms and entered summary judgment in the action in favor of the PCA. The Court of Appeal reversed and the California Supreme Court affirmed allowing the Workmans' action against the PCA to proceed. In affirming, the California Supreme Court expressly overruled its prior decision in Pendergrass which it characterized as "ill-considered" and (i) being unsupported by the California statute codifying the parol evidence rule, (ii) conflicting with the law in other states, and (iii) providing a shield for fraudulent conduct rather than preventing fraud. The result is that the Workmans will have their day in court to assert that they were fraudulently induced into signing the forbearance agreement and that the signed contract does not embody the terms agreed upon. Responding to the fact that the Workmans had failed to read the forbearance agreement, the Court did note that a showing of justifiable reliance would still be necessary to establish the alleged fraud but left that issue for determination by the trial court in further proceedings.

The Court's decision in *Riverisland* will have broad implications and leaves open many significant questions. Although the case involved a real estate finance transaction, the Court's expansion of the exception to the parol evidence rule will be applicable to virtually all contracts regardless of context. Early resolution of contract and fraud claims through summary judgment will now be much more difficult or impossible, as the mere allegation of oral promises and/or misrepresentations will create a question of fact to be decided at trial. How can a lender or other contracting party be assured that the borrower or other contracting party does not think it was promised something different than or in addition to what is contained in the written contract? What protective steps can the lender or other contracting party take to prevent or discourage these claims?

Although there is likely no bullet-proof way to completely avoid this expanded exposure to contract fraud claims, there are some steps that lenders and others can take to reduce their risks: (i) provide final copies of complex documents to the other parties well in advance of closing to allow sufficient time for such parties' review, (ii) encourage or require that the other parties (particularly less sophisticated parties) have legal counsel review and advise them with regard to the contract documents, and (iii) have the other parties confirm verbally before witnesses (who in turn sign a confirming declaration) or on audio tape (to be retained for the life of the contract), or in a separate hand-written statement, that they have read and understood the documents and that no contradictory or supplemental representations or promises have been made and are being relied upon

The unavoidable outcome of the Court's decision in *Riverisland* will be an increase in litigation. Contracting parties should be increasingly careful with whom they deal and how they document their transactions.

process. How should you advise developers and subdividers or public agencies reviewing applications under the Act? What should you look for in reviewing subdivision proceedings for local agencies? Our speakers discuss the Act's legal requirements, map approval process, frequently encountered problems, and practical solutions. They draw on their own practical experience for the information you will need to counsel your clients and avoid common pitfalls.

Presented in San Francisco (May 17) and in Los Angeles (May 23)
http://ceb.com/progUrl.asp?prodno=RE08289

**Check CEB.com for more information**

## Section News

### Report From REAL Symposium 2013: the Impact of Tech and the Future of Redevelopment

The second Real Estate and Law (REAL) Symposium was held on January 30, 2013 at Paul Brest Hall on the Stanford University campus. Sponsored by The State Bar of California Real Property Law Section and Stanford Professionals in Real Estate (SPIRE), the REAL Symposium has established itself as the premier multidisciplinary real estate business and law event in Northern California. This year's REAL Symposium was co-chaired by Ken Whiting of Schiff Hardin LLP, representing the Real Property Law Section, and Steve Dostart of Dostart Development Company LLP, representing SPIRE. The attendees comprised a true cross-section of the real estate industry, and included lawyers, business professionals, government employees and students.

REAL Symposium 2013 featured an impressive roster of keynotes speakers and panelists. Keynote speakers included Michael Covarrubias, Chairman and CEO of TMG Partners, a prominent development company, and John Taylor, a noted economist from Stanford University who has served as an economic advisor to three American presidents.

In the day's first panel, hosted by Tim Tosta of McKenna, Long & Aldridge LLP, real estate experts from Twitter, Google, Facebook and Stanford discussed the impact of the tech industry on real estate.

The second panel, moderated by Gillian van Muyden, Chief Assistant City Attorney of the City of Glendale, addressed the future of redevelopment in California, and boasted "stakeholder" participants from the legal, development and governmental fields.

Plans are already under way for next year. The location is beautiful, the presentations are thought-providing and informative, the company is excellent, and the networking opportunities are abundant. See you there!

