association of southern california defense counsel

verdict

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- Pedestrian accidents and the jaywalking defense
- Asbestos litigation and the 2002 RAND Analysis in 2011
- Avoiding gaps in your E&O liability policy

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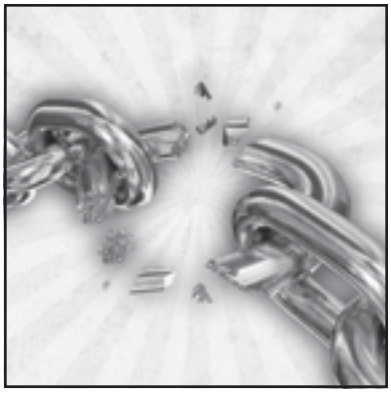

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— staff —

editor
Lisa Perrochet

executive director
Jennifer Blevins

art director
John Berkowitz

contributors
Michael D. Belote
Daniel David Klauss
Jeffrey M. Lenkov
Patrick A. Long
Matthew Manjarrez, PE
Linda Miller Savitt
Steven J. Renick
D. David Steele
Diane Mar Wiesmann

printing
Sig-1 Printing

— executive offices —

2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
800-564-6791 • *ascdc@camgmt.com* • *www.ascdc.org*

president's message

As 2011 Comes to an End

As 2011 comes to a close, our courts are faced with bigger challenges than ever before. We can anticipate serious proposed legislative changes to try to cut back and redistribute the workload in the courts. For example, the jurisdictional ceiling in small claims cases was recently increased to $10,000 with some exceptions. The idea is being kicked about that perhaps small claims limits should be raised again, to $15,000, to save court processing time and litigants' transaction costs. Of course, if that happens, the current jurisdictional amount of limited jurisdiction cases, $25,000, will ultimately be raised. This may be an inevitable result of the court crisis and inflation, but ASCDC is weighing in on just how much that increase should be, as we are aware that it does affect the practices of some of our members.

As different courts wrestle with potential solutions, we urge the court leadership of Kern, Ventura, Los Angeles, Orange, San Bernardino, Riverside, San Diego and Imperial counties to reach out to us for any assistance we can offer to see that the ideas and programs they are implementing to address these budget cuts work smoothly and efficiently. For example, most recently at least 25 of our members participated in the Los Angeles Superior Court CRASH settlement program for employment cases, and I am told that close to 2/3 of the cases settled. Our participation contributed to that success.

ASCDC's scholarly amicus work has been among the hallmarks of this organization. As many of you are aware, *Howell v. Hamilton Meats & Provisions Co.* is probably the most significant Supreme Court decision of 2011 affecting our practices. Bob Olson, our Secretary-Treasurer, argued for ASCDC as amicus curiae in front of the California Supreme Court and was instrumental in convincing the Court to rule favorably for the defense. Peter Doody of San Diego, one of our members at large and a member of the Board of Directors, had originally brought this case to ASCDC's attention and suggested that we file an amicus letter in support of the petition for Supreme Court review. This is just an example of how our members, taking full advantage of the benefits of our organization, can get the ball rolling on a major issue that will impact the defense bar for years going forward. Thank you to Peter and Bob.

We had a very successful seminar on October 20th at the Jonathan Club about some of the practical effects and "how tos" as to the implementation of the *Howell* decision and what to expect from the plaintiff's bar in trying to narrow the decision's impact. We followed that seminar with a meet-and-greet for young lawyers. As it is our goal every year to increase our membership, it is also one of our goals to get the young lawyers at defense firms involved to prepare for our future, as well as theirs. The event was very well attended and introduced many young lawyers to one another. I'm hoping this becomes an annual event and can be expanded upon.

Also in October, two additional Court of Appeal opinions were certified for publication, pursuant to requests from ASCDC. *Adams v. Ford Motor Company* dealt with whether a defendant's CCP section 998 offer of $10,000 was reasonable for cost shifting purposes and recovery of expert witness fees. *Dozier v. Shapiro* dealt with some of the gamesmanship that goes on in designating non-retained expert witnesses. Due to the efforts of ASCDC, both of these opinions are now citable.

2012 will be a very big year in terms of elections and possible legislative proposals affecting the defense of civil lawsuits and our voice in Sacramento. California Defense Counsel will be working to analyze these proposals. This is another pitch to contribute to CDC, without which we have no advocate in the Capitol to keep balance in our legislative process. Please go to *www.califdefense.org.*

As the year comes to a close, we had our annual construction defect seminar

Linda Miller Savitt
ASCDC 2011 President

December 1st in Orange County followed by a holiday party with some of the judges. On December 13, 2012, we held our annual Judge's night at the Jonathan Club in Los Angeles to celebrate the holidays as well as ASCDC's relationship with the judiciary.

Our 2012 Annual Seminar is scheduled for March 1 and 2, so please mark your calendars. The program will be very exciting and innovative. Our keynote speaker will be James Carville, the Ragin' Cajun. Love him or hate him, you will find him engaging. It will be quite an event.

It has been an exciting and challenging year for the ASCDC and I sincerely hope we have met your expectations. Please remember that our strength is in our numbers. ASCDC is an active, vital and essential organization and all lawyers who represent the defense side of civil litigation should be actively working with us and benefiting by being a member. Please help us keep our membership numbers high so we can continue the great work we do. To your Board of Directors and committee chairs, and to our recently expanded amicus subcommittee, my deepest gratitude for all you do for ASCDC.

Linda Miller Savitt

Better Late Than Never

Michael D. Belote
CDC Representative

Advertising people say that repetition is necessary to sell products. Similarly, in the legislative world of ideas, sometimes proposals must be introduced repeatedly in order ultimately to win enactment. Such was the case this year with an idea originally introduced by the California Defense Counsel *in 2001*, relating to motions for summary adjudication.

The MSA proposal was the brainchild of former ASCDC and CDC President Edith Matthai. Edith noted that while summary adjudication motions which are not legally dispositive are not permitted, there are occasions when the parties and court agree that an issue is *practically* dispositive, such that resolution will dramatically shorten the trial or likely lead to settlement. An example might be whether pre-trial interest is available in a given case. Putting an issue such as this before the judge, while not completely disposing of a cause of action, can contribute to judicial efficiency by increasing the chances of settlement or shortening the later trial.

CDC first proposed this concept in a 2001 bill, which was derailed by other controversies relating to summary judgment. The issue has been discussed a number of other times in the intervening years. Finally this year the change suggested by Edith was enacted in SB 384 (Evans), entered into law as Chapter 419, Statutes of 2011. Effective on January 1, 2012, SB 384 details the procedure for a joint stipulation by the parties, which must be approved by the judge. The procedure is contained in new subdivision (s) of Code of Civil Procedure Section 437c.

A second issue addressed by the Legislature in the closing days of the 2011 legislative year is voir dire. This issue also has been discussed repeatedly over the years. This year, CDC worked with judges and the Consumer Attorneys of California on voir dire clarifications, enacted in AB 1403 by the Assembly Judiciary Committee (Chapter 409, Statutes of 2011). AB 1403 amended Code of Civil Procedure Section 222.5. The changes were largely noncontroversial, clarifying that courts must not impose blanket time limits for voir dire, and should permit counsel the opportunity to present brief opening statements in advance of oral voir dire.

Of course, the opportunity to bring summary adjudication motions, and to conduct voir dire, is meaningless if courts do not remain open to resolve civil disputes. To that end, CDC is a major participant in wide-ranging efforts to restore adequate funding for the courts. In recent years, the judicial branch has suffered from budget cuts in excess of a half- billion dollars, and access to civil courtrooms is now severely jeopardized. Expect to read a great deal in coming weeks about a giant coalition coming together to fight for judicial branch funding, including some restoration of state general fund support.

The problem is that the legislature will once again be required to address state budget issues immediately upon returning to Sacramento in January. The way the 2011-2102 state budget was constructed, "trigger" reductions in spending will occur automatically if tax revenues come in below projections. At this point it appears quite likely that these triggers will be pulled, resulting in spending reductions for UC, CSU, K-12, and other programs. Reductions in such popular categories is bound to raise the volume of discussion over potential tax increases, whether in the areas of income, property, or sales.

We should expect 2012 to be a busy year also on issues beyond budgets and court funding. The recent *Howell* and *Concepcion* decisions are very likely to emerge as legislative issues, and the *Brinker* decision expected by February could raise legislative issues relating to employment law on meal and rest periods, and class certification.

And it is an election year, where some experts suggest that nearly 50% of all Assembly seats could turn over. 2012 could be a very momentous year for California indeed.

new members august – november

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Grisham Didn't Make the List

Patrick A. Long
palong@ldlawyers.com

It was all Ed Schmitt's idea. Many of you know Ed. He practices law periodically when he's not otherwise reading books. I recently received an e-mail from Ed asking what book was the greatest I'd ever read. Ha, my first thought was to object that his question was vague and ambiguous as to the term "greatest." But we weren't in a deposition. Note also that he didn't ask me what my favorite book was. If you're Irish Catholic, and even if you're not, the most frequent immediate response is of course, the Bible. But Ed was looking for more of a non-religious answer.

The question posed is similar to several other essentially unanswerable questions, like what's your favorite movie, rock band, restaurant, etc. There really isn't just one true answer. It depends on the day you're asked, you're mood, maybe how much you've had to drink. Be that as it may, Ed's question was fascinating in that the answer that people give as to what is the greatest book ever written (other than the Bible) may perhaps provide clues as to their personality, life style, intelligence, and education. Or maybe not.

The more I thought about the question the more it intrigued me, intrigued me enough that I called ten of our ASCDC colleagues and posed it to them. While I'm going to sit on the names (unless you offer to buy me a diet Coke) I will tell you that three were from Orange County, four from L.A. County, one from Ventura and one each from Riverside and San Bernardino Counties. There was an eleventh interviewee, not currently a member of ASCDC, but rather a member of the judiciary. I assumed he was probably a reader, and he is.

Wow, the books named truly ran the gamut, from the ridiculous to the sublime. The sublime (in my opinion) was Joyce's *Ulysses*. The ridiculous, and this won't come as a shock to the purveyor of this title, as I guffawed loudly when he passed this on to me, was *Fear And Loathing In Las Vegas* by Hunter Thompson (in the interests of almost full disclosure, this was not the selection of our jurist).

I can only say that our members are incredibly well-read. Obviously tastes vary, and the list of greatest books included fiction, history, biography, memoir and in one surprising instance, travel (Bruce Chatwin's *In Patagonia).* What was not included were books about, or specifically directed to, lawyers.

Of immediate benefit to me in making these few phone calls was that our colleagues not only provided the title of what they felt were the greatest books, but also lamented that making such a selection was a terrible task, and they gave me the names of several other books which were all "close seconds" to their prime selection. Let me pass along just a few of the titles of the selected greatest books: *On The Road,* Jack Kerouac, *The Son Also Rises,* Hemingway, *A Confederacy of Dunces,* John Kennedy Toole, *The Great Gatsby,* F. Scott Fitzgerald, and *Jonathan Livingston Seagull* (okay, just kidding with JLS).

One thought was repeated to me several times, that we're too busy to have the discretionary time to devote to non-job related reading. I'm certainly personally in agreement with that thought. I've always been a reader. Perhaps I don't read as much as some of the folks with whom I spoke, but I can tell you what I read forty years ago. This is something of family secret (which has been known to actually embarrass my family), but I maintain a list of every book I've read since 1970 which includes the date reading was finished, title and author, and the occasional fifteen word review (and in the last couple of years, whether I read the book on a Kindle or with real paper). Do I qualify as obsessive/compulsive?

Two or three of the folks with whom I spoke suggested that since so many of our members read so much someone might give some thought to organizing some kind of on-line reading group to meet via internet once or twice a month with an assigned book to read and then discuss. Additionally, I suspect that our editor, Lisa Perrochet, would welcome submissions of book reviews for possible publication in *Verdict.* The subject of those reviews however would probably need to be law-related books.

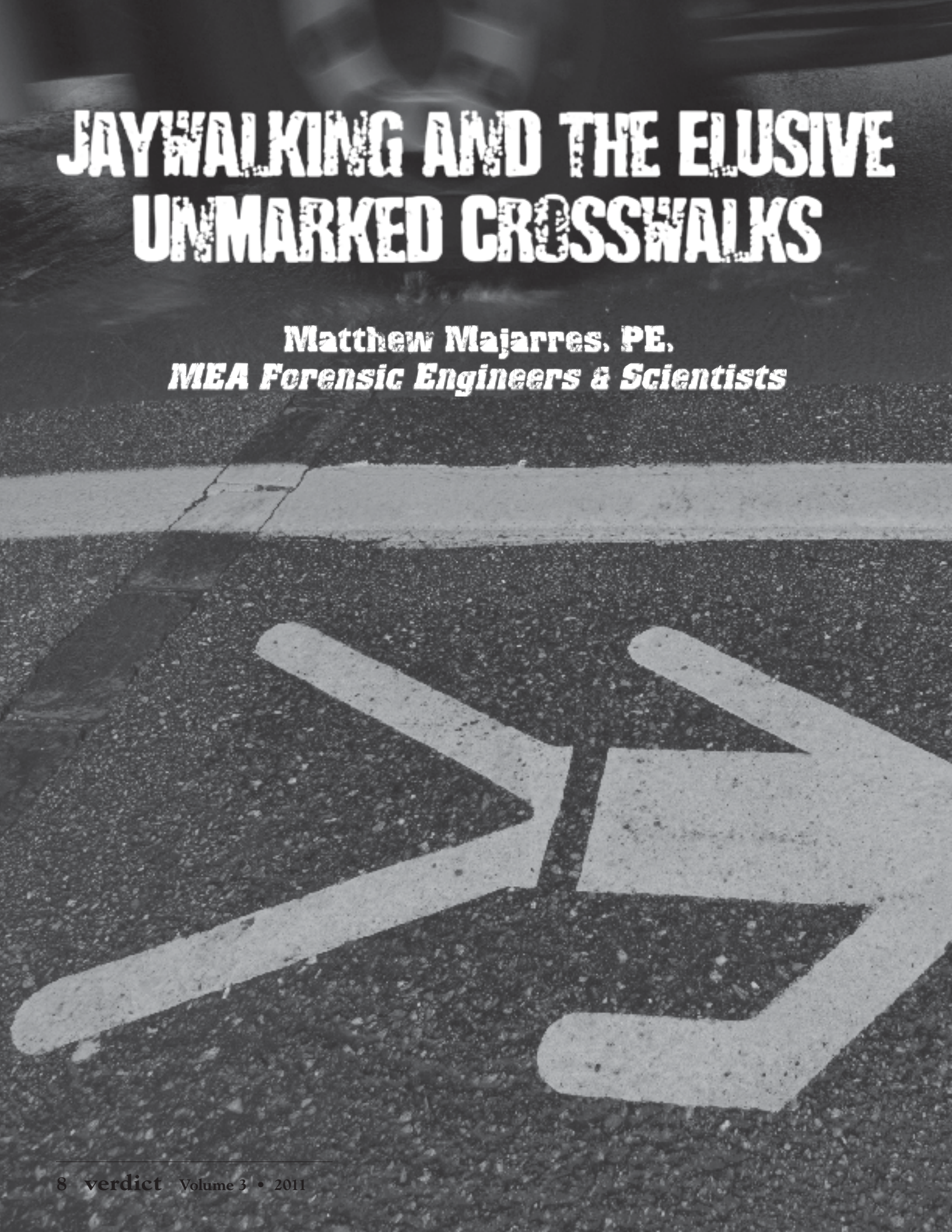
I'm grateful for Ed's e-mail. Obviously many of our colleagues, myself included, are book freaks, and there are worse things in life to which we could be addicted.

