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— staff —

editor
Lisa Perrochet

executive director
Jennifer Blevins

art director
John Berkowitz

contributors
Roxana Amini
Michael D. Belote
Patrick C. Farber
Hon. Joe Hilberman
Patrick A. Long
Connie Lopez
John F. Querio
Felix Shafir
Carol Sherman
Patrick E. Stockalper
Chrisopher P. Wesierski
Diane Mar Wiesmann

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president's message

Fixing the Broken Record

Diane Mar Wiesmann
ASCDC 2012 President

As president of an organization as prominent and diverse as ours, and in the spirit of carrying out our theme to "Connect" this year, I have the privilege of going out to the community to ceremonial events as the voice of the civil defense bar. The civil defense bar. Not the other defense bar (not that there is anything wrong with that). I recently encountered a reporter who quipped that the defense bar was more "interesting" – after all, our clients were considered innocent until proven guilty, weren't they?

Let the broken record play.

First, we are not the other defense bar (not that there is anything wrong with that). Second, there are many fascinating plaintiffs' attorneys, and their work is hardly boring. Third, I take issue with the insinuation that if someone is a defendant in a litigated matter, they did or did not do something to deserve being sued and I was only there to help them avoid responsibility, which made me and my job "interesting."

This dismal misperception of civil defense attorneys is not new. In fact, it is consistent with the overall negative image of attorneys in general. Most of us grin ruefully whenever an attorney joke is made. But it is that very internal fortitude that serves as the underpinning of the professionalism required to counsel and advise our clients at all times, to advocate on their behalf, and to serve the court as its officers. Plaintiff or defense, it is a meaningful profession.

However, this year more than any other, we face changes that will impact our collective livelihood. At this writing, we are about to see unprecedented cuts to court services: reduced hours, courtrooms, courtroom personnel, court services and other unnamed cuts-in-progress. Legislation is proposed that will impact our clients and our practice areas, and I venture to say that the business of law as we know it may never be the same again--for anyone. It is thus important to "connect" and work together to manage these changes as they relate to our clients and practices.

At this writing, we have already connected at a reception with new lawyers in practice under five years. On June 15, we will head out to Oak Quarry Golf Course in Riverside County to "connect" over a friendly round of golf. We invite the judicial officers of Riverside and San Bernardino Counties to join us over golf and/or a post-tournament reception in their honor. In July, we will talk about the new *Brinker* decision in Orange County, and spend some time connecting with Orange County judges. In September, we will head up to Santa Barbara for the return of the Medical Malpractice Seminar; we will provide medical education, learn more about Medicare liens and courtroom technology, and we will honor our Santa Barbara, San Luis Obispo, Ventura, and Kern County judges. In October, we will come back to Los Angeles for a "Hot Topics" seminar and another Young Lawyers reception. In November, we will hold our Bi-Annual Management seminar. In December, we will revisit Construction Defect, and honor our Orange County judges; we will also thank our Los Angeles judiciary in our Annual Judges' Night.

Along the way, we will "connect" in other ways as well: we will keep you in touch with the progress of proposed legislation, the relevance of the different tax bills we will see this fall, cases on appeal that will affect you, and offer a better understanding of the changes on their way. This year more than any other, we are here to make the practice of law better for you.

There is more to our practice than a tiresome clarification of what kind of defense attorney we are. There is honor and value in what we do, and now in the face of impending changes, it is time to "connect" and adapt. I invite you to invest some of your valuable time in our activities this year, and to take advantage of the benefits of membership in the ASCDC. This year more than any other, you'll be glad you did.

Gut and Amend

Michael D. Belote
CDC Representative

In Sacramento circles, there is an old axiom that the legislature makes the rules, so the legislature can break them. There are a few constitutional limitations on legislative power; for example, the session in even-numbered years really must end at midnight, August 31, but most legislative rules are created, imposed, and in some cases waived, by the legislature itself.

It is in this context that bills which enter life dealing with one subject often are amended to address an entirely different issue. When this "gut and amend" process is employed on August 30, the press takes notice. When a gut and amend occurs in April, however, it is just how the process works. But it makes it critical to read every bill, and equally important, every amendment to every bill.

One gut and amend of critical interest to CDC is SB 491 (Evans). The bill was introduced way back in February, 2011 (the first year of our current two-year session) dealing with floating homes. In March of last year, amendments converted the bill into one dealing with probate law, and will contests. In this form, SB 491 passed the Senate, and even the Assembly. On its way back to the Senate for a concurrence vote, SB 491 was literally one-step from the Governor's desk.

BAM! On April 30, the Assembly voted to rescind the action by which it had passed the probate bill, and amended it to instead deal with..the *Concepcion* decision! Proposing to add new Civil Code Section 1589.5, effective for contracts entered into on and after January 1, 2013, the substance of SB 491 is a beguilingly simple 51 words: "Any term in a contract of adhesion purporting to waive the right to join or consolidate claims, or to bring a claim as a representative member of a class or in a private attorney general capacity shall be deemed to lack the necessary consent to waive that right, and is void."

In one fell swoop SB 491 was converted from an obscure probate bill into one of the most controversial items for the legislative year. Literally within hours, business groups began meeting to develop strategy to defeat the bill, which attempts to avoid obvious preemption questions by not mentioning arbitration, at issue in the U.S. Supreme Court's *Concepcion* decision.