Article submitted by Scott Rogers of Rutan & Tucker, LLP (srogers@rutan.com) and Ted Klaassen of Rutan & Tucker, LLP (tklaassen@rutan.com). Scott is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. Ted is senior counsel in the Palo Alto office of Rutan & Tucker, LLP where he represents developer, investor, corporate, and institutional clients in a broad spectrum of real estate transactional and litigation matters.

### Legal Update: Prevailing Party in an HOA Enforcement Action May Recover Pre-Litigation Attorneys' Fees Under the Davis-Stirling Act

Navigating the Davis-Stirling Act's various ADR and attorneys' fees requirements can be difficult at times given the various hurdles one must clear. In *Grossman v. Park Fort Washington Association*, the Fifth Circuit reconciled the various provisions of the Davis-Stirling Act in a decision which awarded the prevailing party homeowners the attorneys' fees they incurred in pre-litigation ADR.

Grossman involved a dispute between the Park Fort Washington Association, a homeowners association, and association members Neil and Doredda Grossman. The Grossmans undertook a renovation project of their backyard which included the construction of a cabana. However, the Grossmans failed to obtain prior approval for their renovations in accordance with the Association's governing documents and petitioned the Association for approval after the fact. The Association refused to approve the cabana, determining that the cabana's construction and location was in violation of the CC&Rs. The Grossmans appealed the Association's decision through the Association's administrative process to no avail.

Having exhausted their Association's appeal process, the Grossmans and the Association went to mediation in accordance with the Davis-Stirling Act. Mediation was unsuccessful and the instant lawsuit ensued. After a three day bench trial, the court found in favor of the Grossmans. As the prevailing party, the Grossmans petitioned for their attorneys' fees, including attorneys' fees incurred in the pre-litigation enforcement action. The court awarded those fees. The Association appealed arguing that the Davis-Stirling Act only awarded attorneys' fees incurred in the litigation, not pre-litigation ADR.

Dismissing the Association's arguments as merely textual, the Fifth Circuit Court of Appeal affirmed the trial court's ruling. In so doing, the Fifth Circuit employed an analysis of three different sections of the Davis-Stirling Act. When an association or a member of the association is seeking to enforce the governing documents, California Civil Code Section 1369.520(a) prevents them from filing a legal action unless the parties have endeavored to submit their dispute to alternative dispute resolution. If alternative dispute resolution fails and the parties end up in litigation to enforce the governing documents, pursuant to California Civil Code Section 1354(c), the prevailing party *shall* be awarded reasonable attorneys' fee and costs. Of course, in order to encourage the parties to participate in ADR, the legislature enacted Civil Code Section 1369.580, which states that in determining the amount of the

## Recap of Central Coast Roundtable Subsection Seminar: A Review of the Year's Top CA Real Property Cases and Ethical Conundrums in Real Estate Transactions

On February 23, 2013, the Real Property Law Section - Central Coast Roundtable, hosted a continuing education event at the Santa Barbara College of Law. The topics included a review by Jacqueline Vitti Frederick of the top California Real Property cases that were decided in 2012. Ms. Frederick is the chair of the Central Coast Real Property Roundtable of the RPLS. Ms. Frederick discussed cases covering a wide area of issues including loan servicing matters, insurance coverage, contractor liability, prescriptive easements, housing discrimination, notice rules that apply to recordation of instruments, bankruptcy cram-downs, CEQA, broker liability and statute of limitation questions.

The second topic presented at the event was entitled "Ethical Conundrums in Real Estate Transactions." RPLS committee member Robert Miller and Walnut Creek based attorney Carol M. Langford provided a number of hypothetical scenarios involving ethical issues that a real estate practitioner may be faced with at some time during his or her career. Ms. Langford specializes in attorney conduct and State Bar defense matters. The presentation included a discussion of handling potential conflicts of interests when representing more than a single client in a matter, and a review of a case brought before the State Bar Court of CA pertaining to attorney violations of loan modification laws designed to protect the public.

Pictured are panelists Jacqueline Frederick, Carol M. Langford and RPLS Executive Committee member Robert Miller, as well as Ex Com co-chair David Fu, who handled the introductions.