Let's raise a glass to Mr. Joyce.

Pat Long *palong@ldlawyers.com.*

JAYWALKING AND THE ELUSIVE UNMARKED CROSSWALKS

Matthew Majarres, PE,
MEA Forensic Engineers & Scientists



Properly defining "jaywalking" is of utmost importance to attorneys who are litigating collisions involving pedestrians. Those who are defending a driver or a public agency must first appreciate the nuances of "jaywalking" before assuming that fault can easily be transferred to a pedestrian who was crossing outside of a marked crosswalk. Likewise, those who are defending pedestrians are better able to do so when fully understanding what "jaywalking" is and what it is not.

A survey of recent headlines reveals that "jaywalking" continues to be a commonly used term when pedestrians and motorists collide. "Jaywalking Georgia Mom Spared Prison Time."[1] "Jaywalking Woman Hit and Killed."[2] "Pedestrian Injured while Jaywalking on Highway 140."[3] "Phoenix High School Students Hit while Jaywalking."[4]

[1] Wall Street Journal Law Blog, July 27, 2011 *[http://blogs.wsj.com/law/2011/07/27/jaywalking-georgia-mom-spared-prison-time];*

[2] *Los Angeles Times,* October 29, 2010;

[3] *Merced Sun-Star,* August 17, 2011;

[4] *Tucson Citizen,* August 16, 2011)

The term "jaywalking" is clearly used to make a fast and forceful impression that the pedestrian was crossing in an illegal manner outside of a crosswalk. However, is this really a fair assessment?

The answer to this question demands that we evaluate several associated questions. Were these pedestrians simply crossing at a location without a crosswalk marked on the roadway? Is it always wrong to cross at such a location? Is it sometimes okay to cross? Must a crosswalk always be marked on the roadway? Are certain locations a crosswalk even without markings? A careful and critical evaluation of the Vehicle Code provides our answers and helps us to define what "jaywalking" truly is.

Defining Jaywalking

Upon consulting the California Vehicle Code (CVC), we might be surprised to find that there is no blanket prohibition against crossing roadways at locations without a crosswalk. In fact, CVC §21961 acknowledges that a local ordinance would

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be needed to prohibit pedestrians from crossing roadways at locations other than crosswalks. In addition, CVC §21954 requires pedestrians who cross at locations outside of a crosswalk to yield to vehicles that would present a dangerous conflict. Simply stated, barring a local ordinance (see sidebar for two examples), a pedestrian is free to cross the roadway, even between intersections, regardless of the presence of a crosswalk. However, this does not give a pedestrian free reign to cross wherever and whenever desired.

A couple of key provisions in the CVC place restraints on pedestrian movement. Most broadly, CVC §21950 specifies that even when in a crosswalk, a pedestrian has a duty of using due care for his safety. Therefore, pedestrians may not walk onto a roadway into the path of approaching vehicles even at locations where they have the legal right-of-way. More specifically, CVC §21955 prohibits pedestrian crossings at very specific locations, which leads us to the concept of "jaywalking."

The term "jaywalking" is used in only one location in the CVC, and it is associated with pedestrians who violate CVC §21955. This section states, "Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk." CVC Appendix B identifies violation of this section as an infraction that is described as "jaywalking, between signal controlled intersections." Three aspects of CVC §21955 must be properly understood to rightly apply its prohibition.

- First, the prohibition applies between "intersections controlled by traffic signal devices or by police officers." Simply stated, this section only applies between two intersections that are each controlled by red-yellow-green traffic signals or police officers. An intersection is not considered to be controlled when the traffic signals are dark, not actually operating due to a power outage or other issue. At such a location or any other lacking traffic signal control, police officers must be present and controlling traffic for the prohibition to apply.
- Second, the controlled intersections must be *adjacent* to one another. This means intersections that are not separated by any other intervening intersections, which includes both streets and alleys.
- Third, a pedestrian may cross between adjacent traffic signal or police-controlled intersections only within a crosswalk.

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Applicable California Vehicle Code Sections

CVC § 275 – "Crosswalk" is either:

(a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street.

(b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.

Notwithstanding the foregoing provisions of this section, there shall not be a crosswalk where local authorities have placed signs indicating no crossing.

CVC § 21950 - (a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.

(b) This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. No pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

(c) The driver of a vehicle approaching a pedestrian within any marked or unmarked crosswalk shall exercise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian.

(d) Subdivision (b) does not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.

CVC § 21954 – (a) Every pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard.

(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway.

CVC § 21955 - Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk.

CVC § 21961 - This chapter does not prevent local authorities from adopting ordinances prohibiting pedestrians from crossing roadways at other than crosswalks.

Example Local Ordinances

City of Long Beach Municipal Code §10.58.020 - No pedestrian shall cross a roadway, other than by a crosswalk, in the central traffic district, or in any business district, except at intersections where pedestrian traffic is controlled by a scramble-system automatic signal.

City of Pasadena Municipal Code §10.32.020 -No pedestrian shall cross a roadway other than by a crosswalk in any business district."

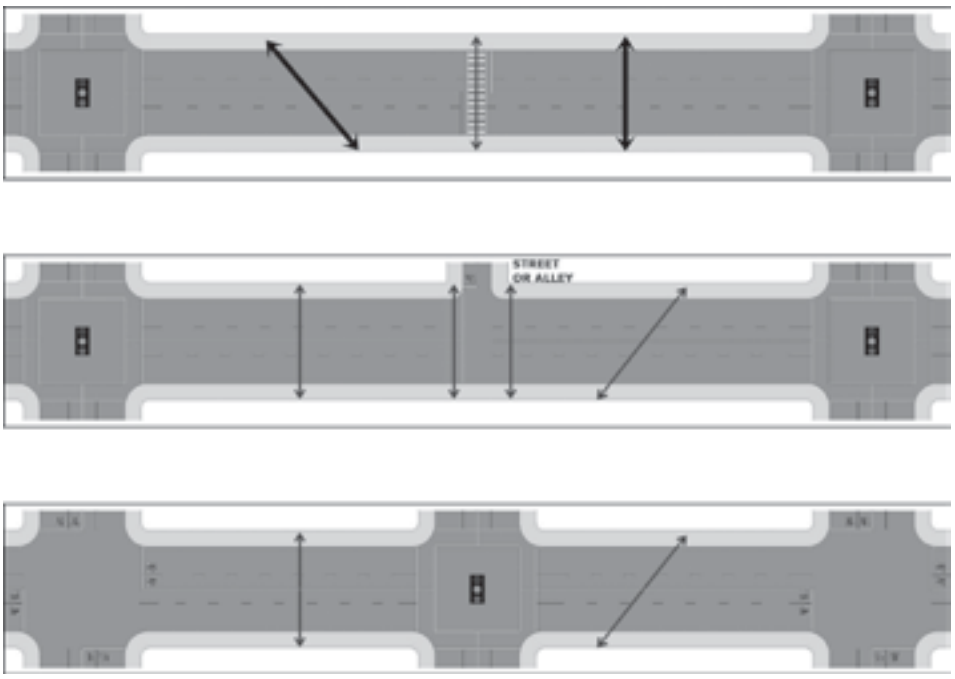

Figure 1: Application of CVC §21955 – Pedestrian crossing locations shown with heavy lines constitute an infraction of this section, and crossing locations shown with thin lines would be permitted under its provisions.

The top portion of Figure 1 shows conditions with adjacent signalized intersections. Therefore, pedestrian crossings between these intersections must occur within a crosswalk. Only the crossing location shown in green is within a crosswalk, so crossings at the other two locations violate CVC §21955.

The middle portion of Figure 1 shows conditions when a street or alley is located between signalized intersections. As a result, pedestrian crossings are allowed at any location regardless of the presence of a crosswalk. In fact, the crossings do not even need to be perpendicular to the roadway.

The bottom portion of Figure 1 shows conditions with a signalized intersection but without an associated signal adjacent to it. Accordingly, pedestrians are free to cross at any location they deem appropriate.

Clearly, when "jaywalking" is viewed from a legal perspective, it is a much narrower term than when viewed from the perspective of society in general. "Jaywalking" is not simply crossing outside of a crosswalk. It is often perfectly legal to cross in locations without a crosswalk. Now, however, we must complete our review by exploring what constitutes a crosswalk.

Finding the Crosswalk

Many find the proper identification of crosswalks to be somewhat elusive. This is understandable when we realize that there are both marked and unmarked crosswalks. It is even more understandable when the minutia of what defines a crosswalk is fully explored.

Crosswalks are defined in CVC §275, which states:

"Crosswalk" is either:

(a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street.

(b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.

Notwithstanding the foregoing provisions of this section, there shall not be a crosswalk where local authorities have placed signs indicating no crossing.

We shall begin with CVC §275(b), which sets forth that any location marked on the pavement as a crosswalk is a crosswalk. This is irrespective of the location's relationship to an intersection. Accordingly, a crosswalk can be marked either at an intersection or mid-block. It is this provision that establishes the legitimacy of mid-block crosswalks.

As we move to CVC §275(a), the concept of the unmarked crosswalk is found. This concept begins with the premise that the location of an unmarked crosswalk must be at an intersection. There cannot be an unmarked mid-block crosswalk. Further, the unmarked crosswalk is defined by the prolongation or connection of sidewalk areas. Consequently, there cannot be an unmarked crosswalk at an intersection between roadways without sidewalks. Next, the intersecting roadways must meet at approximately right angles and cannot include an alley (see CVC §110 for the definition of an alley). Lastly, signs can be posted, which eliminate an unmarked crosswalk where there otherwise would have been one. The appropriate sign is defined in the *California Manual on Uniform Traffic Control Devices* and is shown in Figure 2.

Figure 2: Standard Pedestrian Crossing Prohibition Sign

The following figure (Figure 3) illustrates the minutia in applying CVC § 275(a) to identify unmarked crosswalks. Unmarked crosswalks are shown with dashed green lines.

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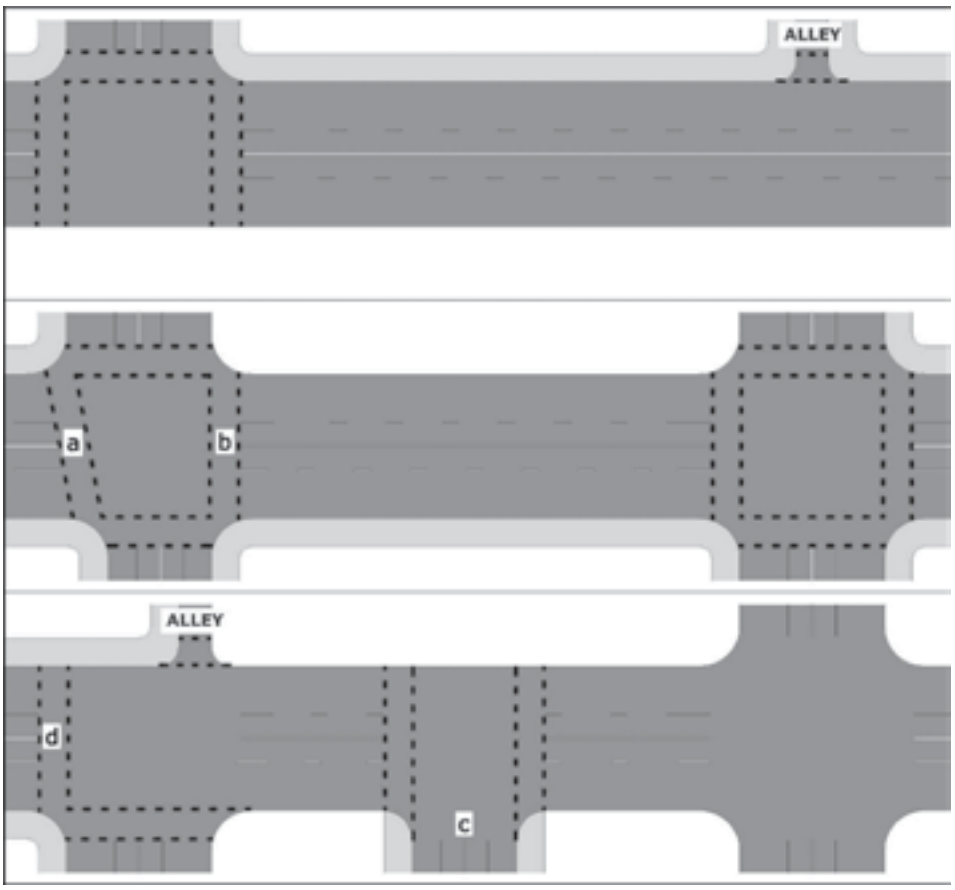

Figure 3: Unmarked Crosswalk Locations – This figure illustrates the minutia in applying CVC § 275(a) to identify unmarked crosswalks. Unmarked crosswalks are shown with dashed lines.

The top portion of Figure 3 displays the effect of the presence of alleys on the location of unmarked crosswalks. The rightmost intersection includes an alley. As a result, the sidewalks along the alley are not prolongated as an unmarked crosswalk across the intersecting roadway. However, the sidewalk along the intersecting roadway is prolongated across the alley. Each of the sidewalks at the leftmost intersection results in an unmarked crosswalk; a sidewalk is not required on both sides of the intersection since the sidewalk can be prolongated from a single side.

The middle portion of Figure 3 shows the effect of a skewed intersection. The unmarked crosswalk labeled "a" is angled to connect the sidewalks on either side of the intersection. This occurs in compliance with the provision that the crosswalk be located at the "connection of the boundary lines of sidewalks." In contradistinction, the unmarked crosswalk labeled "b" extends directly across without an angle because there is no sidewalk to connect to on one side of the intersection. This occurs in compliance with the provision that the crosswalk be located "within the prolongation ... of the boundary lines of sidewalks."

The bottom portion of Figure 3 illustrates the effect of the lack of sidewalks and the presence of alleys. The rightmost intersection lacks sidewalks on any side of the intersection resulting in no unmarked crosswalks. The middle intersection has sidewalks which prolongate to form crosswalks vertically in the diagram; however, there is no sidewalk to prolongate horizontally meaning that there is not an unmarked crosswalk at location "c." Finally, the rightmost intersection shows that the unmarked crosswalk labeled "d" does not angle because the sidewalk that it would connect with is associated with an alley; as such, the crosswalk is the straight prolongation of the sidewalk originating at the bottom of the diagram.