Because the Assembly dealt with SB 491 as a probate issue, rather than one affecting consumer contracts of virtually all types, the bill is likely to be referred back to the Assembly Judiciary Committee for hearing. If passed by the committee and by the full Assembly, it will be returned back to the Senate where another policy committee hearing will occur. This is an important point: amendments to SB 491 will receive full policy vetting in at least two committees. Nothing is being hidden, but the history of the bill illustrates why interest groups (including CDC) maintain continuous activity in Sacramento.

SB 491 is one of three bills sponsored by our colleagues in the plaintiff's bar, members of the Consumer Attorneys of California. The other two are AB 1875 (Gatto), proposing to add to the Code of Civil Procedure the federal standard for length of depositions, one day of seven hours, and SB 1528 (Steinberg), introduced to deal with the *Howell* decision on damages. CDC is active in all three bills.

Interestingly, the Howell bill illustrates another principal of legislative procedure. Because Howell raises complex questions of damages, with impacts on health care providers, insurers, public entities and more, it was recently amended into what is known in Sacramento parlance as an "intent" measure. As such, the bill merely declares legislative intent to address the issue.

The uninitiated ask "why would they pass that?" The answer is that the legislature will not pass an "intent bill". The language is inserted just to hold a place for the ultimate substantive language to be added later.

Can they do that? According to the rules, yes!

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Astaire Should Have Been There

Patrick A. Long
palong@ldlawyers.com

My friends appreciate that I'm a freak, and they indulge me, God bless them. They indulge my fondness for books, movies, and music because they understand that I can't help myself. They also understand that I'm not exactly alone in my freakiness because many among our members share similar enthusiasms. In fact my love of books, movies and music may perhaps be low key compared to some of our colleagues.

And those of you with lower bar numbers may recall that this magazine has, over the years, published cover stories featuring what some might even describe as a kind of fetish among some of our members, i.e. the cowboy (and cowgirl) lawyers, the pilot lawyers, the rock 'n roll lawyers, etc.

Well, during our recent 51st Annual Seminar on March 1 and 2, I discovered, as many of you did also, a group of lawyers and judges that make the combined enthusiasms of our entire membership small potatoes. I'm speaking of the Band of Barristers, that stupendously talented group of judges and lawyers who entertained us during the Thursday night reception. For those of you who weren't there, you'd have been amazed at the impressive sight of a large group of guys in their tuxedos seated with their instruments at the ready. The scene came on like a reply of a DVD of "The Glenn Miller Story," or perhaps a newsreel from the 1940's of the Tommy Dorsey band. Then this assembly of 20-25 instrumentalists lifted their instruments and began to blow, strum, drum, and tinkle the ivories. It was mind-boggling; these folks actually sounded better than recordings of Dorsey, Miller, Harry James, and Berigan (Bunny to those of you who knew him well). Words fail me in describing their talents. (My friends advise me that words failing me is a chronic condition.) Suffice it to say that they were world class, and what is of course more remarkable is that these folks all have day jobs as judges and lawyers (the pianist was Justice Arthur Gilbert of the Court of Appeal). The Band of Barristers may have had a few baby lawyers among them, but the drummer probably had a bar number lower than mine, yet his skills made me think perhaps that the Lord had granted Gene Krupa a second chance. Wow, for an hour or so, swing really was king, and a sizable number of our membership were out there cutting a rug (I've never really understood the etymological basis of that iteration, cutting a rug). I had no idea our membership included so many who could jitterbug, and their number definitely included some young folks. Be that as it may, everyone sure had a swell time, thanks to the Band of Barristers.

After the Annual Seminar concluded, through the efforts of the amazing Jennifer Blevins, and Linda Hurevitz of Linda Miller Savitt's firm, I was put in touch with Attorney Gary Greene, the founder of the Band Of Barristers. Mr. Greene is quite a guy. In addition to his law practice he founded the Los Angeles Lawyers Philharmonic Orchestra, and its choral group, Legal Voices, and most recently the Band of Barristers. Mr. Greene, in addition to his conducting duties, also plays the violin. Since the fiddle doesn't exactly fit in with the musical genre promulgated by the Band of Barristers, he is perfectly positioned to conduct this outfit, and he does a heck of a job guiding this bunch of legal eagles through some wildly swinging numbers.

You could have fooled me. I didn't think we had time for anything but eating, sleeping and taking depositions. Boy, these guys apparently found a couple of minutes here and there to become terrific musicians.

I'd like to thank Linda Miller Savitt, Jennifer Blevins, and everyone else who worked so hard to put together our Annual Seminar. We owe great praise to them for their foresight and creativity in including the Band Of Barristers as part of our Thursday night reception. And thanks also to those judges and attorneys who gave their time and musical skills and keep us hopping, I mean dancing.

I've always been a wallflower myself.

Pat Long – *palong@ldlawyers.com*

51st Seminar Highlights

ASCDC's 51st Annual Seminar returned to the historic Millennium Biltmore Hotel in downtown Los Angeles, March 1-2, 2012. This year's program appealed not only to lawyers, but clients as well. Friday's luncheon featured keynote speaker James "the Ragin' Cajun" Carville, who enlightened and entertained the packed Biltmore Bowl with his candid and colorful observations of the 2012 race for the White House.