Thank you to Jacqueline, Robert and Carol for sharing their expertise.

## Our Own e-Bulletin Cartoonist, Scott Miller!

We are delighted to publish legal cartoons from one of our own—Scott Miller. Scott is Of Counsel to Dudnick Detwiler Rivin & Stikker LLP in San Francisco. His practice focuses on commercial real estate and environmental law. Check out http://www.blurb.com/bookstore/detail/2646318 to order Scott's book on real estate cartoons, entitled *A New Lease on Life*. If you have any suggested topics for Scott, please feel free to contact him at miller@ddrs.com, and who knows? You might get your idea immortalized in the next E-Bulletin!

attorneys' fees and costs to be awarded pursuant to Civil Code Section 1354(c), the court "may consider whether a party's refusal to participate in alternative dispute resolution before commencement of the action was reasonable."

Pulling these statutes together, the Fifth Circuit Court of Appeals concluded that since the legislature required the parties to submit their dispute to ADR before commencing an action, the legislature must have intended for attorneys' fees incurred in the ADR process to be a part of any fee award. Continuing its analysis, the appellate court observed that since pre-litigation ADR was required before commencing an action, the fees incurred in the ADR process could not be unreasonable per se under Civil Code Section 1354(c) and could therefore be awarded. The analytical impact of this decision on disputes between homeowners associations and their members is important. It encourages a good faith attempt at pre-litigation ADR by both sides knowing that if an action to enforce the governing documents ensues and there is a prevailing party, that prevailing party has the right to request recovery of its pre-litigation attorneys' fees.

Article submitted by Gabe P. Wright (GWright@Klinedinstlaw.com), who is a Shareholder of the Klinedinst PC firm in San Diego.

## Legislative Update: AB 122 , SB 387, and AB 796 – Proposed Legislation Involving Clean Energy, Once-Through Cooling, and the Effects of Sea Level Change on Proposed Power Plant Facilities

The 2013 Legislative season has begun! The California legislature has been busy this session; more than 2,000 new bills were introduced by the February 22, 2013 deadline. Energy and environmental issues are featured in an abundant amount of proposed legislation, including Assemblymember Anthony Rendon's (Democrat, 63rd District) energy assessment, nonresidential buildings, and financing bill (Assembly Bill 122), and two bills introduced to address the controversial topic of once-through cooling of power plants.

If passed, AB 122 would enact the Nonresidential Building Energy Retrofit Act of 2012, requiring the State Energy Resources Conservation and Development Commission (Commission) to establish the Nonresidential Building Energy Retrofit Financing Program, which would facilitate private financing in order to enable nonresidential building owners and eligible public entities to invest in clean energy improvements, renewable energy and conservation. The bill adds sections 25987.1 through 25987.42 to the Public Resources Code and requires appropriation of funds to implement the program. In January, AB 122 was referred to the Committees on Banking and Finance and Natural Resources. As of March 5, 2013, no amendments had been made to the bill.

In 2010, the State Water Resources Control Board (SWRCB) adopted a policy regulating the use of ocean water for the once-through cooling of power plants in California. The Policy required power plant owner and operators to reduce their use of seawater by 93 percent. Senator Roderick Wright (Democrat, 35th District) introduced Senate Bill 387 that requires the SWRCB to authorize the process of once-through

Just because it's out of the box doesn't mean it's thinking.



cooling to the extent allowable by federal law. SB 387 was referred to the Committee on Environmental Quality on February 28, 2013 and is expected to be heard on or after March 23, 2013.

Lastly, Assemblymember Al Muratsuchi (Democrat, District 66) introduced Assembly Bill 796, a bill that would require the Commission to consider and analyze the effects of sea level rise on a proposed thermal power plant with a generation capacity of 50 megawatts or more and its related facilities. While the bill is likely to be amended, if AB 796 is passed it would require this analysis during the application for certification process pursuant to the Warren-Alquist Act. AB 796 is currently pending referral and may be heard in Committee on March 24, 2013.

Article submitted by Melissa Foster (mafoster@stoel.com), who is a partner in the Environment, Land Use and Natural Resources group at Stoel Rives LLP and focuses her practice on energy facility siting and environmental compliance.