The above discussion illustrates the subtle minutia in determining the presence and location of unmarked crosswalks. This is an important issue in evaluating collisions involving pedestrians because right-of-way changes depending upon whether they are crossing within a crosswalk or outside of one. When this is coupled with the foregoing discussion of "jaywalking," we can conclude our exploration of these topics by answering our initial question.

Conclusion

Is the common perspective on "jaywalking" really a fair assessment? No, it is not. Pedestrians need not cross in a marked crosswalk except under very specific circumstances. In fact, they may be crossing in a crosswalk that does not have any markings at all. Most often, pedestrians can cross at any location they perceive is appropriate as long as they do so without creating unsafe conflicts or violating the right-of-way provisions contained in the CVC. In the end, we must admit that societal perspectives on "jaywalking" tend to give short shrift to pedestrians as they travel about our auto-dominated culture.

***Matthew Manjarrez, PE** is a licensed Civil and Traffic Engineer at MEA Forensic Engineers & Scientists. He is experienced in transportation engineering, planning, and design with particular specialization in transportation safety, roadway design and operations, pedestrian and bicycle facilities, and construction traffic handling. Matthew is responsible for analyzing transportation infrastructure including roadways, traffic signals, parking lots, guardrail, railroad crossings, signs, and pavement markings.*

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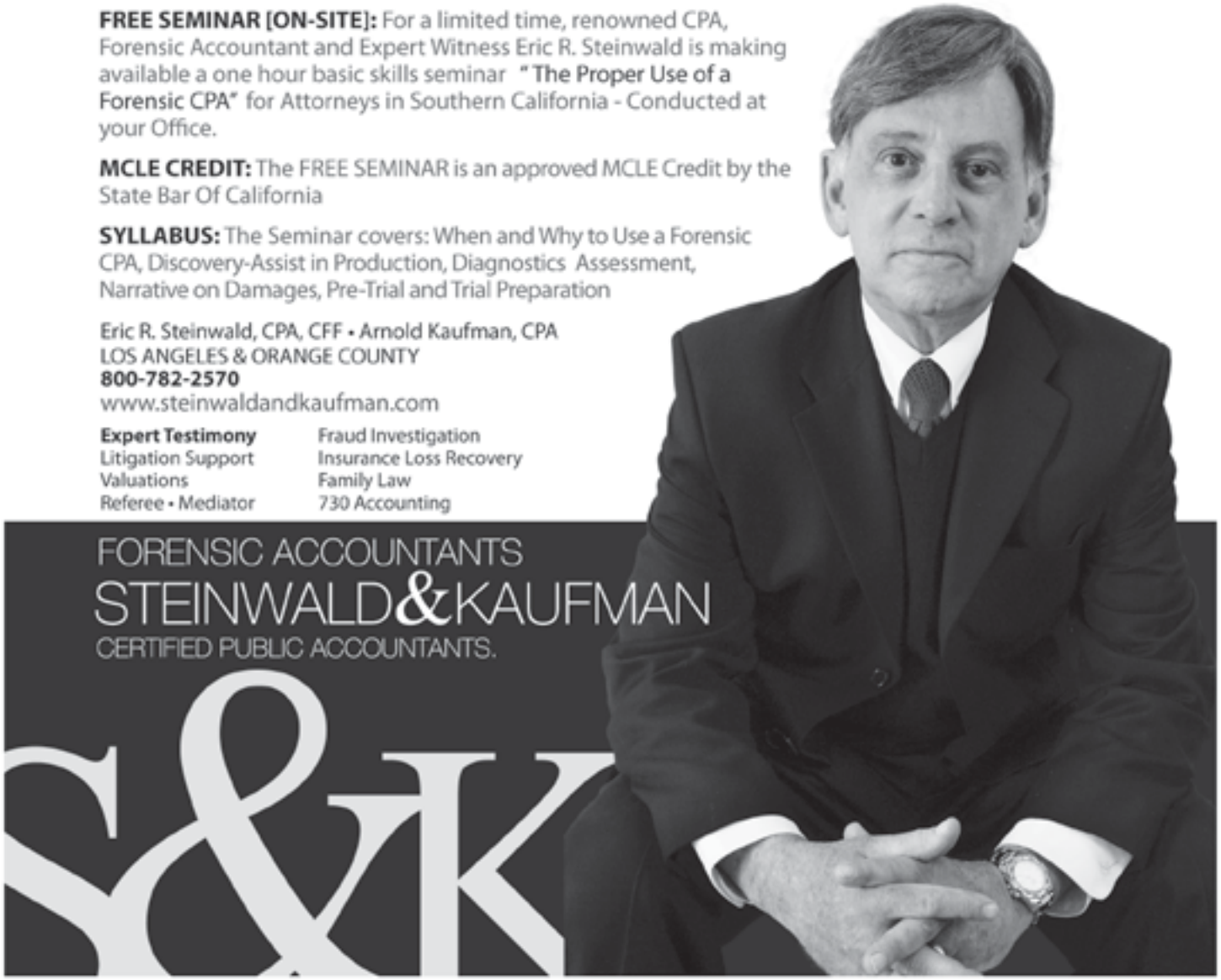

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Revisiting the RAND Report on Asbestos

by D. David Steele

In 2006, asbestos litigation as we knew it almost ended. On February 14, 2006, one lone Republican Senator from Nevada, John Ensign, broke ranks to exercise his right on a procedural maneuver to become the 41st vote to filibuster the proposed Fairness in Asbestos Injury (FAIR) Act. The bill had already passed the Republican House of Representatives by a wide margin, and then-President George W. Bush had signaled his intention to sign it into law.

This legislation would have created a $140 billion trust fund at the federal level and eliminated all state court civil actions for asbestos-related claims across the country. At the time, the legislation was pushed by both the National Chamber of Commerce and many industries, who believed they had suffered unfairly under the "elephantine mass of asbestos litigation," as famously described by Justice David Souter in 1999. Indeed, at least 94 companies have filed for bankruptcy, based in whole or in part, on asbestos liabilities, ranging from asbestos manufacturer, Johns-Manville to car manufacturer, General Motors.

By 2006, with GOP control of both the executive branch and both houses of Congress, as well as support from notable Democrats such as Senator Dianne Feinstein of California and certain prominent plaintiffs' attorneys, the legislative window for major asbestos reform was finally open, as many business and industry leaders had hoped for years. But, by one procedural vote in the Senate, it was not to be. Shortly after Senator Ensign's senatorial filibuster, in November 2006, Democrats won smashing victories in both the House and Senate, which set the stage for President Obama's historic victory in 2008. We have not heard from the asbestos reform movement since. So, how did we get that far in 2006 and, with a potential shift in the political winds, will the reform movement rise again?

The RAND Analysis of 2002

Much of the impetus behind the push for major reform of asbestos litigation was based on a comprehensive investigation and analysis by the Rand Corporation, whose preliminary findings in 2002 were finalized in 2005.

Originally created in the Department of Defense as a research project at the end of World War II, the Rand Corporation quickly spun off into a self-sustaining, highly influential think tank, designed to provide strategic thinking on military matters, such as war games, nuclear weapons policy and satellite technology. For example, in 1958 – 12 years before Neil Armstrong walked on the moon – the RAND Corporation published a seminal paper on Space Exploration at the behest of the Speaker of the House of Representatives, which served as a virtual cookbook on astronautics and its applications, technology in the space environment, rocket vehicles, propulsion systems, propellants and atmospheric flight.

Over the years, the RAND Corporation has expanded its charter partly away from pure military matters to tackle other big ticket policy issues that affect our country, such as healthcare reform, internet development and cigarette smoking prevention. Today, about 50 percent of its work remains in military affairs, while the other 50 percent is spread through other public policy measures.

In any event, when RAND speaks, politicians move. Conversely, when politicians speak, RAND moves. Indeed, some of the most notable public figures associated with RAND over the years include former Chairman of the Board Donald Rumsfeld, Henry Kissinger and even Scooter Libby. So as not to suggest the organization is solely comprised of politicians of one stripe, it should be noted that Walter Mondale and Richard Gephardt have also been part of RAND for years.

As it began to gather great influence in military matters during the Cold War, the RAND Corporation also became subject to criticism as the brains behind what some termed the "military-industrial complex," about which President Eisenhower warned in his farewell speech of 1960. RAND was famously lampooned by director Stanley Kubrick in his epic 1962 film, *Dr.*

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Strangelove, as the "Bland Corporation." (Mr. Kubrick followed this up seven years later with the omnipresent computer HAL in *2001, A Space Odyssey*, an obvious spoof of IBM. (You should compare the matching letters if you don't believe me.)

In any event, RAND set its sights on studying asbestos litigation, often described as the longest active tort docket since 1971, and published its initial analysis in 2002. The connection between asbestos and the military has deep historical roots. During World War II, the United States Navy believed that asbestos-containing insulation used on its hot steam pipes on ships was not only an effective but also a safe way to protect military personnel and property from fire hazards and to conserve steam energy. Asbestos fibers are some of the toughest in nature, and serve as excellent fire retardants. That the Nazi regime lacked access to asbestos mines of Canada and South Africa gave the Allied Powers what they thought was a competitive advantage in Naval warfare. Tragically, what was lost on the experts of the era was that exposure to asbestos could cause cancer that would take 20 to 50 years to develop. Many thousands of blue collar workers in refineries, shipyards and construction fields suffered as a result.

Historical inquiries aside, some of the modern day questions posed by RAND were: How many claims have been filed across the country? For what injuries? How much is spent on litigation? What is the balance on compensating victims and the cost of to deliver such compensation? What are the economic costs as a whole? What are the future prospects for the litigation? Is there a more equitable and efficient alternative strategy?

As of 2002, in light of several notable bankruptcies, the GOP control of Congress and the Presidency, and the near invitation of the Supreme Court to address the asbestos Leviathan through Legislative means, the political stars seemed to be aligned for a major reform effort.

The Major Findings of the Rand Report

In its exhaustive analysis, which reviewed litigation filings throughout the country, the RAND Report came to some powerful, preliminary conclusions:

First, Rand reported that there had been about 600,000 claims filed since the beginning of litigation in 1971, which involved over 6,000 different companies, named in the litigation. There has been about 56 bankruptcies, the most notable being that of Johns-Manville, a company that spearheaded most of the sales and production of asbestos containing thermal insulation in this country. This number of bankruptcies would eventually almost double, reaching 96 by 2010. The insolvency crisis engulfed not just traditional product manufacturers and distributors, but shipyards, construction companies and even car makers that had incorporated asbestos into their brake linings.

For the large macro picture, the RAND Corporation also estimated that the total cost incurred for the asbestos litigation had been about $70 billion. By far, the most expensive claims were for mesothelioma, a cancer of the lining of the lung that can be triggered by certain asbestos exposures, but that also occurs in people with no known asbestos contact. Mesothelioma claims result in verdicts with an average of $3.8 million dollars in damages.

Since asbestos consumption in the United States was largely curtailed in the mid-1970s, due to the cancer fears and general health hazards, it was thought that asbestos-related cancers (and hence lawsuits) would slowly dissipate in the future, with illness attributable to exposures higher than background, ambient levels tapering off by 2042. Based on published epidemiology papers in the peer-reviewed literature, RAND estimated that when asbestos claims ran its course, the total cost would be between $200-265 billion dollars.

One of its major points of contention, which served as the main predicate for the proposed FAIR Act, was the finding of a

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hugely inefficient distribution of benefits to victims, due to massive transaction costs inherent in litigation. Both sides must pay experts, court fees, investigators, and, of course, contingency fees ranging from 33 – 40 percent to the plaintiffs' attorneys. RAND estimated that of the $70 billion total incurred cost, only $30 billion reached actual injured victims, while the remaining $40 billion was spent on costs for both sides.

Based on this finding, the idea of the $140 Billion dollar federal trust fund was born. The thought was to curb the excess amount of dollars spent on transaction costs, reduce the uncertainty factor of contentious litigation, and guarantee a stable, predictable, equitable compensation scheme for the people afflicted with lung cancer, mesothelioma and asbestosis, according to some orderly scheme, analogous to worker's compensation. The effort, though, burned out a few steps before the Legislative finish line.

The Future of Asbestos Litigation

The 2006 collapse of the asbestos reform at the Federal level did not negate all reform efforts. Positive trends in asbestos reform were seen at the state levels. For example, several states, such as Texas, enacted medical criteria laws, to warehouse the vast amount of claims filed by unimpaired plaintiffs on a separate, much slower docket. According to RAND, asbestos filings peaked at about 80,000 in 2002, but have drastically declined to 5,000 claims per year as of 2009. However, the key point is that mesothelioma claims and other cancer claims – the big-ticket malignancy claims – have essentially remained unchanged at about 2,000 filing per year.

In Northern California, where San Francisco Superior Court was one of the original filing hubs in 1970, asbestos claims have shrunk from 509 to 337 between 2006 and 2010. Mesothelioma claims have similarly fallen during that same period from 160 to 105. As of this writing in 2011, asbestos filings in Northern California have further dropped to 170. Nonetheless, anyone who watches late night television will see multiple advertisements for law firms emphasizing mesothelioma disease, although not necessarily highlighting asbestos exposure, as in years past.

Irrespective of the collapse of asbestos reform at the Federal level, and the advent of some tort reform at the state level, the direction of future asbestos claims may turn on the evolving published epidemiology on asbestos related diseases.

Bert Price has published some excellent epidemiology on past and future mesothelioma claims. His data show that mesothelioma diagnoses for males form a bell shaped curve that tracks the bell shaped curve of asbestos consumption that peaked in 1976. Of course, due to the latency period between the exposure and development of cancer, the two curves are offset by time: the peak for male mesothelioma cases came in 2006, about 30 years after the peak of asbestos consumption, at slightly more than 2,000 per year in the United States. Price estimated this figure to drop further to slightly more than 500 by the year 2046.

Of interest is the contrasting incidence and projection of female mesothelioma cases. Price notes that female mesothelioma cases have stayed pretty constant at slightly more than 500 cases per year from the early 1970s, when asbestos consumption was still rising, through its peak in 1976, and has been steady even through the vast decline in asbestos use to the present and presumably into the future. The rate, Price estimates, will be slightly more than 500 cases per year by 2046. This flat line suggests that something other than asbestos exposure is causing mesothelioma in these women, since its incidence has not correlated with either the increases or decreases of asbestos use and exposure over the past 40 years.

The comparison between the mesothelioma cancer rates for men (who had direct military and occupational exposure to asbestos) and women (who at most were typically bystanders where asbestos was used by others, or had secondary "take

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home" exposures) is a strong indication that many mesotheliomas are simply "idiopathic," without any meaningful way to trace their genesis to asbestos exposure or any other as-yet identifiable cause. Nonetheless, plaintiffs' experts can often speculate as to some minimal potential asbestos exposure in mesothelioma victims with no known occupational link to asbestos, and juries are left to guess whether activities such as washing a father or husband's laundry really contributed to triggering disease.

Regardless of questions of causation, the best epidemiology to date suggests that mesothelioma cases will bottom out at about 1,000 per year in the United States by 2046, nearly 70 years after asbestos consumption pretty much ceased. Will there still be lawsuits, absent intervening tort reform? To ask the question, is to answer it.