In keeping with tradition, the Friday luncheon kicked off with a rousing rendition of the National Anthem, sung this year by 14-year-old Arianna Reznik, daughter of Phil Reznik, an attorney with Linda Miller Savitt's firm. Following lunch, in-coming ASCDC President Diane Mar Wiesmann introduced the head table: speaker Carville, ASCDC Immediate President Linda Miller Savitt, President-elect Denise Taylor, Vice President Robert Olson, Secretary-Treasurer Michael Schonbuch, and members of the Northern California Defense Counsel. Diane recognized members of ASCDC's Board of Directors, committee chairpersons, past presidents and the many members of the judiciary in attendance. She also thanked her family and law firm partners for their support.

Also on the program agenda, California Defense Counsel (CDC) Vice President, Bob Morgenstern, acknowledged the law firms who contributed to CDC's Political Action Committee (PAC) in 2011 with the presentation of commemorative plaques. Past President of ASCDC and Defense Research Institute (DRI), Pat Long, presented Linda with the DRI award for outstanding leadership this past year. Diane followed with the presentation of the ASCDC's President's plaque to Linda, saying, "You truly stepped up and we were so lucky to have you as our president." Diane also took the opportunity to recognize retired ASCDC Executive Director Carolyn Webb and Stan Bissey, the Executve Director of the California Judges Association, who were also in attendance.

Following the presentations, Linda Miller Savitt summed up the past year.

"It has been my absolute pleasure and privilege to be your president." In her final act as President, she thanked members of the Board, her law firm partners and her husband, and then introduced 2012-2013 ASCDC President Diane Mar Wiesmann.

Diane took a few minutes to introduce a theme for ASCDC activities over the coming year: "To Connect" – with clients, juries, courts and with people in our communities. "We work for our clients but how much do we *connect*? ASCDC needs to recognize that we are going to reach out and connect."

Consistent with this theme, Diane announced seminars and special events planned for the year. They include: a mixer for young lawyers, an Orange County "hot topic" seminar, a Riverside County golf tournament in June, the revival of the Santa Barbara seminar and wine tour in September, a Los Angeles "hot topic" seminar in October, a law firm management seminar in Los Angeles in November, and the Annual Judges' reception in Los Angeles in December. "These are all opportunities to connect." She concluded her remarks by recognizing the hard work and efforts of the Amicus Committee, reminding everyone of the busy year ahead for CDC in its legislative efforts, and adding, "Thank you for the honor to lead you this year."

ASCDC Connect

James Carville Addresses the 51st Annual Seminar

A look at presidential politics in a hotly contested election year

By Carol Sherman

Few individuals are more qualified to put presidential politics in perspective than well-known political consultant James Carville. The former co-host of CNN's *Crossfire* and chief strategist for Clinton/Gore '92, Carville delivered the keynote address before a packed ballroom at the Association of Southern California Defense Counsel's (ASCDC) 51st Annual Seminar.

With his trademark Southern accent and colorful humor, he focused his remarks on the political scene unfolding in the country as the Republicans make a bid to regain the White House. "There is nothing more predictable in the world than the way the Republicans pick their presidential nominee. In 2012, it's going to be Mitt Romney."

As a Democrat, Carville admits that it's "entertaining" watching the Republican candidates vie for their party's nomination. "They have tried everything they can *not* to be for Romney. It's like giving a dog a pill. The dog keeps spitting it up, but sooner or later the vet is going to get the pill down."

"Right now, Romney's not running against Santorum. Santorum's not going to be the nominee. Gingrich is not going to be the nominee. Romney's running against 1144, the number of delegates he needs to get nominated. How soon does he get there, and how does he get there makes all the difference." In Carville's view, the longer the process of choosing a candidate goes on, the more difficult it becomes for the Republicans to prevail in the November election. "The Romney people gave a briefing to some friends of mine in the press, and the fastest they think they can get there

continued on page 12

is late May. Now if they don't get there before the convention, it's going to be a mess, because when you go into a general election, you have to have a united party and you have to look strong."

It's the swing voters that decide an election. According to Carville, Romney must appear strong enough to unite his party, and show he can deal with difficult people, not only within his own party, but on the world stage. "That's the test of a good leader and so far, Romney is having difficulty dealing within his own party."

Carville concedes that Romney may become a better candidate in the general election by honing his political skills during the intra-party fight, but he doesn't think the Republicans can unseat President Obama, unless domestic and international events conspire against the President. "Durable good orders were down in the last quarter, gas prices are high, and there are problems in Europe and Iran."

Shifting his attention from the primary to the general election, Carville offered up what he sees as the important topics for the national debate. "I wish we'd quit talking about everybody in the world being our competitor and talk about them being our customer." He singled out the entertainment, automotive and agricultural industries as among the country's leading exports. "We can produce more food better than anybody in the world. We sell more Buicks in China than we do in North America."

"Instead of being a nation that's always trying to figure out how to buy things, let's be a nation that figures out to make stuff the world wants. We've got that kind of talent here. We have terrific young people in this country in every race and ethnic group, and in every region. We see it in New Orleans. We have one of the most improved urban school districts in the country. If I told you we [in Louisiana] would have one of the most honest governments in the South, you would have thought I was crazy. If I would have told you three years ago that GM and Ford were making a car that JD Powers

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Working Together, Across the Aisle

James Carville and Mary Matalin

He's a Democrat; she's a Republican. Together, they are one of the most influential and recognizable couples in U.S. politics.