## Recent Legal Developments (cont.)

### Reader Alert – New Truth in Lending Rules Are Shadowed in Doubt

On January 17, 2013, the Consumer Financial Protection Bureau (CFPB) published its new Final Rule, amending Regulation Z, the implementing regulation of the Truth in Lending Act (TILA). The new Regulation Z becomes effective on January 10, 2014. It adds certain protections for customers, but also adds interesting and worthwhile protections for lenders and mortgage originators. However, a recent decision in the United States Court of Appeals for the District of Columbia Circuit has called into question whether this and other actions of the CFPB have any validity at all.

The CFPB acquired general rulemaking authority for TILA (and many other federal consumer protection statutes) in July 2011, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5519 (Dodd-Frank). Although the CFPB already published an interim final rule in December 2011, that rule did not impose any new substantive obligations, and only made technical and conforming changes to reflect the transfer of authority to CFPB.

The Final Rule issued in January does make substantive changes, based on the Dodd-Frank amendments to TILA, including specific protections for lenders and mortgage originators. The Final Rule provides at 12 C.F.R. § 1026.43(c) for certain repayment ability requirements in the origination of loans. But it also provides, at 12 C.F.R. § 1026.43(e)(1), for a safe harbor from ability-to-repay challenges for the least risky type of "qualified mortgages," while also providing a rebuttable presumption of validity for a separate tier of qualified mortgages whose pricing is indicative of a higher level of risk. A qualified mortgage can very roughly be defined as a typical fixed-rate mortgage loan not exceeding a 30-year term, issued with limited points, which is either insurable by a Government -Sponsored Entity, or as to which other verification requirements apply, and which under certain circumstances may provide for a balloon payment. 12 C.F.R. §§ 1026 (e)(2) & (4), & (f). The safe harbor provision is expected to provide an important defense to challenges that a mortgage loan was made without ability to repay it.

However, a recent Court decision has cast significant doubt on whether *anything* the CFPB has done in the last year, including issuance of this Final Rule, is valid. On January 25, 2013, the District of Columbia Circuit Court decided the case of *Canning v.*

*National Labor Relations Board*, No. 12-1115 (D.C. Cir. Jan. 25, 2003), which reviewed a decision of the National Labor Relations Board (NLRB), *Noel Canning, a Division of the Noel Corp*., 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012). In this decision, the Court of Appeals held that the NLRB could not lawfully act at all, because it did not have a quorum when it did so. That was because three of its five Board members' appointments were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3. The Court held that President Obama had not actually appointed them during a "recess" as contemplated by the Constitution.

This decision is relevant because, like the NLRB board members, the director of the CFPB, Richard Cordray, was appointed by President Obama under such circumstances on January 4, 2012. A case already is pending, in fact, in the United States District Court, District of Columbia, called *State National Bank of Big Spring et al. v. Wolin et al.*, No. 12-1032, which among other things challenges the authority of Mr. Cordray on these grounds. Notably, the *Canning* NLRB decision is binding on the lower court in this case, assuming there are no other jurisdictional, standing or other grounds on which the plaintiffs' case in *Wolin* first fails. Given recent events, on March 12, 2013, a Senate Committee is also expected (as of this writing) to consider what authority Mr. Cordray actually has.

Finally, it is noteworthy that the *Canning* decision also explicitly disagreed with a 2004 decision of the Eleventh Circuit, *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005), which had held a similar "recess" appointment valid. This means that there is now a split of Circuit authority on an important Constitutional issue, so review by the United States Supreme Court is quite possible. It remains to be seen whether the issue will be resolved prior to the January 2014 effective date of the CFPB's new Regulation Z.

Article submitted by Kenyon Harbison (kharbison@allenmatkins.com), who is an associate in the Los Angeles office of Allen Matkins.

## Selected Developments in Real Property Law – *California Construction Contracts, Defects, & Litigation*

Courtesy of CEB, we are bringing you selected legal developments in areas of California real property law that are covered by CEB's publications. This month's feature is from the January 2013 update to ***California Construction Contracts, Defects, & Litigation***. References are to the book's section numbers.