Will Asbestos Reform be Revived?

Currently, we have a divided political government. The House of Representatives has a large GOP majority (242 – 192), while the Senate has a Democrat majority (53-47_. President Obama, a Democrat, and an attorney himself, is generally considered a friend and supporter of the trial attorneys. While in the Senate in 2006, before his historic run for the presidency, he voted to kill the asbestos reform bill. He is the slight favorite at this early stage of what will surely be a close presidential election, but if reelected, it seems likely that no asbestos reform measure will get past his desk.

If the GOP retains the House and captures the Senate and Presidency, will asbestos reform be revived? I doubt it for several reasons: first, there is no likelihood that the GOP will obtain a filibuster-proof majority, even if they win the Senate. Second, state legislatures who are serious about reigning in their asbestos dockets, such as Texas, have shown how to do it effectively and efficiently, through medical criteria schemes. This may remove the impetus for reform at the federal level. Third, the large downward trend of filings (only 5,000 in 2009), shows that unimpaired claims have steadily declined, greatly reducing the "elephantine mass" of claims. Even without enacting the FAIR Act or adopting the RAND Report's findings at the National level, asbestos litigation has slowly evolved into a more focused, mesothelioma-litigation, while the continuous diagnoses of mesothelioma cases in the United States is a fact of life, and will continue to be for decades to come.

green sheets

Notes on Recent Decisions

Lisa Perrochet

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact:

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To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

Arbitration

A party has the right to seek a statement of decision (CCP 632) in connection with a trial court's denial of a petition to compel arbitration (CCP 1291).

Metis Development LLC v. Bohacek (2011)
199 Cal.App.4th 748.

After a bank sued to foreclose on an allegedly defaulted construction loan, the loan guarantors cross-complained against one another for indemnity. Pursuant to the contract that governed the guarantors' relationship, one petitioner, Bohacek, petitioned the trial court to compel arbitration. The trial court issued a tentative ruling, indicating it intended to deny the petition. Pursuant to Code of Civil Procedure section 632, at the hearing on the petition, Bohacek's counsel requested a statement of decision on the issues set forth in the tentative ruling before the matter was submitted. The court declined to issue a statement of decision, reasoning that the proceeding was a "law and motion" matter. The trial court later issued a written order denying the petition. Bohacek appealed the order denying her petition.

The Court of Appeal (First District, Division Five) reversed. Code of Civil Procedure section 1291 requires a trial court issue a statement of decision, if requested pursuant to section 632, whenever an order or judgment "is made that is appealable under this title." The court explained "[b]ecause section 1291 mandates the issuance of a statement of decision in the part of the Code of Civil Procedure that pertains to petitions to compel arbitration, and the denial of a petition to compel arbitration is an appealable order, the logical inference is that the Legislature intended to require the trial court to issue a statement of decision." The court acknowledged that section 632 has been interpreted to require statements of decision for "trials" and not motions. But the court found that, while it is heard in the manner of a motion, a petition to compel arbitration is "in essence a suit in equity to compel specific performance of a contract." Thus, where the court adjudicates a question of fact in deciding a petition to compel arbitration, a "trial" has occurred within the meaning of section 632, and the trial court must issue a statement of decision if requested to do so.

Civil Procedure

Attorney-client privilege covers communications among multiple counsel or other reasonably necessary parties representing a client, and the work product doctrine extends to an attorney's impressions, conclusions, opinions, legal research, or theories not reduced to writing.

Fireman's Fund Insurance Company v. Superior Court (Front Gate Plaza, LLC) (2011)
196 Cal.App.4th 1263.

In this insurance bad faith action, the trial court ordered an attorney – a member of a law firm that had formerly represented the defendant insurer in the action – to answer deposition questions to which attorney-client privilege and work product objections had been asserted. The questions asked what the attorney said to a partner in the firm to convince the partner to write a personal check payable to a witness; asked how the attorney drafted the witness's declaration without speaking to the witness; and asked about unwritten opinion

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work product as well as subpoenas the attorney prepared based on documents received from the witness. In overruling these objections, the trial court held that: (i) the attorney-client privilege applied only to communications directly between an attorney and his or her client, not to communications among and between multiple counsel or other reasonably necessary parties representing the client; and (ii) that the work product doctrine applied only to written attorney work product. The insurer petitioned for a writ of mandate.

The Court of Appeal (Second District, Division Three) granted the petition. The court held that the trial court had improperly restricted the scope of the two privileges. The court explained that: (i) the attorney-client privilege covers communications related to a client's matter or interests among and between multiple counsel, or other reasonably necessary parties who are representing the client; and (ii) that the work product doctrine extends to an attorney's impressions, conclusions, opinions, legal research, or theories not reduced to writing.

Note: ASCDC submitted an amicus brief in support of the defendant's successful writ petition in this case.

When ordering disclosure of confidential nonparty information, a trial court must take a nuanced approach to disclosure, weighing the requesting party's need against the nonparty's privacy interests, and considering whether a less intrusive alternative to disclosure exists; a trial court must also impose confidentiality provisions to protect the disclosed information.

Life Technologies Corporation v. Superior Court (Joyce) (2011)
197 Cal.App.4th 640.

In this employment discrimination action, the plaintiff filed a motion to compel further answers to special interrogatories, seeking detailed information about other employees and former employees. The employer objected, asserting the information was irrelevant, unlikely to lead to admissible evidence, and implicated significant privacy rights of the third party employees and former employees. The employer also contended that any order should mandate procedures to protect third parties' private information both before and after such is disclosed. The trial court granted the plaintiff's motion. The employer petitioned for a writ of mandate.

The Court of Appeal (First District, Division One) granted the petition. It held the trial court abused its discretion because it did not take a nuanced approach to whether confidential information should be disclosed or impose confidentiality requirements before ordering the employer to answer the plaintiff's special interrogatories. A trial court must first evaluate whether a plaintiff's need for information outweighs third parties' privacy interests, and whether less intrusive means existed to obtain the information sought. Moreover, a trial court must install methods for safeguarding the confidentiality of disclosed information when compelling their disclosure. The court found a notice letter to the third party former employees was an inadequate safeguard.

If a trial court concludes that a party is responsible for the disordered state of discoverable documents acquired from a third party, the trial court may sanction that party for its failure to organize the acquired documents when it produces them in response to discovery.

Kayne v. The Grande Holdings Limited (2011)
198 Cal.App.4th 1470.

In this judgment enforcement action, the plaintiffs sued a subsidiary's parent company, asserting an alter ego enforcement theory. In response to the trial court's discovery order compelling a document production to the plaintiffs, the parent company produced thousands of pages of documents – in plastic bags and in "complete disorder" – which the parent claimed to have suddenly uncovered in the subsidiary's file cabinets in the office both companies occupied. The parent did not produce evidence on the condition the documents were found or explain the disorganized condition in which it produced the documents. The parent also refused the plaintiffs' request to label the documents in accordance Code of Civil Procedure section 2031.280, subd. (a). The plaintiffs filed a motion for compliance with the discovery order and requested monetary sanctions for the cost of organizing the documents. The parent argued the plaintiffs' motion was untimely because it was made outside of the 45-day limit for a motion to compel further responses. The trial court ordered the parent to pay the full requested amount of sanctions for willful abuse of discovery procedure and failure to comply with discovery statutes. The parent company appealed.

The Court of Appeal (Second District, Division Five) affirmed, first holding that a motion for sanctions and a motion for compliance are not subject to the 45-day time limit for a motion to compel further responses, making the plaintiffs' motion timely. The court then held the trial court did not abuse its discretion in monetarily sanctioning the parent for its failure to organize the documents. The court explained that absent admissible evidence to the contrary, the trial court could reasonably conclude that the parent caused the disorder of the documents it acquired from its third party subsidiary.

A CCP section 998 settlement offer that requires parties to bear their own costs also requires parties to bear their own attorney fees, unless the offer expressly states otherwise.

Martinez v. Los Angeles County Metropolitan Transportation Authority (2011)
195 Cal.App.4th 1038.

In this disability discrimination action, a public transit rider sued the county metropolitan transportation authority under state and federal law. The plaintiff accepted the defendant's section 998 settlement offer, which expressly provided that the parties would "bear their own costs." The offer said nothing about attorney fees. After the settlement, the plaintiff moved for attorney fees under the Americans with Disabilities Act and similar California statutes. The trial court denied the plaintiff's attorney fees motion, ruling that the term "costs" as used in the settlement referred to "costs" as defined in Civil Code section 1033.5, subdivision (a)(10)(B), which includes statutory attorney fees. The plaintiff appealed.

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The Court of Appeal (Second District, Division One) affirmed. The court established a bright-line rule that an offer of monetary compromise that excludes "costs" also excludes attorney fees unless the offer expressly states otherwise. The court observed that section 1033.5, subdivision (a)(10) provides that attorney fees are allowable "costs" under section 1032 when authorized by contract, statute, or law. Since attorney fees are "costs" under section 1033.5, the court explained, it followed that when a section 998 offer states that each party will bear its own costs, the word "costs" refers to all the costs described in section 1033.5, including attorney fees. This rule complements that announced in *Engle v. Copenbarger & Copenbarger* (2007) 157 Cal.App.4th 165, 169, which held that "a party who secures a recovery by accepting a section 998 offer is entitled to costs and attorney fees unless they are excluded by the offer."

A party does not consent to personal jurisdiction in California by entering into a contract that specifies any litigation arising out of the contract will be venued in a specific California county.

Global Packaging, Inc. v. Superior Court (Epicor Software Corporation) (2011) 196 Cal.App.4th 1623.

The plaintiff in this action – a Delaware software company with its principal place of business in Orange County, California – sued a licensee of its software – a Pennsylvania company – for nonpayment. The licensing agreement required that disputes arising from the agreement would be venued in Orange County or a jurisdiction in which the software was "located." The Pennsylvania licensee moved to quash service of summons for lack of personal jurisdiction, asserting that it had neither presence within nor minimum contacts with California. The trial court denied the licensee's motion, concluding that the venue provision constituted an enforceable forum-selection clause that, by implication, included consent to jurisdiction. The licensee petitioned for a writ of mandate.

The Court of Appeal (Fourth District, Division Three) granted the petition. As an initial matter, the court found the venue provision was void as a forum selection clause because it designated a particular county rather than a state in violation of Civil Code section 395.5. The court also held that even assuming the venue provision were a valid forum selection clause, it still could not operate to confer consent jurisdiction over the licensee. The court explained that courts should not find that a defendant consented to all of the power of a court simply by virtue of an unrelated choice of venue provision. To do so would conflate venue, forum, and personal jurisdiction at the expense of important liberties.

The court's holding creates a split among the Courts of Appeal. (Cf. *Berard Construction Co. v. Municipal Court* (1975) 49 Cal.App.3d 710, 721 [Second District, Division Three case holding a forum-selection clause can confer consent jurisdiction].)

Actual notice is insufficient to confer jurisdiction over a defendant where there is no partial or colorable compliance with the service requirements and the defendant is attempting to avoid forfeiture, not adjudication.

American Express Centurion Bank v. Zara (2011) 199 Cal.App.4th 383.

The Code of Civil Procedure specifies various methods service may be made on defendants sued as individuals. Personal service means that service is accomplished "by personal delivery of a copy of the summons and of the complaint to the person to be served." A defendant may also be "personally" served by delivering a copy of the summons and complaint to an agent authorized to accept service on behalf of that defendant. In this action, the defendant moved to quash service. The plaintiff's proof of service stated that a registered process server had personally served the defendant at his residence, described as, among other things, an Asian male with black hair. The defendant submitted his own declaration, which stated that he was neither Asian nor had black hair, and that no one else in his household fit that description. The plaintiff asserted that the service of process statutes are to be liberally construed, and the trial court agreed, denying defendant's motion to quash. The defendant did not answer the complaint, and the trial court rendered a default judgment against him. The defendant appealed the court's order denying his motion to quash.

The Court of Appeal (Sixth District) reversed. Although the trial court was not required to accept the defendant's self-serving evidence contradicting the process server's declaration, the proof of service was facially noncompliant – it showed personal service on an individual that fit the description of no one at the defendant's residence authorized to accept service. The plaintiff argued that because the defendant had actual notice of the summons and complaint, service was valid because it substantially complied with the statutory requirements. The court dismissed this argument for two reasons. First, the record showed neither partial nor colorable compliance; instead, jurisdiction had been obtained over the defendant through an intentional fraud on the court – the untruthful proof of service. Second, when a defendant challenges service of process to avoid a forfeiture, i.e. a default judgment, and not to avoid adjudication altogether, a plaintiff should bear the burden of the difficulty caused by the inadequate service; and such a burden could not be satisfied by mere substantial compliance.

Service of the administrative record by overnight courier is not service by mail within the meaning of Code of Civil Procedure section 1094.6; as a result, the 30-day period to challenge a decision begins to run on the date the administrative record is received, not on the date it is sent.
Blaich v. West Hollywood Rent Stabilization Department (2011)
195 Cal.App.4th 1171.

The petitioners in this action sought a writ of mandate in Superior Court to overturn an administrative decision by West Hollywood's rent stabilization department. The record was given to an overnight courier on June 12, 2009, which delivered the record to the respondent's counsel on June 15, 2009. The petitioners filed their writ petition on July 14, 2009. The respondent agency demurred to the petition, arguing that the time to file it expired on July 13, 2009 because service was complete when the record was deposited with the overnight courier on June 12, 2009. The petitioners argued the time did not begin to run until the record was delivered on June 15, making the petition timely. The trial court sustained respondent's demurrer and dismissed the petition as untimely. The petitioners appealed.

The Court of Appeal (Second District, Division 7) reversed. It held that service of the administrative record by overnight courier was not service by mail within the meaning of Code of Civil Procedure section 1094.6. The plain language of section 1094.6, subdivision (d), specifies that the record be "either personally delivered or mailed," and the word "mailed" is not the same as delivery by an overnight courier. The court found the 30-day period to challenge the decision began to run on date the administrative record was received rather than on the date it was sent.

An attorney whose conduct is subject to a court order has the burden to seek clarification if the order is unclear; moreover, defying a court order not to ask a witness about a particular matter does not fall within the "advocacy exception" to the imposition of sanctions under Code of Civil Procedure section 177.5.
Scott C. Moody, Inc. v. Starr Surgical Company (2011)
195 Cal.App.4th 1043.

At a sidebar, the trial court ordered an attorney not to ask a witness questions about a specific topic. The attorney proceeded to ask the witness a question on this topic anyway. The attorney subsequently claimed he had not understood the court's order, but his co-counsel and opposing counsel both stated they understood they order. The trial court found the attorney knowingly violated its order and imposed a $1,500 sanction under Code of Civil Procedure section 177.5. The attorney appealed.