In spite of their political differences, James Carville and Mary Matalin make it work. James gained national attention as Chief Strategist for Clinton/Gore '92, placing a Democrat in the White House for the first time in 12 years. He has worked in 22 different countries for 14 heads of state, authored six New York Times bestsellers, frequently provides political commentary on CNN, has appeared in feature films and TV shows, and has been the target of numerous comic skits on Saturday Night Live.

Mary served as Assistant to President George H. W. Bush and counselor to Vice President Dick Cheney. Together, they wrote the bestseller All's Fair: Love, War & Running For President. They also starred in HBO's reality docudrama K Street.

James and Mary live in New Orleans with their two daughters, and are deeply involved in the city's ongoing reconstruction efforts in the wake of Hurricane Katrina. Avid sports fans, they are co-chairpersons of the 2013 Superbowl to be held in New Orleans.

Speaking before ASCDC's 51st Annual Seminar, James compared raising daughters to practicing law. "Everything's a negotiation." Known for his colorful humor, he told about the time he was driving his teenage daughter to the French Quarter and was stopped by a policeman for talking on his cell phone. "I said to my daughter, 'Look just back me up.'" When James tried to convince the officer that he was simply scratching his ear and not on the phone, the officer turned to his daughter for confirmation. She reportedly said, "You know officer, my mommy and daddy always taught me to do what they tell me. And my mommy says never to argue with my daddy when he's been drinking."

James received his Juris Doctor degree from Louisiana State University, but after practicing for a while, found that being a lawyer was not for him. Having abandoned that career, he said earnestly to the crowd of lawyers at the 51st Annual Seminar, "I have a lot of respect for what you do. "It takes a lot of talent to do it. My hat goes off to you."

James Carville – continued from page 12

named one of the highest quality cars in the world, you'd have thought I was crazy. We tend to under estimate our ability to turn things around, to change things." Carville stressed that the real challenge is not how we go back to something we had before, but how we choose to move forward.

He spoke of the need to educate and train young people for jobs of the future, not what the jobs were 15 years ago. "I hope at some point, that's what the race gets about."

An optimist, Carville pointed to the Civil War period as one of the country's darkest times. Yet during the period, Congress passed the Morrill Act of 1862 and President Abraham Lincoln signed it into law, giving the states funding and land to build universities. "History has shown that the land grant colleges and universities in the U.S. have produced more Nobel Prize winners than in all of this continent and Europe combined. So the idea that if we are able to do something like that in a time like that, who's to say what we're capable of doing in a time like this? That's the challenge for our country."

Wrapping up, he paraphrased Winston Churchill as having once said, "The Americans always do the right thing ... after they've exhausted all other possibilities." Carville added, "I think we're getting close again, folks."

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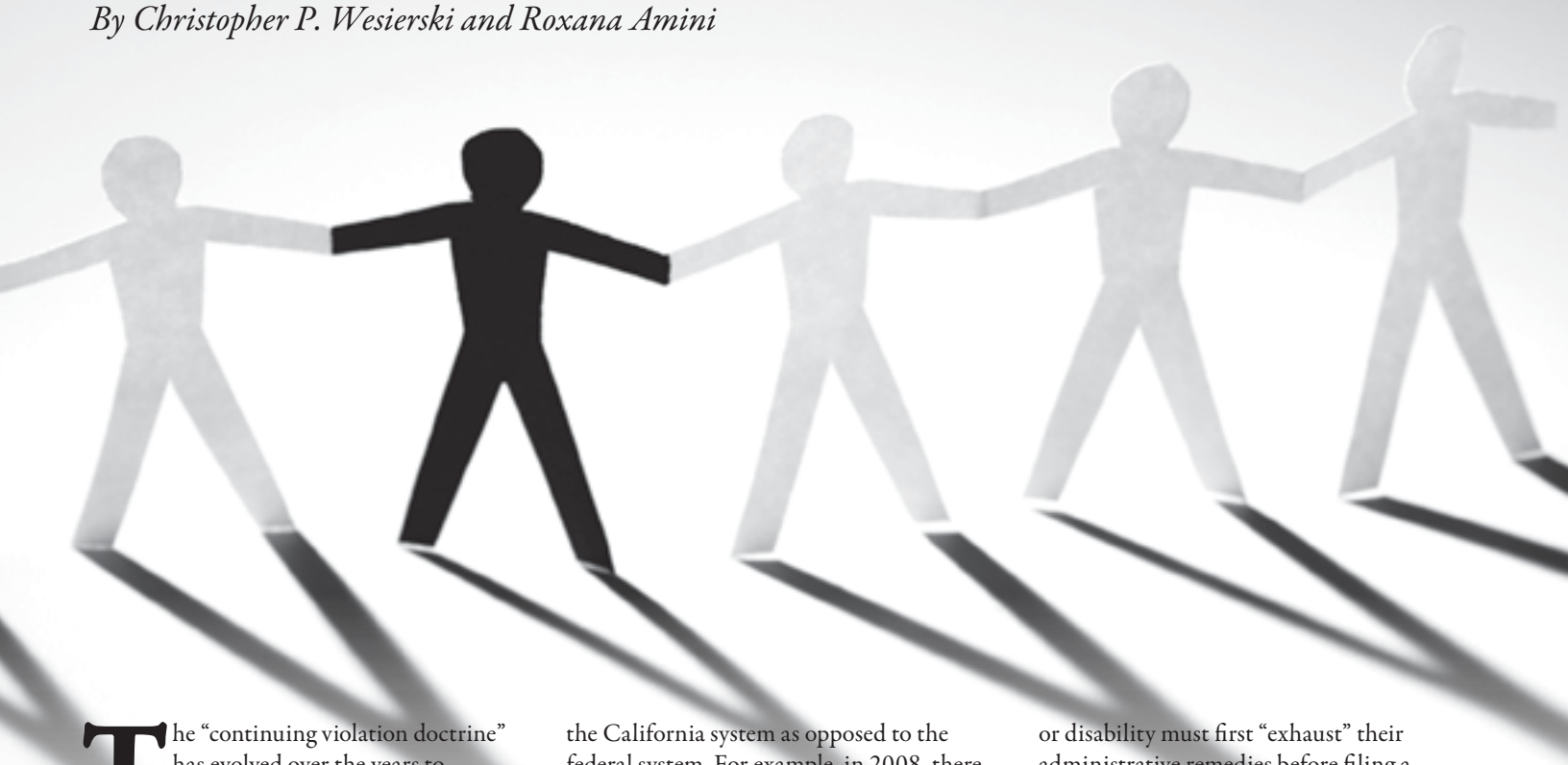
This is a follow-up to Mr. Wesierski's article, "Continuing Violation Doctrine," which was published in the First Quarter 1997 Edition of *Verdict Magazine* (p. 34-43).