READER ALERT: The California Law Revision Commission has reordered statutes governing mechanics liens, stop payment notices, payment bonds, and related remedies for both private and public works. Some changes became operative on January 1, 2011; the remaining changes became operative on July 1, 2012. See full text of SB 189 (Stats 2010, ch 697) and summary at http://www.leginfo.ca.gov/statute.html. Although the bill made some substantive amendments, it primarily renumbered all relevant Civil Code provisions and rearranged their order.

For a recent case discussing how a contractor conducting business under a fictitious business name may pursue a collection action for fictitious business names, see *Montgomery Sansome LP v Rezai* (2012) 204 CA4th 786, 139 CR3d 181, in §1.95A.

In *Greg Opinski Constr., Inc. v City of Oakdale* (2011) 199 CA4th 1107, 132 CR3d 170, the court held that liquidated damages were properly awarded to an owner for a delay in the completion of a project when the contractor failed to follow the required procedures for requesting an extension of time. See §5.112. Under *Opinski,* the 1965 amendments to CC §1511 allow a party to use a notice requirement to bar contractor claims for delays. See §6.90.

A contractor was entitled to payment for extra work when the requirements for a written change order were met, even though the governing board had approved the change orders after the contractor completed the installation of a fire alarm in a school's portable buildings. See *G. Voskanian Constr., Inc. v Alhambra Unified Sch. Dist.* (2012) 204 CA4th 981, 139 CR3d 286, in §§5.46, 5.61, 6.67, 6.73.

For mechanics' liens recorded during the pendency of a bankruptcy, the claimant must foreclose on its lien within 90 days of the lifting of the bankruptcy stay. See *Pioneer Constr., Inc. v Global Inv. Corp.* (2011) 202 CA4th 161, 135 CR3d 785, in §5.164.

Charter city public works projects are not subject to prevailing wage requirements. See *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v City of Vista* (2012) 54 C4th 547, 555, 143 CR3d 529, in §6.9A.

For a recent case discussing how a general contractor's failure to call a "rain day" did not subject the contractor to liability, see *Brannan v Lathrop Constr. Assocs., Inc.* (2012) 206 CA4th 1170, 142 CR3d 336, in §10.16.

The arbitration provisions in a condominium's declaration of covenants, conditions, and restrictions (CC&Rs) are binding on a home owners association, even if the association did not exist as an independent entity when the CC&Rs were drafted and recorded. See *Pinnacle Museum Tower Ass'n v Pinnacle Mkt. Dev. (US), LLC* (2012) 55 C4th 223, 145 CR3d 514, in §§7.25, 7.26, 11.19.

In *Glen Oaks Estates Homeowners Ass'n v Re/Max Premier Props., Inc.* (2012) 203 CA4th 913, 137 CR3d 865, the court held that CC §1368.3 provided a homeowners' association with standing to sue realtors who had acted as dual agents for the developer and association members. See §11.2.

A builder's decision to use contractual nonadversarial prelitigation procedures and opt out of statutory nonadversarial prelitigation procedures excused the builder's compliance with the disclosure provisions of CC §912. See *Baeza v Superior Court* (2011) 201 CA4th 1214, 135 CR3d 557, in §11.19.

For a recent case discussing the negligence of a realtor who failed to investigate and disclose defects, see *William L. Lyon & Assocs. v Superior Court* (2012) 204 CA4th 1294, 139 CR3d 670, in §11.32.

The California Supreme Court has not extended strict liability to the harm caused by the foreseeable use of a product with another manufacturer's defective component or replacement part. See *O'Neil v Crane Co.* (2012) 53 C4th 335, 135 CR3d 288, in §11.35.

For a recent case discussing the awarding of attorney fees to an attorney who was a member of an organization, see *Healdsburg Citizens for Sustainable Solutions v City of Healdsburg* (2012) 206 CA4th 988, 142 CR3d 250, in §11.47.

An insured may stack the insurance coverage from different policy periods to form a giant policy with a coverage limit of the sum of all policies, unless there is an anti-stacking provision in the policy. See *State v Continental Ins. Co.* (2012) 55 C4th 186, 145 CR3d 1, in §§12.38, 12.39, 12.39A.

