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**Business, general liability, employment,  
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SERVING BUSINESSES AND PUBLIC ENTITIES THROUGHOUT CALIFORNIA

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# TORTS

## **Baptist v. Robinson, 06 C.D.O.S. 9019, Cal. App. Ct. 6th Dist. (September 21, 2006)**

*Motorcyclist Who Ran into Bin that Fell from Winery's Pickup Truck Could Not Assert Claim for Negligence Against Winery Where Driver Was Engaged in Personal Errand*

On October 23, 2003, plaintiff ran into a large agricultural bin while driving his motorcycle on Highway 85. The bin belonged to defendant Thomas Fogarty Winery LLC (the Winery) and had fallen from one of the Winery's trucks after the driver employee failed to adequately secure it. The driver was using the bin to pick up grapes for his personal wine-making. Plaintiff sued the driver and the Winery for negligence, arguing that the Winery was vicariously liable for its driver's actions under the doctrine of respondeat superior. The Winery filed a motion for summary judgment on the ground that it could not be vicariously liable for its employee's actions because he was on a personal, unauthorized errand. The trial court granted the Winery's motion and dismissed it from the lawsuit. Plaintiff appealed the trial court's ruling arguing that summary judgment was improper because there were triable issues of material fact as to whether: 1) the driver's actions were foreseeable in light of his employment responsibilities; and 2) the Winery had authorized his personal wine-making errands.

Held: The Appellate Court upheld the Winery's dismissal from the case. There was no evidence that winery employees making personal stocks of wine was a "recognized, established custom" so as to be a customary incident of the employment relationship, either at the Winery in this case or in the winemaking industry at large. Moreover, the record showed that only the driver's supervisor had an oral arrangement with the Winery to make his own wine at the Winery's premises. The driver had no such arrangement, and when it was discovered he was making a small amount of wine for personal use, he was instructed to stop doing so and remove his wine from the Winery's property. The driver did not seek approval from his superiors to use the bin in question, did not notify anyone he was using the bin, and the bins were not intended to be taken off the Winery's property. Therefore, the Winery could not be vicariously liable for the driver's actions.

Note: Vehicle Code Section 17150, et seq., creates liability of an owner of a vehicle for injury or death up to \$15,000 if the vehicle is being operated with the express or implied permission of the owner.

## **Chee v. Amanda Goldt Property Management, 06 C.D.O.S. 9703, Cal. App. Ct. 1st Dist. (October 16, 2006)**

*Landlord Owed No Duty to Protect Neighboring Condominium Owner from Tenant's Dog*

Plaintiff was a 71-year-old condominium resident who was injured while walking through a common area when her neighbor's Jack Russell terrier jumped up on her and caused her to fall and incur injuries. Plaintiff sued her neighbor who was subletting from the owner and the owner for premises liability and negligence. Plaintiff argued that the owner breached the standard of care by allowing a dangerous condition to exist on the property, i.e., his tenant's dog whose "characteristics and traits posed a risk of harm to persons in the common areas." She also argued that the owner "knew, or had reason to know, or should have known" the dangerous propensities of the dog that posed a foreseeable risk of harm to her, and had a duty to investigate the dog to ensure it was not dangerous. Plaintiff presented evidence concerning the alleged dangerous nature of the Jack Russell breed, and expert testimony to support this claim.

The owner moved for summary judgment on the basis that absent actual knowledge that his sublettor's dog was dangerous, he owed no duty to plaintiff to protect her from the dog, or to inspect or investigate whether the dog had dangerous propensities. The motion was granted. The record established that he did not have such knowledge, and plaintiff could not show that the dog had harmed tenants previously. On appeal, plaintiff's motion for summary judgment was upheld.

## INSURANCE

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### **Noya v. A.W. Coulter Trucking, 06 C.D.O.S. 9019, Cal. App. Ct. 2nd Dist. (October 5, 2006)**

*Insurer Had No Right to Belatedly Intervene to Contest Settlement After Rejecting Additional Insured's Tender of Defense*

CalTrans supervised a highway modification project in an area where a runaway truck owned by defendant collided with oncoming traffic. Plaintiff filed a wrongful death action against CalTrans, the project contractor and the trucking company whose truck caused the accident. The complaint alleged that the accident resulted from a lack of an adequate median barrier. CalTrans tendered its defense to Zurich North America as an additional insured under the policy issued to the project contractor. Zurich denied CalTrans tender.

After several years of litigation, plaintiff settled with CalTrans, the project contractor and the trucking company. As a term of the settlement agreement, plaintiff's counsel agreed to represent CalTrans in any breach of contract and

bad faith action against Zurich. When Zurich learned of the settlement terms two months later, it attempted to intervene in the settlement and provide CalTrans with a defense. The trial court denied Zurich's motion to intervene, and Zurich appealed.