The Continuing Violation Doctrine: Implications of *Shelley v. Geren*

By Christopher P. Wesierski and Roxana Amini



The "continuing violation doctrine" has evolved over the years to provide a safe harbor for a plaintiff who failed to file a timely charge with the EEOC or their state's equivalent anti-discrimination agency. The doctrine allows an employee to aggregate an employer's conduct in a lawsuit that would otherwise be barred by the statute of limitations, as long as the last act of discrimination fell within the proper time frame.

For the last decade, Federal courts have limited the doctrine's application to hostile work environment claims, while California allows the doctrine to apply to all types of discrimination claims. This subtle difference in the law is of great importance to both plaintiffs and employers because it helps dictate whether a state or federal claim will be barred by the statute of limitations. It also illustrates the well-known fact that California provides much broader protections for employees and explains why more plaintiffs seek redress through the California system as opposed to the federal system. For example, in 2008, there were 18,787 complaints filed with FEHA while there were 5,393 complaints filed with the EEOC. (*California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50*, UCLA RAND Center for Law and Public Policy, February 9, 2010).

Despite this, a recent 9th Circuit case, *Shelley v. Geren*, discussed below, suggests that the "continuing violation" distinction is slowly dissipating and Federal courts may find themselves applying broader protections for employees.

Background to Statute of Limitations

Under both federal and California law, employees or applicants for employment who believe they have been discriminated or retaliated against on the basis of race, color, religion, sex, national origin, age, or disability must first "exhaust" their administrative remedies before filing a civil action. Employees who fail to exhaust administrative remedies within a specified time frame are generally barred from filing the claim in court by the statute of limitations. (See *Zipes v. Trans World Airlines, Inc*. 455 U.S. 385, 393 (1982) (failure to exhaust administrative remedies is essentially a statute of limitations issue)).

When it comes to filing a claim against an employer for alleged discrimination, employees generally have two options. If the claim involves a federal law, it falls under Title VII and the employee should exhaust administrative remedies with the Equal Employment Opportunity Commission (EEOC). If the claim involves a state law, it falls under the Fair Employment and Housing Act (FEHA) and the employee should first seek redress from the California Department of Fair Employment & Housing

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(DFEH). Under both Title VII and FEHA, a plaintiff must exhaust administrative remedies before filing a civil action.

For EEOC complaints, employees must file a charge within 180 days of the alleged illegal action, while the DFEH extends this time frame to 300 days. The FEHA limitation is extended by a maximum of 90 days if the claimant does not learn of the facts of the alleged unlawful act until more than one year after its occurrence. (Gov. Code §12960). The EEOC deadline is even stricter for federal employees. Those who believe they have been discriminated against must consult an EEOC counselor within 45 days of the alleged discriminatory event. (29 C.F.R. §§ 1614.103, 1614.105(a)(1)).

Aside from the difference in filing deadlines, the EEOC and DFEH investigate claims similarly. The agencies use a neutral, unbiased investigator to gather evidence and write a report. If either agency finds that discrimination occurred, it will try to settle the charge, prosecute the case, or issue the employee a "right to sue" letter.

Contrary to what most lay people think, a "right to sue letter" will also be issued if the agency determines there is no reasonable cause to believe that discrimination occurred. In fact, a majority of investigations result in a finding of no reasonable cause, yet the agency will still issue a "right to sue letter" because the letter is a prerequisite for filing a civil suit. For example, in 2010, over 60 % of all EEOC charges resulted in a finding of no reasonable cause. This number may be similar for DFEH claims. (See http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm; DFEH does not provide Charge Statistics.).