The California Supreme Court has repudiated the common law "release rule." See *Leung v Verdugo Hills Hosp.* (2012) 55 C4th 291, 145 CR3d 553, in §§10.34, 13.12.

For a recent case discussing how a good faith settlement determination is a nonappealable interlocutory ruling immediately appealable only by a timely writ petition under CCP §877.6(e), see *Oak Springs Villas Homeowners Ass'n v Advanced Truss Sys., Inc.* (2012) 206 CA4th 1304, 142 CR3d 724, in §13.22.

## Current Real Property Case Tweets From CEB

CLICK ON CASE NAME TO GO DIRECTLY TO SLIP OPINION

**California courts:**

Soco West, Inc. v. California Environmental Protection Agency (Fourth Dist., Div. Three, 2/28/13) **[Environmental Law]**
DTSC must transfer cleanup of hazardous waste site from Chap 6.5 to 6.8 of Health & S C Div 20 on written request.

Habitat and Watershed Caretakers v. City of Santa Cruz (Sixth Dist., 2/19/13) **[Environmental Law]**
City's #EIR for providing water to proposed development failed to consider & discuss feasible alternatives.

Aguayo v. Amaro (Second Dist., Div. Three, 2/14/13) **[Real Property]**
Recording wild deed to divert property tax notices constitutes "unclean hands" as defense to #quiettitle action.

ABCO, LLC v. Eversley (Second Dist., Div. Five, 2/14/13) **[Real Property]**
Residence subject to rent control and not exempt as 1-family dwelling because not "detached." #landlordtenant

Acquire II, Ltd. v. Colton Real Estate Group (Fourth Dist., Div. Three, 2/11/13) **[Civil Procedure]**
#arbitrate multiple claims improper w/o subst'l evidence that each satisfied CCP §1281.2

Save Cuyama Valley v. County of Santa Barbara (Second Dist., Div. Six, 2/8/13) **[Environmental Law]**
County did not abuse discretion by relying on #EIR to form basis for approval of sand and gravel mining.

Hutton v. Fidelity National Title Co. (Fifth Dist., 1/31/13) **[Real Property]**
No Govt C §8211 violation when notary not employed by defendant escrow co; but atty fee provision unconscionable.

Windsor Pacific LLC v. Samwood Co., Inc. (Second Dist., Div. Three, 1/30/13) **[Real Property]**
Plaintiff equitably #estopped to deny or question defendant's authority to grant #easement over disputed property.

Ahdout v. Hekmatjah (Second Dist., Div. Four, 1/25/13) **[Alternative Dispute Resolution]**
Public policy mandates the disgorgement of compensation received by an unlicensed contractor.

Reichert v. State Farm General Ins. Co. (Fourth Dist., Div. Three, 1/24/13) **[Insurance Law]**
Law or ordinance exclusion precludes ins. coverage when home demolished by city b/c of FEMA floodplain regs.

California Redevelopment Assn. v. Matosantos (Third Dist., 1/24/13) **[Government Law]**
Legislature's direction to redevel. agencies to pay part of tax revenue to education funds not unconstitutional.

R.E. Loans, LLC v. Investors Warranty of America, Inc. (Second Dist., Div. Six, 1/23/13) **[Real Property]**
Unless otherwise agreed, priority of loans secured by single deed of trust does not change priority of loans.

**9th Circuit:**

San Luis Unit Food Producers v. United States (Eastern District of California, 3/1/13) **[Water Law]**
U.S. Bureau of Reclamation not legally required to deliver farmers' preferred amount of water.

Alaska Survival v. Surface Transp. Bd. (Surface Transportation Board, 1/23/13) **[Environmental Law]**
STP didn't violate ICCTA or NEPA when it approved a proposed rail line through Alaska #wetlands.

## News from the Section (cont.)

### Matt's Musings: Public Service Announcement: Do Not, Under Any Circumstances, Use this Pen

Happy belated new year to those of you who are reading the column this month, whether by accident or intention. January slipped away from me before I could get a good grip on it, and then February just sort of sidled away in it sneaky 28-day way. March is not so lucky, however.