Held: The Appellate Court upheld the trial's court denial of Zurich's motion to intervene. The Court acknowledged that although Zurich had a "direct and immediate" interest in the lawsuit, this interest did not outweigh the interests of plaintiff and CalTrans in resolving the litigation. Zurich was in no position to complain where it consistently denied coverage and refused to provide a defense to CalTrans. Given this, CalTrans was entitled to make a reasonable, noncollusive settlement without Zurich's consent.

## EMPLOYMENT LAW

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### **Syverson v. International Business Machines Corporation, 06 C.D.O.S. 8155, U.S.D.C. 9th Cir. App. Ct. (August 31, 2006)**

*Employer-Supplied Waiver of Age Discrimination in Employment Act Rights and Claims in Connection with Severance Benefit Package Did Not Meet Minimal Federal Statutory Requirements*

As part of a downsizing its employee workforce, IBM offered several employees selected for termination severance pay and benefits in exchange for signing a general release and covenant not to sue. The release and covenant contained a waiver of rights arising from the Age Discrimination and Employment Act (ADEA), depriving the terminated employees of the ability to sue for age discrimination. For a release of ADEA rights to be valid, the waiver must be "knowing and voluntary" and must be "written in a manner calculated to be understood" by the average employee. The terminated employees filed a claim with the EEOC arguing that they were discriminated against on the basis of age. The EEOC issued a notice of the right to sue, but stated that the

waiver of ADEA rights was "knowing and voluntary" and was written so that it could be understood by the average employee. The district court agreed, held that the waiver was valid, and granted IBM's motion to dismiss.

On appeal, the employees argued that the dismissal was improper because the waiver was confusing. The employees' core complaint was that the release and covenant misled participating employees to believe that they retained the right to pursue an ADEA claim in court independent of their right to file a claim with the EEOC.

The Appellate Court agreed with the employees, and held that the overlap between the two concepts of: 1) being able to complain to the EEOC that their ADEA waiver was not knowing and voluntary; and 2) relinquishing their right to sue under ADEA, could be viewed by an average employee as confusing. The confusion ensued, in part, from including in the release and covenant two concepts, technically, that cannot coexist. Thus, the employees' waiver of ADEA claims was not "knowing and voluntary" and could not be easily understood by the average employee and therefore was unenforceable.

# CONSTRUCTION LAW

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## **The Stonegate Homeowners Association v. T.A. Staben, 06 C.D.O.S. 10306, Cal. App. Ct. 2d Dist. (November 7, 2006)**

*Subcontractor Who Negligently Installed Waterproofing and Drains Was Not Exempted from Liability on Basis That General Contractor Failed to Provide Him with Project Specifications or Explicitly Instruct Him on Proper Installation Techniques*

In a construction defect case, the general contractor hired a subcontractor and entered into an oral contract to waterproof retaining walls and install back drains in a large residential development. The general contractor had worked with the subcontractor previously, and believed that he knew how to correctly apply waterproofing material and place drains. The general contractor failed to provide the subcontractor with project plans or specifications showing the placement of the drains and dictating the proper installation of the waterproofing materials. The general contractor also did not provide explicit instructions on how to properly undertake and accomplish the work the subcontractor was hired to do.

After discovering retaining wall seepage and drainage problems in their back yards, the homeowners sued the general contractor and subcontractor for negligence through their homeowners association (plaintiff). Plaintiff settled with the general contractor and went to trial against the subcontractor.

At trial, the court prevented plaintiff from presenting expert testimony that the subcontractor failed his duty of care by negligently installing the waterproofing materials in failing to apply two coats of the sealant material, and improperly placing the drains too high for them to drain effectively. The

court reasoned that expert testimony on the subcontractor's standard of care was irrelevant because its actions were instead governed by the scope of the oral contract it entered into with the general contractor. The court found that the subcontractor satisfied the responsibilities of this oral contract, i.e., it performed what it was asked to do and installed the waterproofing material and drains without project specifications or explicit instructions. The court granted the subcontractor's nonsuit motion and entered judgment against the plaintiff. It stated: "The bottom line of the situation is that the plaintiff just did not present any evidence of facts with regard to the contract between [the general contractor] and [the subcontractor] to raise any duty or obligation for [the subcontractor] to perform other than he did."

**Held:** The Appellate Court reversed the trial court's judgment in favor of the subcontractor. It held that the trial court erred in precluding plaintiff from presenting expert testimony on the subcontractor's standard of care. The subcontractor had a duty independent of its oral contract to perform its work in a good and workmanlike nature. As such, the testimony of plaintiff's experts was relevant on whether the subcontractor met its standard of care expected within the industry. If the trial court's logic were followed to its rational end, the subcontractor would only be liable for its work if the general had given it detailed instructions on how to do the work. In other words, the more the general contractor must rely on the subcontractor, the less the subcontractor will be held accountable. This is not sound public policy. The fact that the general failed to instruct the subcontractor only underscores the subcontractor's responsibility to adhere to its standard of care in the industry and determine how to correctly install drains and apply waterproofing materials.

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