The determination of whether a plaintiff has filed a timely charge depends on when the alleged unlawful employment practice "occurred." Under federal law, the limitations period is triggered when a complainant *should reasonably suspect discrimination*, even if all the facts that would support a charge of discrimination are not yet apparent. In California, the statute of limitations starts to run at the time of the last conduct allegedly constituting discrimination.

The Continuing Violation Doctrine

When it comes to the statute of limitations, the most important variance between Federal law and California law is the "continuing violation doctrine". The doctrine was first recognized in 1968, when a federal court extended the filing period for a plaintiff when the employer conduct was construed as "continuing acts". (*King v. Georgia Power*, 295 F.Supp. 943, 946 (N.D. Ga. 1968)).

Until 2002, federal courts generally allowed a plaintiff to invoke the doctrine

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by demonstrating a series of "related acts, one or more of which falls within the limitations period," or "the maintenance of a discriminatory system both before and during the statutory period." (*Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003) quoting Henry H. Perritt, Jr., Civil Rights In The Workplace, § 7.04(e) (3d Ed. 2001)). This has also been referred to as the "serial violation" theory.

California continues to adhere to the "serial violation" theory. Employees alleging discrimination and retaliation may include conduct that would generally be barred by the statute of limitations as long as the conduct is continuous and similar to a claim that falls within the proper time frame. The rationale behind allowing this exception is that an employee might not be on notice that discrimination is occurring until after the fact. Thus, a rigid application of the statute of limitations would prejudice the employee. (*Accardi v. Sup. Ct*., 17 Cal.App.4th 341, 351 (1993)).

In 2002, the United States Supreme Court limited the continuing violation doctrine to hostile work environment claims. In *National R.R. Passenger Corp. v. Morgan*, the Court noted that hostile work environment claims involve "repeated conduct which occurs over a series of days or perhaps years." (536 U.S. 101, 103 (2002)). Such claims are based on the "cumulative effect of individual acts," and epitomize the need for the continuing violation doctrine. *Id*. at 115.

On the other hand, the Court recognized that general discrimination and retaliation claims are founded on discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire. *Id*. at 114. Discrete acts are easy to identify and actionable on their own, so liability is not dependant "upon proof of repeated conduct extending over a period of time." *Id*. at 119. As a result, the *Morgan* Court held that unless the charge alleges hostile work environment, each discriminatory act constitutes a separate actionable "unlawful employment practice" as to which a separate limitations clock runs for each. *Id*. at 113.

Federal courts have generally adhered to the *Morgan* Court's finding that "failure to promote" and "failure to hire" are discrete discriminatory acts that are not subject to the continuing violation doctrine, even when the actions involved were separate hiring or promotion decisions. (See *Lamb v. Boeing Co*., 213 Fed.Appx. 175 (4th Circ. 2007) (African-American alleging racial discrimination could not include five time-barred hiring denials as part of discrimination claim); *Davidson v. America Online, Inc*., 337 F.3d 1179 (10th Cir. 2003) (individual refusals to hire are discrete discriminatory acts); *Davis v. Coca-Cola Bottling Co. Consol*., 516 F.3d 955 (11th Cir. 2008) (employer's allegedly discriminatory hiring decisions constituted discrete acts, not acts that were part of hostile work environment, on which statute of limitations began to run when acts were committed.)).

Conversely, Federal courts have recognized that hiring decisions surrounding separate positions can be considered one discrete action if an employer makes one announcement to fill three vacancies. (*Sivulich-Boddy v. Clearfield City*, 365 F.Supp.2d 1174 (D. Utah 2005) (holding that the statute of limitations did not begin to run until the third position was filled.)).

Thus, the determination of whether separate hiring decisions constitute a series of discrete employment acts or one discrete employment act appears to be a fact-driven analysis. This can create uncertainty because the federal limitation for the continuing violation, namely that the doctrine applies only to hostile work environment claims, may be extended to other discrimination claims based on the facts.

Gradual Unraveling of Federal Law

A recent 9th Circuit Court of Appeals decision is illustrative. In *Shelley v. Geren*, the court held that a plaintiff alleging age discrimination could include separate hiring decisions as part of his claim, even when they were months apart. (2012 WL 89215

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(9th Cir. 2012)). Unless courts carefully confine *Shelley* to its facts, this appears to be in conflict with the strict limitation set forth under *Morgan* that the continuing violation doctrine only applied to hostile work environment claims, and that "failure to hire" is a discrete act.

The plaintiff in *Shelly* was a 54 year-old contractor for the U.S. Army Corps of Engineers ("the Corps"). Federal age discrimination laws protect employees who are over the age of 40 from being discriminated against on the basis of their age. On October 3, 2005, the Corps sent out an email announcement for a temporary Chief of Contracting position that was scheduled to last 120 days. It was generally known in the Corps that temporary positions often led to permanent positions. Shelley applied for the position. On October 24, 2005, the Corps announced that it was accepting applications for a permanent Chief of Contracting position, and Shelley also applied.