2013 is off to an odd start for me. I'm going to try to keep this topical (pending pun intended), so just bear with me for a moment. If there's one thing I dislike about California real property it is the fact that so much of it is covered with a particular species that I actually, literally, and really very seriously despise. No, for once I don't mean USC fans. I mean Toxicodendron diversilobum, aka "poison tree of diverse foliage." Aka western poison oak (or, my pet name for it, bleeping bleepweed).

I really shouldn't have to explain why I hate poison oak so much. I'm guessing that most of you reading this have personally gotten to know this herbaceous devil that appears to have been spawned from one of the deeper infernal pits. And by personally, I mean really intimately. Your ever-present companion, 24-7. Am I right? Of course I am. (Those of you who claim to be "immune" may not be able to appreciate what the rest of us have gone through, but even if you haven't gotten to know poison oak directly, you've probably witnessed the sufferings of a close friend or family member who has. So try to have some empathy here.)

Poison oak is really very evil. The toxic oil it exudes (urushiol) is found in all parts of the plant – leaves, stems, trunks, roots, berries. It is amazingly sticky stuff, adhering to anything it comes into contact with – clothes, tools, pets, sleeping bags, etc. And it can endure and remain potent years after the plant itself is dead. So you can get it from bare branches in the fall… or a pile of harmless-looking dead sticks and leaves… or while digging holes feet away from any plant showing itself above ground… or from that tent you went camping with last year… or from the neighbor's dog… or from the smoke of any fire that may contain poison oak in appreciable amounts.

In case there are sensitive types reading this, I will not detail the abject viciousness of the poison oak plant's assault on us mild-mannered humans who happen to wander unwittingly into its demon jaws of doom. The term "rash" is often used in this context, but woefully underdescribes the dermal horrors urushiol unleashes on soft, vulnerable human skin. Likewise, the medical term "contact dermatitis" is far too clinical to capture the actual symptoms involved. The closest I can come to an apt descriptor – and I'm no poet, mind you – is "skin napalm." (I'm going to propose this to the American Academy of Dermatology at their next annual meeting.)

Poison oak's ubiquity in California is my home state's one great moral failing; I'm willing to overlook almost everything else, including smog, traffic, Richard Nixon, the state government, Claremont McKenna, and the Kardashians. My wife is from Monterey, which I consider one of the best places on the planet, especially when taken with Carmel and Big Sur. However, this whole area also appears to be the spiritual home of poison oak – its Vatican City, or Mecca, or Lumbini. Poison oak grows in such astonishing profusion in Monterey that at some places I refuse to get out of the car. I can feel my eyeballs itch just looking at Monterey hillsides covered with creeping poison oak undergrowth and head-high poison oak shrubs and 80' tall Monterey pines whose trunks are completely covered in climbing vines of the stuff. (This is where the whole "diversilobum" name comes from.)

[Side Note: Speaking of Monterey and my wife, she is allergic to almost everything (her hay fever is more like hay tuberculosis) and has very sensitive skin, yet for some unfathomable reason has never come down with a case of poison oak in spite of being raised in an area that is basically wall-to-wall carpeted with the stuff. I don't get it, either.]

Now some of you may have surmised by this point that I recently got a case of poison oak and that it has triggered this frothing-at-the-mouth assault on the poor, helpless, non-sentient-and-therefore-unable-to-defend-itself plant that is just going about its evolutionary business. See, that's where you're wrong. About everything. Poison oak isn't helpless – it just wants you to think that. And the whole urushiol thing isn't actually an evolutionary defense against predation or anything, because poison oak doesn't affect wild animals, which eat it with abandon. It's only us poor outdoor-loving humans who suffer from this terrible affliction.