The Court of Appeal (Fourth District, Division 3) affirmed. It is incumbent on counsel to request clarification if a trial court issues an order that counsel does not understand. Moreover, calculated defiance of a court order not to inquire on a particular subject does not fall within Code of Civil Procedure section 177.5's advocacy exception, which ordinarily shields attorneys from judicially imposed monetary sanctions for "pleading, arguing, supporting or recommending a particular position or idea." As the court explained, the attorney here "proceeded to do exactly what the court ordered him not to do."

Posttrial motions may properly be denied for failure to comply with California Rule of Court rule 3.1113's requirements regarding supporting memoranda; a trial court has no obligation to comb the record and the law for factual and legal support that the party fails to provide.
Quantum Cooking Concepts, Inc. v. LV Associates, Inc. (2011)
197 Cal.App.4th 927.

Following a jury verdict and judgment for the plaintiffs, the defendants moved for a new trial and judgment notwithstanding the verdict. However, in their motions, the defendants failed to submit a statement of the facts or identify specific evidence supporting their challenge to the sufficiency of the evidence. The trial court denied the defendants' post-trial motions for failure to comply with California Rule of Court, rule 3.1113, which requires a "party filing a motion" to "serve and file a supporting memorandum." The defendants appealed.

The Court of Appeal (Second District, Division One) affirmed. The court held that post-trial motions come within the plain meaning of rule 3.1113's reference to "motions"; therefore, post-trial motions must be supported by memoranda containing statements of facts, law, evidence, and arguments. The court explained that no abuse of discretion occurred because the defendants offered no statement of the facts; and no identification of the specific evidence or arguments on which their challenges to the sufficiency of the evidence relied. The court also stated that a trial court has no obligation to comb the record and the law for factual and legal support that a defendant fails to identify or provide.

Code of Civil Procedure section 660's time limit on new trial motions does not apply on remand when an appellate court directs a trial court to conduct further proceedings on a new trial motion.
Barrese v. Murray (2011)
198 Cal.App.4th 494.

Following a jury verdict and judgment in the plaintiff's favor, the defendant moved for a new trial. Although the trial court stated in the new trial hearing that the plaintiff "could not be believed," the court denied the new trial motion because it concluded that it had no authority to overturn the jury's credibility determination. The defendant appealed, in part on the ground that the trial court failed properly to exercise its full discretion to act as a "thirteenth juror" on a new trial motion.

The Court of Appeal (Second District, Division Eight) reversed, holding that the trial court erred because a trial court can set aside a jury verdict based on a credibility determination. In its disposition, the court remanded for a redetermination of the new trial motion. In a petition for rehearing, the defendant raised the question whether

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the more proper disposition was remand for a new trial, given Code of Civil Procedure section 660 granting a trial court only 60 days within which to grant a new trial. The Court of Appeal reissued its opinion with a modification explaining that section 660's 60-day limit on a trial court's power to rule on a motion for new trial did not apply in the procedural posture of this case. Section 660 governs the disposition of new trial motions brought under Code of Civil Procedure section 659, but does not apply where, following an appeal from the judgment, the appellate court remands the case with directions to the trial court to conduct further proceedings on a motion for new trial.

See also *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366 [First District, Division Five: Code of Civil Procedure section 472b – which imposes a 30-day time limit on filing an amended complaint after reversal of an order sustaining a demurrer – applies only when the Court of Appeal explicitly directs a plaintiff to file an amended complaint to cure a deficiency in the complaint, and not where the Court of Appeal reverses based on a finding that the complaint at issue was sufficient; in the latter circumstance, subsequent amendment is allowed independent of section 472b].

See also *Davis v. Superior Court* (*City of Los Angeles*) (2011) 196 Cal.App.4th 669 [Second District, Division Eight: written ruling granting summary judgment and minute order reflecting entry of that ruling did not constitute entry of *judgment* where construing the order otherwise would set up a time-bar to any appeal by the plaintiff: "Consistent with the importance of the right to appeal, we conclude that denying [plaintiff] his appellate rights requires more than an 'order' (the court's own title for its ruling) dressed-up to masquerade as a 'judgment.' "]

See also *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573 [Fourth District, Division Three: Neither an unsigned order of dismissal without prejudice nor an order denying reconsideration of such a ruling is appealable].)

The *Rooker-Feldman* abstention doctrine – which holds that a federal district court does not sit in review of state court judgments – does not bar review of non-judgment orders of a state court, and in any event cannot be invoked against a party in the federal action that was not a party in the state action; but the Colorado River abstention doctrine does apply in exceptional circumstances where assuming federal jurisdiction over the matter would result in piecemeal and duplicative litigation of state law issues.

R.R. Street & Co., Inc. v. Transport Insurance Company (9th Cir. 2011) 656 F.3d 966

A product distributor and its insurance company sued the product manufacturer's insurer in federal court. The manufacturer's insurer in turn sued the distributor in state court seeking a declaration of its coverage obligations *to the distributor*, and that action was removed to federal court. In another related state court case, a different trial court had issued an order on the manufacturer's insurance company's obligations *to the manufacturer*, which the insurer then appealed. Meanwhile, the insurer asked the federal district court to remand its declaratory relief action back to state court and dismiss the federal action. The district court agreed, dismissing the federal action and remanding the declaratory relief action. The district court cited two abstention principles in support of its ruling. First, the court cited *Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, which holds that federal courts may abstain from asserting jurisdiction over a case it would otherwise have jurisdiction over in rare situations involving concurrent state court jurisdiction. Second, the district court relied on the *Rooker-Feldman* abstention doctrine, which holds that federal district courts do not review state court judgments, which the court found included the order on appeal addressing the obligations of the manufacturer's insurance company to the manufacturer. The distributor and its insurance company appealed.

The Ninth Circuit affirmed. It first disagreed with the trial court's application of the *Rooker–Feldman* abstention doctrine. The doctrine does not apply to state court orders that are not final judgments, like the order on appeal in the related state case. The court further explained that even if an order is a judgment, the doctrine cannot not be invoked against a party to the federal action that was not a party in the state action; because the distributor was not a party to the state court action between the manufacturer and its insurance company, the doctrine did not apply. However, the district court properly applied the *Colorado River* abstention doctrine, because exercising jurisdiction over the declaratory relief would have required the district court to decide issues of state law that were already the subject of a state court action. The district court was within its discretion to find exceptional circumstances warranting dismissal of the federal action where maintaining jurisdiction would have resulted in piecemeal litigation.

Professional Responsibility

The First Amendment does not protect an attorney's alleged act of using confidential information to oppose a former client; accordingly, the former client's suit for breach of fiduciary duty survives an anti-SLAPP challenge by the attorney.

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

In this professional negligence action, a real estate development company, Oasis West, had previously retained the defendant-attorney to obtain approval of a redevelopment project. The relationship ended and, years later, the attorney became involved in a campaign to thwart the same redevelopment project. Oasis West sued the attorney, who in turn filed a special motion to strike the complaint under the anti-SLAPP statute, contending that all causes of action arose from protected activity. The trial court denied the motion, holding that the anti-SLAPP statute did not apply because the gravamen of the causes of action were not the attorney's petitioning activity but his breaches of the duties of loyalty and confidentiality. The Court of Appeal reversed, finding the claims arose from protected activity, and that Oasis West had failed to demonstrate a probability of prevailing on them. Specifically, the court found

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that the attorney had acted adversely to his former client with respect to an ongoing matter that was the precise subject of the prior representation, but concluded that this conduct was actionable only "in the context of subsequent representations or employment" and did not govern "the acts an attorney takes on his or her own behalf."

The California Supreme Court reversed. As an initial matter, the court bypassed the first prong of the anti-SLAPP analysis – whether a plaintiff's claims arise out of a defendant's protected conduct – citing the holding from *Obrien v. Jones* (2000) 23 Cal.4th 40, 57, that the Supreme Court has "inherent, primary authority over the practice of law." But the court also stated that the First Amendment does not protect an attorney's violations of his ethical duties to his client. To the contrary, attorneys are officers of the court and legitimately may be subject to ethical precepts that prevent them from engaging in otherwise constitutionally protected speech. Proceeding to the second prong of the anti-SLAPP analysis – whether the party has demonstrated a likelihood of prevailing – the court held that Oasis West's complaint survived the second prong because Oasis had proffered sufficient evidence to support the inference that the attorney had used confidential information acquired during his representation of Oasis in active and overt support of a referendum in opposition to the project.

An attorney who changes firms and has a sophisticated client sign an engagement agreement with his new firm has no duty to highlight for to that client a difference between the prior firm's engagement agreement and the new firm's agreement containing an arbitration clause.

Desert Outdoor Advertising v. Superior Court (Murphy) (2011) 196 Cal.App.4th 866.

In this professional negligence action, the defendant-attorney had represented the plaintiffs under a fee agreement that did not contain an arbitration clause. In the midst of the litigation, the attorney changed firms and the clients signed a new engagement and fee agreement that included an arbitration clause. The litigation was resolved adversely to the plaintiffs, who sued the attorney and his firm. The defendants petitioned to compel arbitration pursuant to the arbitration clause of the new firm's fee agreement. The plaintiffs opposed the petition, arguing that the attorney had not separately disclosed there was an arbitration clause in the new firm's fee agreement when the agreement from the attorney's prior firm did not have one. The trial court granted the petition to compel arbitration, ruling that California law expresses a clear public policy in favor of enforcing arbitration provisions, including attorney retainer agreements. The plaintiffs filed a petition for writ of mandate.

The Court of Appeal (First District, Division 1) denied the petition, stating that the attorney had no "duty to explain the arbitration clause that was clearly set forth in the fee agreement signed by the clients." The plaintiffs claimed failure to read the new arbitration agreement was not reasonable because the plaintiffs: (i) were sophisticated clients; (ii) were urged to read the new arbitration agreement; and (iii) were encouraged to seek the advice of their own counsel before executing it. As a result, the court held the scope of the attorney's fiduciary duties was not so broad so as to excuse the plaintiffs from reading the new fee agreement.

The relation-back doctrine applies in legal malpractice cases where all of the causes of action sound in professional negligence, even if original complaint was void of operative facts.

Pointe San Diego Residential Comm'y, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP (2011) 195 Cal.App.4th 265.

In this legal malpractice action, the plaintiffs' suit was based on their attorneys' alleged professional negligence during a complex, ongoing real estate litigation. The original complaint alleged only that their attorneys did not exercise due professional care in the handling of the litigation. As the real estate litigation progressed, the plaintiffs filed a series of amended complaints alleging more detail, culminating in a fourth amended complaint. The attorneys demurred on statute of limitations grounds. The plaintiffs claimed the operative complaint related back to their original complaint, which did not contain additional facts because they did not know the precise nature of their attorneys' malpractice since the litigation was ongoing and no final judgment had been entered. The trial court concluded that the claims asserted in the fourth amended complaint were time-barred, and that the relation-back doctrine did not apply because the original complaint was "void of operative facts." The court sustained defendants' demurrer without leave to amend and granted judgment on the pleadings. The plaintiffs appealed.

The Court of Appeal (Fourth District, Division 1) reversed. The the relation-back doctrine applies where all causes of action are based on the general right, asserted in the original complaint, to be free of negligence by their attorneys. Here, the court found that both the later-filed and original complaints rested on the same general set of facts, involved the same injury, and referenced the same alleged malpractice. Although the original complaint did not detail the specifics of the claim, defendants had superior knowledge of their conduct and the manner in which they may have breached the standard of care. The court pointed specifically to the fact the attorneys here had sufficient information to be apprised of the factual basis for the claim such that they could take steps to preserve the necessary relevant information for their defense and to notify their malpractice carrier of the claim.

Insurance

An insured may seek a judicial declaration of his rights before submitting his valuation dispute to the statutory appraisal process.

Doan v. State Farm General Insurance Company (2011) 195 Cal.App.4th 1082.

In this insurance class action, plaintiff sued State Farm for allegedly breaching its property insurance contracts and violating California law by settling first party damage claims using valuation methods that overstate depreciation. The trial court sustained State Farm's demurrer to the plaintiff's second amended complaint for breach of contract without leave to amend. The court held that the appraisal process for resolving disputes over valuation under Insurance Code section 2071 was an exclusive remedy. As a result, the plaintiff could

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not state a breach of contract cause of action because he had failed to first submit his valuation dispute to the statutory appraisal process.

The Court of Appeal (Sixth District) reversed, holding that the plaintiff could seek a judicial declaration of legal rights under the Insurance Code and his insurance policy before submitting his valuation dispute to the statutory appraisal process. The Legislature's mandate of an appraisal process in section 2071 was not an exclusive remedy. Thus, the plaintiff could proceed with a declaratory relief action under Code of Civil Procedure section 1060, and the trial court had discretion to stay the appraisal process pending resolution of the plaintiff's request for declaratory relief. Specifically, the plaintiff was first entitled to a judicial determination of the type of valuation methods the Insurance Code requires State Farm to use.

Labor and Employment Law

Hours worked to earn fixed payments received as commissions are exempt from overtime laws, whether or not the commissions are tied to the dollar value of the product or services sold.

Areso v. CarMax, Inc. (2011)
195 Cal.App.4th 996.

In this wage and hour class action, the plaintiff, a automobile sales consultant, sued her employer for alleged violations of the Labor Code, including failure to pay overtime compensation, waiting time penalties, unfair competition, and Civil Code section 2699 penalties. The plaintiff alleged that she was entitled to overtime compensation for hours worked to earn fixed commissions per vehicle sold. She argued her work did not fall within the overtime law exemption for workers who earn more than half their wages from commissions "based proportionately on the amount or value" of property or services sold. The trial granted the employer's summary adjudication motion on the overtime claim and dismissed the remaining causes of action without prejudice. The plaintiff appealed the order granting summary adjudication of the overtime claim.

The Court of Appeal (Second District, Division 1) affirmed. Fixed commissions on car sales constituted "commission compensation" exempt from overtime laws – even though they were not "directly related to the dollar amount of the product or services sold," the commissions were nevertheless "based proportionately on the amount or value" of property or services sold within the meaning of Labor Code section 204.1 because "[p]aying salespeople a uniform fee for each vehicle is proportionate – a one to one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold." On those grounds, the Court of Appeal affirmed the order granting summary adjudication.

Labor Code section 226.7, which authorizes a plaintiff to recover from an employer payment for meal and rest periods an employer fails to provide, allows up to two payments for each work day: one for failure to provide a meal period, and another for failure to provide a rest period.

United Parcel Service, Inc. v. Superior Court (Allen) (2011)
192 Cal.App.4th 1043.

In a coordinated group of wage-and-hour actions, parcel workers sought compensation from UPS for its failure to provide meal and rest periods pursuant to Labor Code section 226.7. Section 226.7, subdivision (b) provides that: "[i]f an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." UPS sought a pretrial determination that section 226.7 allowed only one such "premium" payment per work day, regardless of the number or type of break periods that an employer failed to provide. The plaintiffs disagreed, contending that section 226.7 allowed up to two premium payments per work day – one for meal periods and another for rest periods. The trial court found for the plaintiffs. UPS filed a petition for writ of mandate.