Shelley learned that he was not selected for the 120-day position on or about November 4, 2005. On or about February 17, 2006, Shelley learned he was not granted an interview for the permanent position. Seventeen days later, he made initial contact with the Corps' Equal Opportunity Office. After receiving notice of his right to file a formal complaint, Shelley did so, alleging that he had been discriminated against between November 2005 and January 2006 based on his age because he was not afforded the opportunity to interview for the position.

The Corps argued that Shelley's complaint based upon non-selection for the 120-day period was barred by the statute of limitations because he failed to seek administrative remedies within 45 days of learning that he was not selected for the position. The district court agreed and granted summary judgment for the Corps on this basis.

Shelley appealed to the 9th Circuit, which held that the decisions surrounding the temporary 120-day position and the permanent position "were not discrete employment actions, but were part of a single, two-step, hiring process." *Id*. The Court stated "it is obvious that the person selected for the temporary position would have a significant competitive advantage" for the permanent position, thus the temporary position could be seen as "a step toward the permanent position." *Id*. The Court also indicated that the temporary position and the permanent position were so interrelated, that the process could be seen as a "continuum." *Id*.

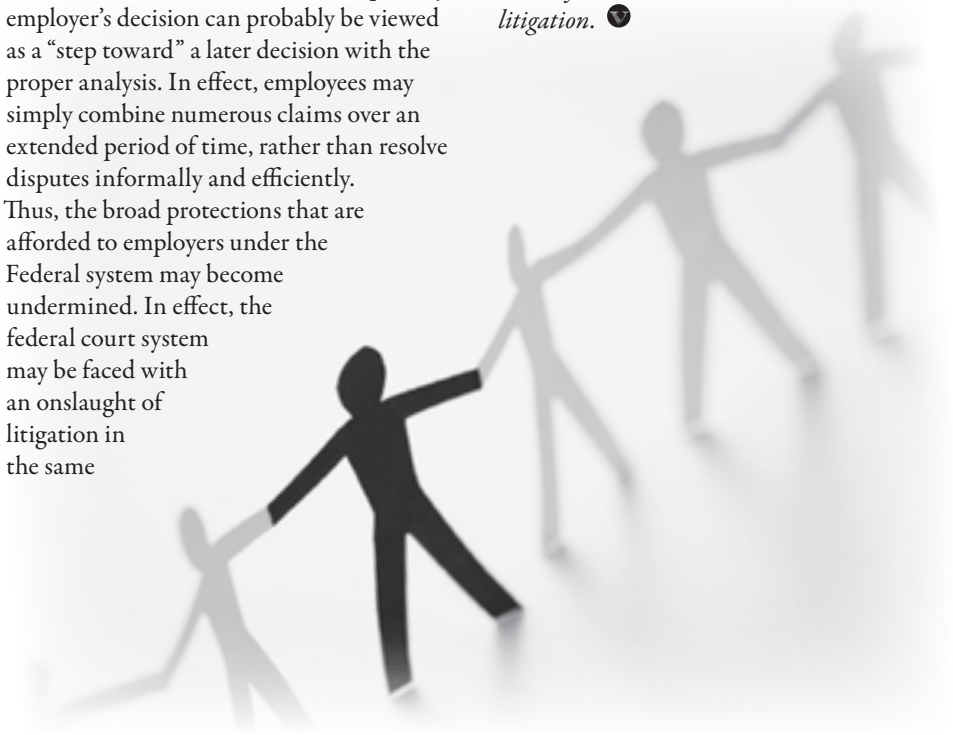
Future Implications

Shelley means that an employer's decisions that take place over a period of time may be aggregated under Title VII, even when they involve separate decisions and the charge does not involve a hostile environment claim. By its holding, *Shelley* works to ease the statute of limitations for filing grievances with the EEOC. The point of the statute of limitations in discrimination claims is to encourage informal resolution of disputes and avoid premature lawsuits. *(Yanowitz v. L'Oreal USA, Inc*., 36 Cal.4th 1028, 1058 (2005)). It also works to ease the burden on the court system and provide a more economical way of resolving the dispute.

By continuing to add exceptions to the time frame set forth under Title VII, courts ensure that disputes will not be resolved in the most efficient manner. For example, any employer's decision can probably be viewed as a "step toward" a later decision with the proper analysis. In effect, employees may simply combine numerous claims over an extended period of time, rather than resolve disputes informally and efficiently. Thus, the broad protections that are afforded to employers under the Federal system may become undermined. In effect, the federal court system may be faced with an onslaught of litigation in the same manner that plagues the California court system.

Interestingly, the U.S. Supreme Court decision in *Morgan* was a rejection of a 9th Circuit decision that held that the continuing violation doctrine could be used in retaliation claims. Similarly, the 9th Circuit's decision in *Shelley* may also be challenged in a petition for certiorari to the U.S. Supreme Court, and it will be worthy of note to see what the high court says if certiorari is granted. Regardless, it is imperative that employers continue to plead Failure to Properly Exhaust Administrative Remedies as an affirmative defense if they are faced with a discrimination claim.