Also, I did not just get a case of poison oak. I got a case of poison pen. That is, I got something very like poison oak, only it didn't come from a poison oak plant. It came from a fountain pen I bought. It showed up here at my office a couple of weeks ago and I happily put it to use taking notes and writing fan mail to Justin Bieber (not really) and suchlike. And then the next day my eyes started swelling shut, and a nasty rash started spreading up my neck where I had idly scratched it the day before. Uh oh……

So what was up with this pen? Funny story… it was made with Japanese lacquer, which is processed from the sap of the urushi tree. Hmm… urushi… why does that sound familiar? Probably because it is the root of the word "urushiol," which the astute of you will recollect is the name of the oil contained in poison oak. Yes, that's right… for millennia the Japanese have been using the sap of the Toxicodendron vernicifluum tree to make incredibly beautiful and durable (they used it on armor) lacquerware. When fully cured the oil polymerizes and so loses its allergenic qualities… but for some of us, a very little urushi goes a long way. (Did you know that ¼ ounce of pure urushiol would be enough to give everyone in the world a case of poison oak? I'm amazed this stuff hasn't been weaponized yet. Shhh, don't tell the North Koreans!)

Thus, February for me has involved a couple trips to the doctor and a prescription for heavy corticosteroids, which work wonders on poison oak but also keep one awake late at night and have other fun side effects. Now you know why this month's column has turned into a combination natural history lesson, personal gripefest, and cautionary tale. Spring is almost here, after all, so beware the dread poison oak in your outdoor ventures. Also beware of new Japanese (and certain other Asian) lacquers. Cashew shells, too, contain the same stuff, as do mango trees and the skin of mangoes themselves. (Why, nature, why????)

Now if I'm going to tie this all back to the law and real property litigation I'll make two concluding points. One, I'm told that poison oak exposure is actually covered under California's worker's compensation scheme. (If nothing else, sheer embarrassment precludes me from making a claim.) And two, I would, if I could, bring the nastiest, most scorched-earth, take-no-prisoners nationwide class action against every single iteration of the Toxicodendron genus extant in the United States. But, alas, as it stands now: poison oak/pen 1, lawyer 0 . . .

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## The California Real Property Journal Welcomes Your Contributions

The California Real Property Journal is currently soliciting articles for Issue 2 in 2013. Issue 2 articles are due by March 18, 2013. The CRPJ welcomes and encourages the submission of articles and ideas from our Real Property Law Section members. Submissions and questions can be sent to the Editor-in-Chief of the CRPJ, Teresa Klinkner, at tbk@klinknerlaw.com.

## RPLS ♥s SOCIAL MEDIA: Friendly Reminder to Check Out Two New RPLS Animated Videos on YouTube

We've been getting some great feedback on our two YouTube videos over the past few weeks. In case you haven't checked them out yet, here's the information you need, and let us know what you think!

*RPLS, The Movie*! Well, sort of. Your Real Property Law Section Executive Committee has been working overtime to explain what we do and how it helps you in your life and in your law practice. Now you can tune in and get the score in a couple of minutes. Search "Real Property Section" on YouTube, and find the Real Property Section channel. The video titled "Introduction" tells you about what we do and how we do it, and why you want to be a part. "Subsection Leadership" reviews some of the great ways you can get involved in RPLS, from Subsection Chairs and steering committees, to the Real Property Law Journal and the Executive Committee. Tell your friends and colleagues, loved ones and relatives, and your "Friends", "Connections", and followers as well; we want these videos to go viral, or at least give you the sniffles.

## Set up your Facebook and Twitter Accounts. The State Bar Sections (including the Real Property Law Section and CYLA) are now on Facebook and Twitter!

Social media, anyone? The State Bar Sections (which include the Real Property Law Section) and the California Young Lawyers Association (CYLA) now have a page on **Facebook** and a new **Twitter** account, where we can keep you up-to-date on our latest news and events.Do not delay! Set up your accounts now.

We're also looking forward to interacting with a wider community and reaching out to people who are not currently members.

**We invite you to "Like" us and follow our "Tweets."**

And by the way, the CYLA definition of "young" is any California attorney under the age of 36 or in their first five years of practice.

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Thank you for being a part of the Real Property Law Section. The section is committed to providing relevant real estate practice information and materials for our members. Besides publishing the superb quarterly California Real Property Journal, the section organizes dozens of live programs, including the Annual Retreat, the "Boot Camp" program, Cyber Institute, and the State Bar Annual Meeting. These periodic e-mails are being sent to you because you are a member of the State Bar of California Real Property

Law Section. For more information about the Real Property Law Section, please see the section's website: realpropertylaw.calbar.ca.gov/.