The Court of Appeal (Second District, Division Eight) denied the petition. The court first observed that, based solely on the section's plain language, the interpretation of section 226.7 advanced by each side was reasonable; therefore, the court turned to the legislative history of section 226.7 and the related wage orders. The court found that when the Legislature enacted section 226.7, it used the existing wage orders as a model. Those wage orders had provided a distinct remedy section for meal periods and another for rest periods. In conjunction with the public policy that statutes governing the conditions of employment must be construed broadly in favor of protecting employees, the court held that the plaintiffs could recover up to two additional hours of pay on a single work day, one for each type of period not provided by the employer.

Torts

An injured plaintiff may not rely on the sum stated in a medical provider's nominally "billed" rates to set the value of economic damages for past medical expenses where those rates were never paid by or on behalf of the injured person, and where the provider accepts as full payment a lesser negotiated amount.

Howell v. Hamilton Meats & Provisions, Inc. (2011)
52 Cal.4th 541.

In this personal injury action, the plaintiff's compensatory damages included past medical expenses based on the amount stated on "bills" from the medical care providers. The trial court granted the defendant's post-trial motion to reduce the plaintiff's damages for past medical expenses to the amount the providers actually accepted from the plaintiff's insurer as payment in full. The Court of Appeal

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reversed the reduction order, holding it violated the collateral source rule; and that the plaintiff's past medical expense damages should be the amount a healthcare provider nominally billed for the treatment.

The Supreme Court affirmed, holding that a plaintiff in a tort action who receives treatment for his or her injuries because of a defendant's wrong and "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." The court also concluded that a jury can be told the amount paid for medical services, but not the source of the payment (i.e., the plaintiff's medical insurer). Moreover, the special post-trial proceeding to reduce a plaintiff's past medical expense damages used by some courts, including the trial court here, was unnecessary given the availability of a motion for new trial on grounds of excessive damages.

Note: ASCDC submitted an amicus brief and participated in oral argument before the California Supreme Court in this case.

An employee of an independent contractor cannot sue the hirer of the contractor when the hirer failed to comply with workplace safety requirements, but the hirer implicitly delegated to the contractor the duty to comply with the requirements.

Seabright Insurance Company v. US Airways, Inc. (2011) 52 Cal.4th 590.

In this personal injury action, US Airways retained a contractor to maintain conveyor belts at an airport. During the course of this work, the plaintiff, an employee of the contractor, was injured when one of his arms was caught in a conveyor belt. The plaintiff contended that the conveyor belt lacked a necessary safeguard; that US Airways had a duty under Cal-OSHA regulations to ensure the safety of the conveyor belt; and that US Airways could not delegate this regulatory duty to the contractor. The trial court granted summary judgment in favor of US Airways based on *Privette v. Superior Court* (1993) 5 Cal.4th 689. The Court of Appeal reversed, holding that *Privette* permitted imposition of liability on the airline because it failed to ensure the contractor complied with Cal-OSHA regulations.

The Supreme Court reversed, continuing its course since *Privette* to limit the circumstances in which those who retain contractors may be held liable for injuries sustained by contractors' employees. Cal-OSHA regulations imposed a duty on US Airways to protect its *own* employees, but that the regulations did not preclude US Airways from delegating to the contractor the duty to comply with the regulations in order to prevent injury to the *contractor's* employees such as the plaintiff here.

Case pending in the California Supreme Court

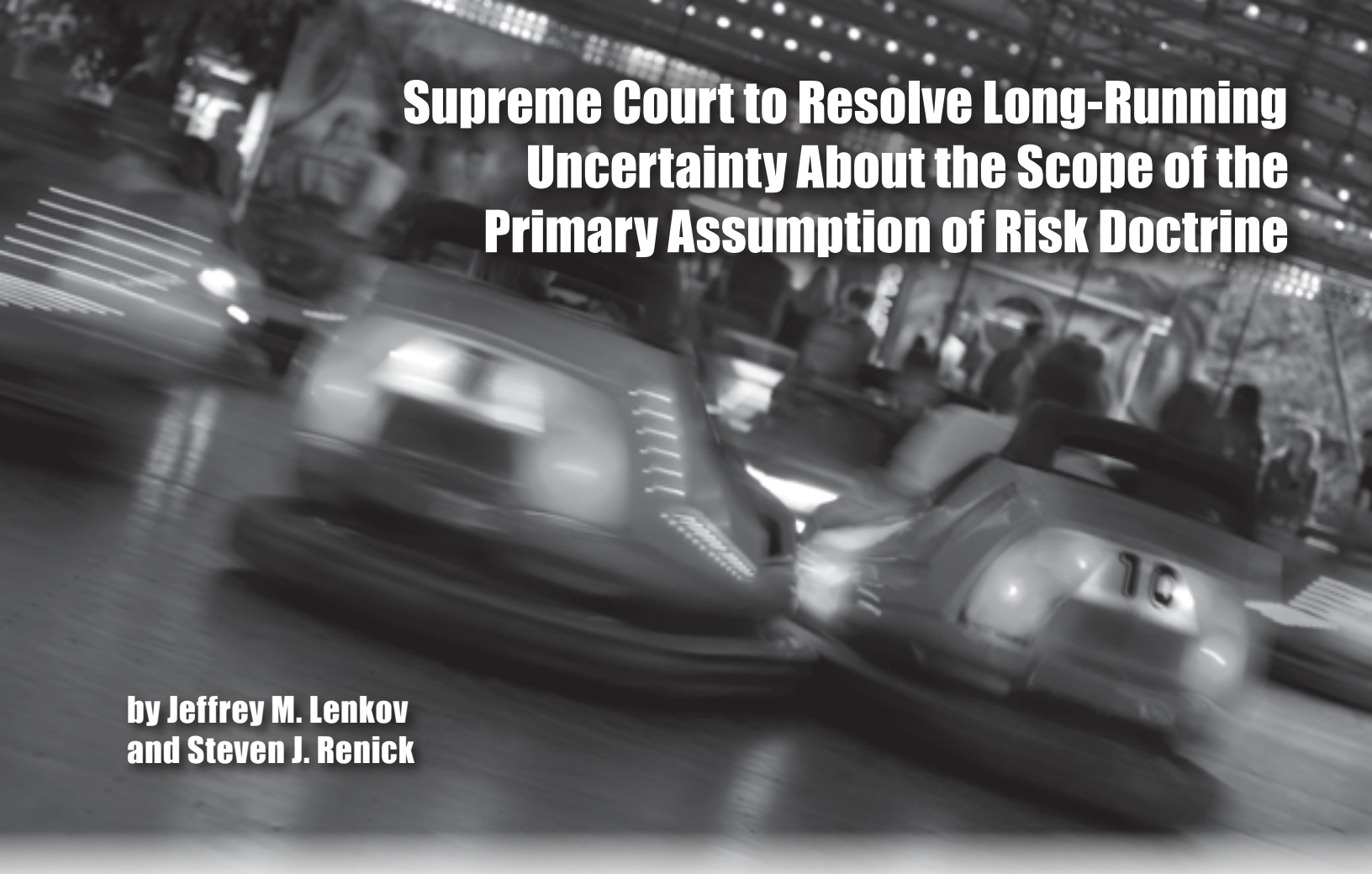
Does the common law primary assumption of risk doctrine, which bars a plaintiff's recovery for tort liability, apply only to active sporting activities, or does it also apply to any recreational activity that carries an inherent risk of injury, such as an amusement park ride?

Nalwa v. Cedar Fair, L.P. (2011) (case no. S195031) formerly published at 196 Cal.App.4th 566.

In this personal injury action, the plaintiff sustained injuries while riding as a passenger on an amusement park's bumper car ride, and she sued the amusement park's owner, Cedar Fair. The trial court granted Cedar Fair's motion for summary judgment on the ground that the primary assumption of risk doctrine barred recovery. It found that the plaintiff's injuries arose from bumping, a risk inherent in the activity of riding bumper cars, and that Cedar Fair had no duty to reduce the risks inherent to bumper car riding.

In a split decision, the Court of Appeal (Sixth Appellate District) reversed. The majority held that the primary assumption of risk doctrine applied only to "sporting-type activities," and that bumper car driving is not a sport. The dissent noted that there have been numerous California appellate decisions applying the primary assumption of risk doctrine to non-sport activities. In line with these decisions, the dissent explained that Cedar Fair had no duty to reduce the risks inherent to riding bumper cars because such reductions would fundamentally alter the activity.

The California Supreme Court granted review, framing the issue as follows: "Does the primary assumption of risk doctrine apply to bar recovery by a rider of a bumper car ride against the owner of an amusement park or is the doctrine limited to 'active sports'?"



Supreme Court to Resolve Long-Running Uncertainty About the Scope of the Primary Assumption of Risk Doctrine

by Jeffrey M. Lenkov and Steven J. Renick

In July 2005, Dr. Smriti Nalwa took her two children to California's Great America amusement park in San Jose, California. They decided to ride the Rue Le Dodge bumper car ride. As they stood in line waiting for their turn, Dr. Nalwa watched the ride. She later explained that she knew that, during the ride, she would be bumped by the other cars. She said this was what made the ride fun. There was even a warning at the entrance to the ride explaining that "Rue Le Dodge cars are independently controlled electric vehicles. The action of this ride subjects your car to bumping."

Dr. Nalwa got into one of the bumper cars with her son. Her son drove, bumping into several other cars during the ride. Near the end of the ride, Dr. Nalwa's car was bumped from the front and then from behind. Dr. Nalwa put her left hand out to brace herself and fractured her wrist.

Dr. Nalwa sued the owners of the amusement park, alleging multiple causes of action. Cedar Fair – the defendant by virtue of having purchased the park after this incident had occurred – brought a motion for summary judgment on the ground of primary assumption of risk. As was pointed out at the very beginning of that motion: "Even a child knows that if you go on a bumper car ride, you will get bumped by other cars. That's the whole point of a bumper car ride.... Sustaining an injury from being bumped by another car is a risk inherent in going on a bumper car ride." The trial judge agreed and granted the motion for summary judgment.

At this point, you are probably asking why you are reading about something so elementary in a cutting-edge magazine like *Verdict*? After all, we all know that part of the fun of riding a bumper car is the bump.

The answer is that while the fun of bumper cars is simple, the doctrine of primary assumption of risk is not. The doctrine has a long history, and, as originally conceived, was "defined as the voluntary acceptance of a specific, known and appreciated risk that is or may have been caused or contributed to by the negligence of another." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 325 (Kennard, J., dissenting).) But the adoption of comparative fault in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 all but eliminated assumption of risk as a viable defense.

That changed in 1992 when the Supreme Court decided the companion cases of *Knight v. Jewett* and *Ford v. Gouin* (1992) 3 Cal.4th 339. With these two opinions, the Supreme Court reinvigorated the all-but-dead assumption of risk doctrine, dividing it into two components: primary and secondary assumption of risk. Primary assumption of risk involves activities "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight*, *supra*, 3 Cal.4th 296, 314-315.) Primary assumption of risk operates as a complete bar to the plaintiff's recovery.

In contrast, cases involving secondary assumption of risk – "where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty" (*Knight*, *supra*, 3 Cal.4th 296, 315) – are viewed as comparative fault situations, where the trier of fact must apportion liability between the plaintiff and the defendant.

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In *Knight* and *Ford*, the Supreme Court did not specify the reach of the primary assumption of risk doctrine; specifically, whether it applied to all activities in which people may engage, or only some activities. Unfortunately, this has led to a split of authority, which brings us back to Dr. Nalwa and her bumper car ride.

Following the granting of the defendant's motion for summary judgment, Dr. Nalwa appealed. In a two-to-one decision, the Court of Appeal for the Sixth Appellate District (located in San Jose) reversed the summary judgment, holding that the primary assumption of risk doctrine was not applicable to amusement park rides. The two judge majority relied on the line of cases that limit application of the primary assumption of risk doctrine to active sports, which the majority described as activities done for "enjoyment or thrill," requiring "physical exertion as well as elements of skill," and involving "a challenge containing a potential risk of injury." (*Nalwa v. Cedar Fair, L.P.* (2011) 196 Cal.App.4th 566, 593; superseded by grant of review.) Based on this authority, the majority concluded that riding in a bumper car was not an active sport – one where the participant controls their activity – and thus was not an activity subject to the primary assumption of risk doctrine.

Justice Wendy Clark Duffy vigorously dissented . She relied on another line of cases, which applied the primary assumption of the risk doctrine more broadly. Justice Duffy noted that while "[t]here are numerous instances in which the court in *Knight* uses language that might suggest that the doctrine applies only to sports ... there are other times the *[Knight]* court suggests that primary assumption of risk may bar a plaintiff's injuries sustained in sports ***or*** other activities." (*Nalwa*, *supra*, 196 Cal.App.4th at 593, fn.9 [Duffy, J., dissenting]; emphasis added.)

Justice Duffy highlighted that the doctrine had been applied to activities as diverse as: working as a nurse's aide in a hospital (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1765); attempting to catch a skateboard deck thrown into a crowd (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 1000); and sustaining injuries where the plaintiff was "burned when he tripped and fell into the remnants of the Burning Man effigy while participating in the festival's commemorative ritual" (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658-659). Based on this broader application of the primary assumption of risk doctrine, Justice Duffy concluded that the summary judgment should have been affirmed.

> "The integral conditions of the bumper car activity at issue here are such that they render the possibility of injury obvious. The fundamental nature of Rue Le Dodge is the bumping of cars. Riders are continually jostled about during the ride. The purpose of the amusement park ride is to provide thrills and entertainment to its riders from bumping fellow riders while attempting to avoid being bumped by others....
>
> Given that the whole point of the Rue Le Dodge ride is bumping, imposing

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a duty of care for *any* injury resulting from a participant being bumped would clearly either require that an essential aspect of the [activity] be abandoned, or else discourage vigorous participation therein." (*Nalwa*, *supra*, 196 Cal. App.4th at 596 [Duffy, J., dissenting]; emphasis in original.)

Cedar Fair sought review of the Court of Appeal decision, and supporting amicus letters were submitted by some industry leaders. On August 31, 2011, the California Supreme Court granted Cedar Fair's petition for review.

Cedar Fair argued in its petition that the Supreme Court should resolve the split of authority on the scope of the primary assumption of risk doctrine. The *Nalwa* opinion and its dissent clearly showed how allowing these two competing theories to simultaneously exist enables judges to come to diametrically opposite legal conclusions in factually indistinguishable cases. Cedar Fair explained that:

"This situation presents tremendous difficulties for persons and companies in California that market – for profit or otherwise – activities that present inherent risks for the participants. If the primary assumption of the risk doctrine applies to their particular activity, their duty to the participants regarding those inherent risks is limited to ensuring that they don't increase those risks beyond the level inherent in the activity. But if the doctrine does not apply, then they may have an obligation to take steps to reduce, and possibly eliminate, that risk."

The *Nalwa* majority made clear that it believed California should follow this latter course:

"Amusement park owners' liability for injuries on their rides will affect the 'nature' of rides. It will make them safer ... [G]iven the regulatory requirements to assure safety on amusement park rides, we conclude that any effect on the rides can only be a positive one consistent with public policy."

(*Nalwa*, *supra*,196 Cal.App.4th at 579.) Justice Duffy, on the other hand, noted the downside to expanding liability in the manner advocated by the majority.

"Imposing liability would have the likely effect of the amusement park either eliminating the ride altogether or altering its character to such a degree – by, for example, significantly decreasing the speed at which the minicars could operate – that the fun of bumping would be eliminated, thereby discouraging patrons from riding. Indeed, who would want to ride a *tapper car* at an amusement park?" (*Nalwa, supra,* 196 Cal.App.4th at 597 [Duffy, J., dissenting]; emphasis in original.)

The Supreme Court's decision in *Nalwa* will likely have a profound effect on the application of the primary assumption of risk doctrine in California. If the Supreme Court adopts the approach taken by the *Nalwa* majority, primary assumption of risk will become a very narrow defense, applicable only to cases arising from injuries sustained while a plaintiff is participating in an active sport. The doctrine will not apply to any non-sports cases – even those where a plaintiff is injured by a risk inherent in the activity in which he or she was participating, and even if the risk was obvious and was one that the plaintiff was fully aware of. In particular, it will not apply to injuries that persons riding on bumper cars may suffer when they are bumped by cars being driven by other persons riding bumper cars, even though bumping is the very reason that all of those persons are on the cars in the first place.

On the other hand, if the Supreme Court adopts the approach taken by Justice Duffy, the primary assumption of risk doctrine will apply more broadly than just to active sports. In that case, the Court will have to decide just how broadly to apply the doctrine. It

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could decide to make the doctrine generally applicable; i.e. if a plaintiff participating in any type or category of activity is injured by a risk inherent in that particular activity, that plaintiff will be barred from bringing suit over that injury. Alternatively, the Supreme Court could decide to limit the types of activities for which the doctrine will be applicable; broader than just active sports, but narrower than all activities that carry inherent risks.

The importance of this case cannot be overstated. Every business and other organization in California that offers any sort of activity to the public will be affected by this decision, because there are risks inherent in many, if not most, of those activities. The *Nalwa* majority imposed a burden on those businesses and organizations to identify, minimize, and even eliminate those risks; or face what amounts to strict liability if a patron is injured through one of those risks. If this becomes the rule in California, every business and organization will have to decide whether they can eliminate all inherent risks from all activities they offer. It could come down to an all-or-nothing proposition for business owners. If they can't, or won't, eliminate these risks, they will have to decide whether they must stop offering those activities entirely.

The alternative is to recognize that individuals must exercise personal responsibility when engaging in activities of all sorts. It is up to the individual to decide whether he or she wants to participate in a particular activity in the face of risks that are inherent in that activity. That seems to be the approach recently followed by the Second District Court of Appeal, which affirmed summary judgment in favor of the defendant (which organized a motorcycle ride on public streets to raise funds for a children's charity), holding that "participating in an organized motorcycle ride along public highways with large numbers of riders is more similar to an organized bicycle ride," as to which the primary assumption of risk defense applies, "than it is to being a mere passenger in a boat, a recreational vehicle or lone motorcyclist." (See *Amezcua v. Los Angeles Harley Davidson* (Oct. 27, 2011, B224748) __ Cal.App.4th __ [2011 WL 5085103].

The Supreme Court's decision in *Nalwa*, likely to be decided within the next year or two, should help clarify what seems to be a continuing uncertainty in the courts as to what assumption of risk means for recreational activities, Let's hope that the justices don't take the bump out of bumper cars!

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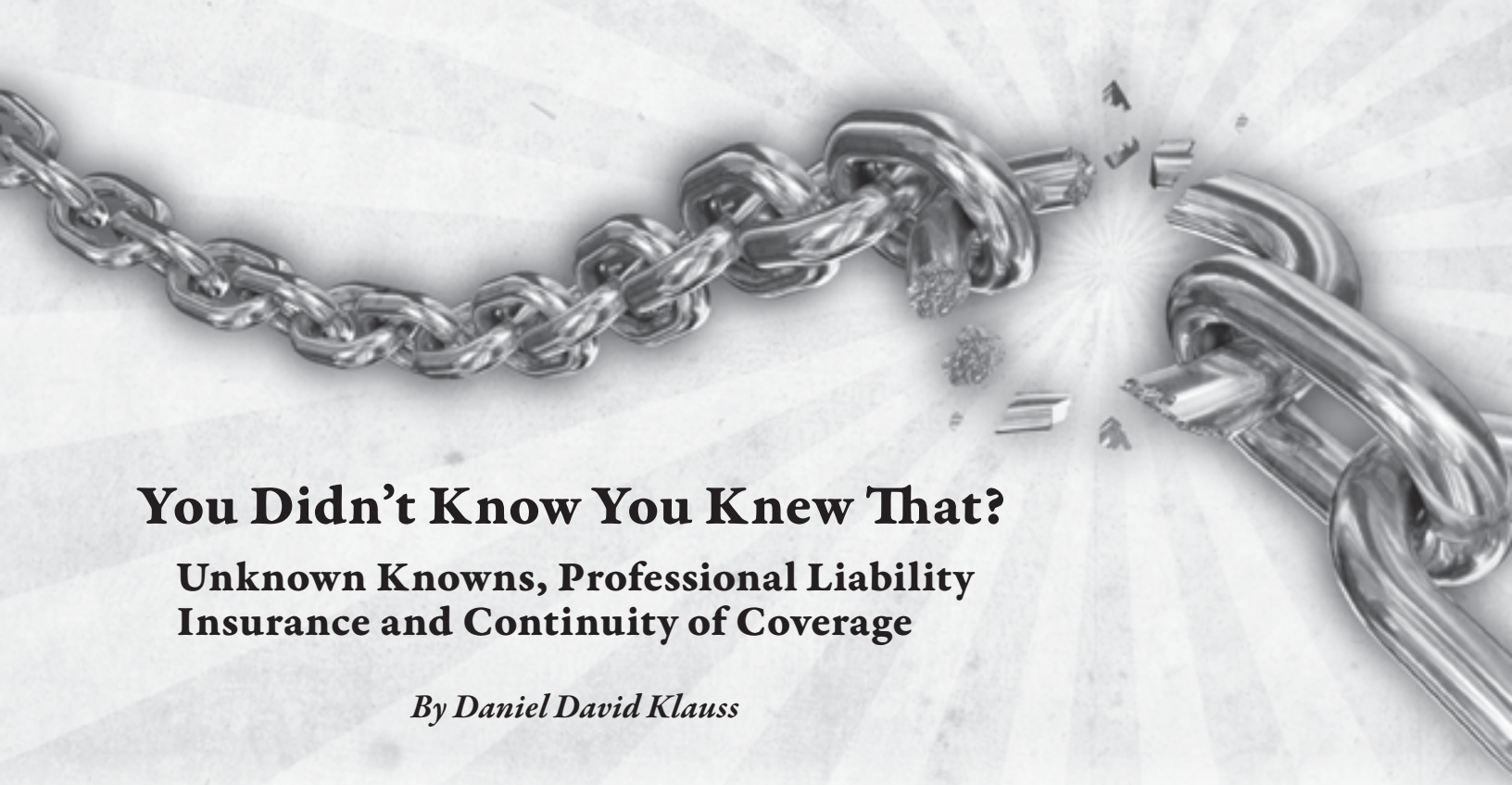

You Didn't Know You Knew That?

Unknown Knowns, Professional Liability Insurance and Continuity of Coverage

By Daniel David Klauss

con·ti·nu·i·ty ***noun*** \kän-tə-ˈnü-ə-tē, -ˈnyü-\

1. The unbroken and consistent existence or operation of something over a period of time
2. A state of stability and the absence of disruption

[from Merriam-Webster, the Free Dictionary Online]

Claims-made coverage for law firms is tricky. Insurance companies *like* offering claims-made coverage because it affords them a much better opportunity to obtain financial certainty on a volatile and long-tail line of insurance. This means that claims-made policies often contain pitfalls that can trap a firm, by using the classic post-Watergate question, "What did you know and when did you know it?"

Claims Example 1: The Prior Knowledge Exclusion and Continuity, or the Lack Thereof

A law firm decides to become more aggressive in pursuing an unpaid fee; the client responds verbally (and under this policy, a verbal chargeis not a "claim"), complaining about the quality of the legal work. The call comes *before* the firm's Lawyers Professional Liability (LPL) insurance renewal. Having reviewed the matter beforehand, the firm is satisfied there is no issue with the quality of the work – this is just a classic example of a deadbeat client trying to wriggle out of a valid debt – and *promptly* sues the client.

And promptly gets a countersuit for malpractice. The countersuit is filed *after* the firm's LPL renewal.

Being a responsible Insured, the firm *promptly* provides notice of the claim to its LPL insurer, with whom the firm has been insured for over 10 years.

And promptly gets a reservation of rights based on the policy's Prior Knowledge exclusion (which applied at each renewal of the policy; see below), as well as for failure to timely report the matter. The insurer argues that the policy mandated the reporting of *potential* claims as soon as they were identified by the firm, and thus should have been reported under the prior policy.

"Tsk, tsk," says the underwriter, after the firm complained to him. "This was badly handled by our claims people, and should have been brought to my attention earlier. I am happy to overrule the claims department and make a *business exception* for such a long-standing, valued client to provide coverage for this matter."

Exception-schmeption, as Latin scholars say. In reality, the law firm shouldn't be relying on the good nature of its insurers – or other extra-contractual factors, like whether it is located in a so-called Notice-Prejudice state (where an insurer must prove prejudice before denying a claim based on failure to comply with the policy notice provisions) – in avoiding disputes about who knew what

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when, and getting its claim paid. The issue should be addressed in the LPL policy wording itself, with the firm negotiating for "Continuity of Coverage" provisions:

Specifically, the customary Prior Knowledge exclusion bars coverage for claims in one policy year arising out of "circumstances" known in a prior policy year to any Insured which could reasonably be expected to give rise to a claim in the future. (For purposes of brevity, "potential claims" and "circumstances which could reasonably be expected to give rise to a claim in the future" are generally referred to as "circumstances.") The policy in the example above applied the Prior Knowledge exclusion at *each renewal,* notwithstanding the fact that the law firm had been covered by the same insurer for over 10 years. Firms should look for: a policy with *no* prior knowledge exclusion (rare, but not unheard of); failing that, look for an exclusion that is applied only to matters known prior to the *inception of the first policy written and continuously renewed* by the current insurer; lastly, if possible, limit the effects of the exclusion to matters known to the Senior Governance (e.g. Management Committee) of the firm.

Claims Example 2: Reporting After the Policy Period Expires

A law firm receives a letter of demand on behalf of the FDIC. Since the letter is somewhat vague, although it arguably shows intent to hold the law firm responsible for certain identified acts (and thus qualifies as a "claim"), the firm does nothing with it for 3 months, whereupon the firm reports it to its then current LPL insurer. Unfortunately, that 3-month period straddled the renewal date, and a change in carrier.

Logistically, for a law firm of any size, a provision that a claim must occur during the policy period, *and be reported to the insurer during the policy period,* can be a difficult issue. Depending on the definition of "Claim" (see below), an angry phone call from a client or adverse party could qualify as an event that must be reported to preserve coverage rights. If such an event occurred, say, 4 or 5 days before the end of the policy period, how confident could the firm be that the call would be brought to the attention of the right people within the firm, and then reported to the insurer on the risk at that time, prior to the expiry of that policy?

Because of that problem, most (but not all) policies contain post-expiry windows – 30 or, more commonly, 60 days – within which to report claims *to the prior insurer* made during the policy period. (Perversely, some of these post-expiry windows apply only if the policy is cancelled or non-renewed, not if a firm stays with the same insurer; presumably, the "business relationship" with the insurer would work to the firm's favor if it somehow blew the notice provisions, but that's not at all clear from the policy.) However, in many jurisdictions, a policy's explicitly-defined window is a hard and fast rule, and an insurer need show no prejudice

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from late notice – so notice 60 days after the policy expiry means coverage, and notice 61 days after expiry means no coverage.

It's for that reason that firms and their brokers are wise to negotiate for policy language that provides coverage for "Claims made during the policy period and reported *as soon as practicable"* – i.e., with no finite window. Such language would protect the firm in Example 2 by pulling the claim into the *prior* insurer's policy period, as it in no event would have been covered by the new insurer (which is going to cover only claims made during that insurer's policy period).

Claims Example 3: The timing of a firm's "awareness" of circumstances, and problems that can arise because of a 14-Hour Delay in Reporting

A law firm undertakes routine annual polling of partners and associates regarding known circumstances prior to the firm's LPL renewal, which has the benefit of ensuring that any future claim related to the circumstance will fall within the policy period during which the circumstance was reported. In response to the poling, a partner sends an e-mail to the firm's Administrator, saying, "Actually, I am aware of one potential problem…." Unfortunately, he sends it after 6 pm on the eve of policy expiry. The Administrator doesn't get the e-mail until the following morning, at which point she reports it to the firm's current carrier – which is the same carrier as last year (and the 4 years before that).

"Ahh," says the claims examiner. "It's true that the policy gives you the right to report a circumstance, but only if you become aware of it *during the Policy Period*. The Policy Period is a term defined in the Declarations of the policy. Since you became aware of this issue in the *last* policy period – and since that period is now expired – you don't have the right to report this as a circumstance. Never fear, though: when and if this matter turns into a claim, it'll be covered – as long as you're still insured by us when it does and as long as other claims during that period have not consumed your policy limits – because our policy doesn't *mandate* the reporting of circumstances."

But what if the firm decides to change carriers before the matter turns into an actual claim?

Some call the specific policy language in the above example the "Hotel California" provision. It typically states, "If, during the Policy Period, you become aware of a circumstance, you *may* report it…." But if, in a *prior* policy period with the same insurer, you had knowledge of a potential claim but didn't report it, you "can check out any time you like," as the song goes, but you can never leave that insurer without risking the matter will go uninsured, since a new carrier is very, very rarely going to be willing to provide coverage for a claim arising from a prior

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known event. By the way, if a firm's insurer insists it would never interpret this policy language in that manner, the firm would be well-served to get that representation in writing (as we, acting as brokers on behalf of a firm in this situation, thankfully had done).

Key to the issue of reporting circumstances, however, is to ensure that the policy *allows* the firm to report them (and lock in the current policy year for when the matter turns into an actual claim), but does not *require* such reporting: because the standard for defining circumstances is what could be "reasonably" expected to give rise to a claim in the future, and because that standard is highly subjective, no firm wants to give an insurer the opportunity to reserve rights based on failure to timely report a matter.

Claims Example 4: broad definitions of "claim" that trigger tricky reporting obligations.

A law firm pats itself on the back for having obtained a policy that permits, but does not require, reporting of circumstances during a policy period in which no claim was made, creating the option of pinning a potential future claim to a policy period preceding that in which the claim was made. The firm learns that a client has called to bellyache about an outcome that wasn't quite as good as the client was expecting, but the firm decides not to report the matter to its carrier because the firm was already defending against another claim that was eroding the policy limits, and figures it would be better for this new matter to fall within a future policy period if and when a complaint is ever filed. The firm's risk management partner, however, says to check in with the firm's E&O insurance broker, and finds out this may not work out as planned.

Tied closely to the issue of optional reporting of circumstances is the definition of claim: if you have Optional Reporting, but your policy's definition of claim is "any demand" (i.e., there isn't a requirement that the demand be reduced to writing to qualify as a claim), then once again, you're open to an argument that a matter was technically a claim, say, at the point the client first called your firm to complain about the quality of the legal work (see the 1st claims example above). A nice, tight, narrow definition of claim reduces the reporting obligation on a law firm, and thus minimizes the chances you'll get a reservation of rights on failure to timely report.

Claims Example 5: reporting of claims and circumstances during the application process.

A firm receives a complaint from the SEC, and reports the matter to its insurer. The insurer, in looking through the allegations contained in the complaint, alleges that the firm knew that it had inadequate systems in place to do the sort of work in which the firm specialized (the specific details are not important), and that, knowing the systems were adequate, the firm should have known that a claim was likely to arise from that fact - and thus should have disclosed it as a potential claim in the application for insurance. Subsequently, the insurer moves for rescission of the entire policy based on material non-disclosure.

Any provision of Continuity of Coverage in the policy language is potentially compromised by the renewal application process. If your insurer insists on a full disclosure of all circumstances at each renewal, and if it issues its renewal based on that application, a firm is always potentially exposed to having its policy rescinded based on a material omission in the application – that is to say, if you miss reporting a circumstance in the application for whatever reason (e.g., some associate was sitting on the problem), you may not have coverage. In renewing with the same insurer, ask to be relieved of disclosing claims information (which the insurer should already have, since claims reporting is not technically optional, and you presumably will have reported all claims) or circumstance information (on the theory that, if the policy doesn't *require* you to report circumstances, neither should your application form).

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Liability Insurance –
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In summary, look for these five continuity-of-insurance features:

1. Either no Prior Knowledge exclusion, or one that applies only to matters known prior to the inception date of the *first policy written and continuously renewed by your current insurer*. That way, as you stay with one insurer over a number of years, you build that contractual continuity over time. Also, try to limit the scope of any Prior Knowledge to the Senior Governance Committee.

2. Scope of Coverage applying to Claims made during the policy period and reported *as soon as practicable*. Failing that, some defined window post-expiry (60 days is common) to report such claims.

3. The option to report circumstances, but not the obligation. Also, look for language that doesn't tie your ability to report such matters only to the policy period in which you became aware of them.

4. A narrow definition of claim. Look for language that limits what a claim is (and thus what the reporting duty is) to a specific, tangible event. Requiring that a demand be made in writing to qualify as a claim is a key piece of the equation.

5. A renewal application that doesn't require disclosure of historical claims and circumstance information.

Dan Klauss is a Senior Vice President with Aon Risk Solutions. He is National Practice Leader for Aon's Mid-Sized Law Firm Initiative, and has been an LPL insurance broker for mid-sized and large law firms since 1988.

ASCDC 51ST ANNUAL SEMINAR

KEYNOTE SPEAKER – Friday Luncheon
James Carville

James Carville Looks at Politics – Today and Tomorrow

James "The Ragin' Cajun" Carville is America's best-known political consultant. His long list of electoral successes evidences a knack for steering overlooked campaigns to unexpected landslide victories and for re-making political underdogs into upset winners. His winning streak began in 1986, when he managed the gubernatorial victory of Robert Casey in Pennsylvania. In 1991, Carville drew national attention when he led Senator Harris Wofford from 40 points behind in the polls to an upset landslide victory over former Pennsylvania Governor and U.S. Attorney General Richard Thornburgh. But his most prominent victory was in 1992 when he helped William Jefferson Clinton win the Presidency. Carville is also a best-selling author, actor, producer, talk-show host, speaker and restaurateur.

— OTHER GUEST SPEAKERS —

Roger Crawford

Sports Illustrated calls Roger "... one of the most accomplished physically-challenged athletes in history." Roger is a leading authority on developing human potential and he has an inspiring message to share.

Steve Kelley

Steve Kelley is an amusing man both sitting down and standing up. He is the political cartoonist for *The Times-Picayune* in New Orleans as well as a nightclub comedian who has made seven successful appearances on *The Tonight Show.* Kelley's political cartoons are widely syndicated, and have appeared in *Time, Newsweek, The Washington Post, The New York Times,* and *USA Today.* In addition to *The Tonight Show,* Kelley has performed at Harrah's, The Desert Inn, The Riviera, Trump Plaza, and Carnegie Hall.

— SEMINAR TOPICS INCLUDE —

Year in Review – Case Highlights and Hot Issues in Insurance Bad Faith
Ostensible Agency • Defense Nightmares • Ethics
If It's the Least Bit Interesting, Don't Do It – What You Can and Can't Do in the Workplace
and, a Practice Track to Include: Jury Selection, Cross Examination, and Visual Aids and Closing Arguments

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Kara Sophie Baysinger and Michele Coleman Mayes

Courageous Counsel: Conversations with Women General Counsel in the Fortune 500

Leverage Media Publishing, 2011

By Diane Mar Wiesmann

When I was in law school in the early 80's, I took what was then called a "hot tub" class on different legal careers. Not alternative. Different. Every week, a different kind of attorney would come and talk to us about his/her area of practice. One week, we had a much-anticipated speaker: in-house counsel for "Ugly Duckling Rent-A-Car." What was it like to work in the world of "big" money, endless corporate resources, elbow-rubbing with CEO's? Well, the speaker was nice enough. But she looked kind of tired. At the end of the class, the impression I got was that there was big money all right. But it wasn't in the legal department. And it was just that. A department. Another department in another corporation, vying for the same money that other departments fought for from the corporate budget every year. And she didn't rub elbows with the CEO. In fact, she monitored corporate compliance. She looked at contracts. She oversaw some lawsuits but not all of them. After all, there was insurance for that. And she didn't go to court (eye-opening). As a law student looking for the prestige and cache of being a "lawyer," in a law firm, who went to trial, this was not exactly glamorama.

Fast forward (thankfully) to 2011, and the role of corporate legal services has evolved to a new sheen and purpose:

> As the moral compass or "conscience" of the corporation, today's general counsel is no longer at arm's length from the business, but familiar and in close contact with all of its working parts. Like a doctor, the general counsel must monitor and examine legal, ethical, governance, and compliance issues for overt or lurking risk to the body corporate....be ready to perform immediate triage to assess and remediate the situation before it reaches crisis proportions. Protecting the interests of the corporation is the top priority for general counsel today....

What, you ask, does this have to do with women? According to the authors, women have a stronger set of core characteristics that suit them for the demands of corporate legal leadership: sensitivity, consensus-building, intuition, empathy and emotional IQ.

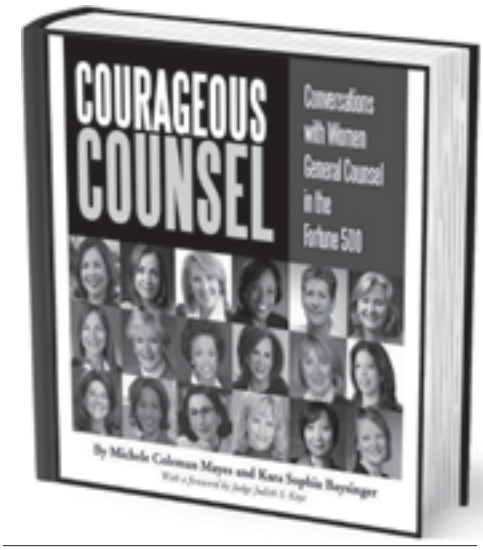
The book also highlights the journeys of women general counsel for the top companies in the world: what motivated them to pursue the law (few women interviewed for the book attributed their motivation to outright feminism); and in some cases, what they encountered when they left law school and entered the male-dominated world of practice: In 1988, Pamela Strobel heard an influential partner in her firm refer to women being admitted to a top Chicago business club by saying, "Pretty soon they're gonna admit dogs."

Many of the women described having one or more mentors. Collective mentoring was not uncommon. Giving credit where credit was due, Michelle Banks, general counsel for Gap, Inc., pointed out that there was a lack of female mentors. "Men, far more than women, were the ones stepping up to mentor me."

Many general counsel succeeded by taking risks: "Taking risks demonstrates the leadership skills and professional judgment necessary to rise to the top of an organization. Even if you do not aspire to reach the executive suite, taking risks shows you have the strength and flexibility to handle more interesting, challenging work."

Peppered with the perspectives of dozens of female general counsel, this book advocates no one way to the top. "[I]t's many steps along many different paths...." Paradoxically, women hold just 94 of general counsel positions in the Fortune 500 because they lack sponsorship. The book goes on to describe what has been and still needs to be done to make way for women in the legal leadership of corporate America.

Written by Michele Coleman Mayes and Kara Sophia Baysinger, this book takes the reader from the first emergence of women in the field of law to the springboard for its future. It cites to studies and resources that carry the ring of credibility with them. In the end, it not only legitimizes the role of women as corporate counsel, but it also inspires the reader to apply the leadership ideas beyond the corporate conference room, to the practice of law and to life as a whole.



amicus committee report

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted amicus curiae briefs in several recent decisions from the California Supreme Court and California Court of Appeal.

Most recently, ASCDC's Amicus Committee has helped secure three major victories for the defense bar.

ASCDC submitted an amicus brief and presented oral argument to the California Supreme Court in *Howell v. Hamilton Meats* (2011) 52 Cal.4th 541. In *Howell*, the court held that a plaintiff in a tort action who receives treatment for his or her injuries because of the defendant's wrong and "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." Plaintiffs had argued, and some Courts of Appeal had held, that, under the collateral source rule, the damages should be the amount a healthcare provider has nominally billed for the treatment even if the provider has accepted a lesser amount as full payment from the plaintiff's health insurer under a negotiated contract. The court also concluded that the jury can be told the amount that the plaintiff's insurer paid for medical services, but not the source of the payment. Moreover, some Courts of Appeal had left for a special post-trial proceeding the reduction of a plaintiff's medical expense damages if they exceeded the amount paid by the plaintiff's insurer. The Supreme Court found such a procedure unnecessary, given the availability of a motion for new trial on grounds of excessive damage.

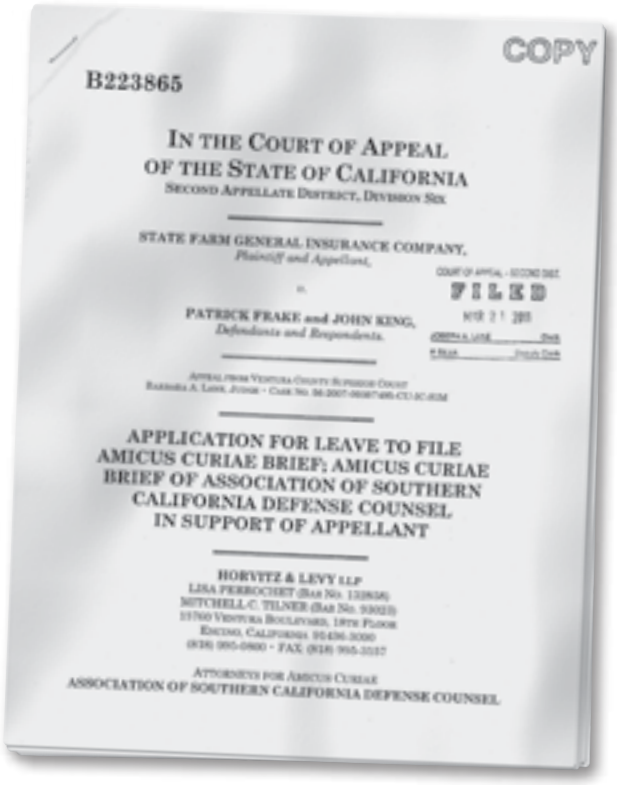
ASCDC also had requests for publication granted in *Dozier v. Shapiro* (Sept. 27, 2011, B224316) __ Cal.App.4th __, 2011 WL 4448549, and *Adams v. Ford Motor Co.* (Sept. 29, 2011, B225791) __ Cal.App.4th __, 2011 WL 4494139. In *Dozier*, the trial court excluded plaintiff's treating physician from testifying regarding the standard of care when opinion was not offered at deposition. The Court of Appeal affirmed, originally in an unpublished decision, and then granted ASCDC's request for publication. In *Adams*, the Court of Appeal held that a $10,000 offer by the defendant in a product liability action was not a "token offer" and, thus, defendants were entitled to Code of Civil Procedure section 998 costs against the plaintiff after a defense verdict. Again, the Court of Appeal's opinion was originally unpublished and then the court granted ASCDC's request for publication.

Pending Cases at the California Supreme Court

ASCDC's Amicus Committee has submitted *amicus curiae* briefs in the following cases pending at the California Supreme Court of interest to ASCDC's membership:

1. *Coito v. Superior Court,* No. S181712. ASCDC submitted an *amicus curiae* brief, drafted by Paul Salvaty of the Glaser Weil firm, in support of protection for the fruits of attorney investigative efforts. This case addresses the work product doctrine and the extent to which parties have to answer form interrogatory No. 12.3 and produce witness statements that allow an opposing party to piggyback on counsel's investigation. ASCDC had also urged the Supreme Court to grant review in this case.

2. *Aryeh v. Cannon Business Solutions*, No. S184929 This case addresses the following issues: (1) May the continuing violation doctrine, under which a defendant may be held liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period, be asserted in an action under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)? (2) May the continuous accrual doctrine, under which each violation of a periodic obligation or duty is deemed to give rise to a separate cause of action that accrues at the time of the individual wrong, be asserted in such an action? (3) May the delayed discovery rule, under which a cause of action does not accrue until a reasonable person in the plaintiff's position has actual or constructive knowledge of facts giving rise to a claim, be asserted in such an action? The Amicus Committee has submitted an amicus brief on the merits drafted by Renee Konigsberg of Bowman & Brooke.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SECOND APPELLATE DISTRICT, DIVISION SIX

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Plaintiff and Appellant,
v.
PATRICK FRAKE and JOHN KING,
Defendants and Respondents.

FILED

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF APPELLANT

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How the Amicus Committee Can Help Your Appeal or Writ Petition and How to Contact Us

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

continued on page 33

Amicus Committee Report – continued from page 32

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.
2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.
3. Letters requesting publication of unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various issues, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, please feel free to contact any Board member or the chairs of the Amicus Committee who are:

Steven S. Fleischman
Horvitz & Levy
818-995-0800

Robert Olson
Greines, Martin, Stein & Richland LLP
310-859-7811

J. Alan Warfield
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213-243-6105

You may also contact members of the Amicus Liaison Subcommittee who are:

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Josh Traver, *Cole Pedroza*

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March 1-2, 2012
51st Annual Seminar
Biltmore, Los Angeles

June 15, 2012
ASCDC Golf Tournament
(exact location TBD)

June 15, 2012
San Bernardino Judiciary Reception
Riverside

September 14-15, 2012
Santa Barbara Seminar