Christopher P. Wesierski *is the founding partner of Wesierski & Zurek LLP, a civil litigation defense firm with offices in Irvine and Los Angeles. He has tried many cases to verdict and regularly represents employers in discrimination claims at Labor hearings as well. In 2011, one of his employment verdicts received the prestigious honor of being selected "Top 20 Verdicts in the State of California" by the* Daily Journal. ***Roxana Amini*** *is an Associate in the firm's Irvine office, where she practices employment law, products liability, and business litigation.*



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:

LPerrochet@horvitzlevy.com

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 number of recent arbitration decisions from both California appellate courts and the Ninth Circuit demonstrate how lower courts are struggling to implement the Supreme Court's recent decision in *AT&T Mobility, LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740, in which the U.S. Supreme Court held that a California state law policy declaring class arbitration waivers to be unconscionable and unenforceable was preempted by the Federal Arbitration Act (FAA). Although section 2 of the FAA permits courts to decline to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" – including generally applicable contract defenses like fraud, duress, or unconscionability – the opinion in *Concepcion* unequivocally stated that this savings clause does not encompass defenses "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, *supra*, 131 S.Ct. at p. 1746.)

Courts have diverged as to the meaning and scope of *Concepcion* and its view of FAA preemption of state law policies regarding unconscionability of arbitration agreements. The California Supreme Court has granted review in *Sanchez v. Valencia Holding Co., LLC* (2011), formerly published at 201 Cal.App.4th 74, to address these questions.

See *Sanchez v. Valencia Holding Co., LLC* (2011), review granted March 21, 2012 (no. S199119) [Second Dist., Div. One: invalidating arbitration clause in auto sales finance contract as substantively unconscionable because parties' right to appeal to arbitration panel was limited to outlier awards (zero or over $100,000), and because certain self-help remedies were permitted without proceeding to arbitration; court construed *Concepcion* as preempting only California's *Discover Bank* rule against certain class arbitration waivers in consumer contracts of adhesion—not as broadly preempting any application of state-law unconscionability principles that are uniquely tailored to invalidating arbitration agreements. As framed by the California Supreme Court, the issue before it on review is "Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion* [citation] preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable?"];

See also *Kilgore v. KeyBank, National Association* (9th Cir. 2012) __ F.3d __, 2012 WL 718344 [9th Cir.: upholding arbitration clause in student loan agreement against unconscionability challenge because it provided opt-out option and clearly explained the pros and cons of arbitration; court broadly applied *Concepcion* to hold that the FAA preempts California's *Broughton-Cruz* rule prohibiting arbitration of public injunctive relief claims, as that rule derives its meaning from the fact that an agreement to arbitrate is at issue];

See also *Coneff v. AT&T Corp.* (9th Cir. 2012) __ F.3d __, 2012 WL 887598 [9th Cir.: reversing district court ruling that class waiver in arbitration clause in consumer cell phone contract was substantively unconscionable; *Concepcion* does not permit consideration of whether the class waiver leaves insufficient incentive for plaintiffs to bring claims in assessing unconscionability];

See also *Mayers v. Volt Management Corp.* (2012) 203 Cal.App.4th 1194 [Fourth Dist., Div. Three: narrowly applying *Concepcion,* approving unconscionability challenge to arbitration clause in employment agreement on the theory that the challenge did not seek to prohibit

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arbitration of a particular type of claim or derive meaning from the fact that an agreement to arbitrate is at issue; arbitration clause was procedurally unconscionable because employee was not provided with the applicable arbitration rules that would govern any arbitration, and substantively unconscionable because the attorney fee-shifting provision made arbitration a greater risk to the employee than proceeding with an action in court].

The U.S. Supreme Court has issued opinions subsequent to *Concepcion* that reaffirm its broad approach to FAA preemption of state law, FAA displacement of other federal laws, and the FAA's liberal federal policy favoring arbitration:

See, e.g., *Marmet Health Care Center, Inc. v. Brown* (2012) __ U.S. __, 132 S.Ct. 1201 [reversing West Virginia Supreme Court ruling that had recognized state public policy against enforcement of pre-dispute arbitration agreements in personal injury or wrongful death lawsuits arising out of nursing home care; this public policy barred arbitration of a particular type of claim in violation of the FAA and in flat contradiction of *Concepcion*];

See also *CompuCredit Corp. v. Greenwood* (2012) __ U.S. __, 132 S.Ct. 665 [holding that arbitration clause in consumer credit card agreement is enforceable under the FAA, even for claims of violation of the Credit Repair Organizations Act (CROA), because the CROA disclosure and anti-waiver provisions do not create a right to litigate in court and do not otherwise express a contrary congressional command overriding the FAA's liberal federal policy favoring arbitration];

See also *KPMG LLP v. Cocchi* (2011) __ U.S. __, 132 S.Ct. 23 [reaffirming FAA's liberal federal policy favoring arbitration and reversing Florida court's denial of motion to compel arbitration where state court had found two of four claims to be non-arbitrable, but did not determine that the remaining two claims were non-arbitrable].

Apart from *Concepcion* and the FAA, California courts have also continued to apply standard unconscionability rules to arbitration clauses, generally with the result that the clause is deemed unconscionable. The California Supreme Court has granted review in *Wisdom v. AccentCare, Inc.* (2012), formerly published at 202 Cal. App.4th 591, to address issues raised by these cases:

See *Wisdom v. AccentCare, Inc.* (2012), review granted March 28, 2012, (no. S200128) [Third District disagreed with *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, and affirmed order denying motion to compel arbitration, holding that non-negotiable arbitration clause in employment application (a) was procedurally unconscionable because of its adhesive nature and because of failure to provide employee with arbitral rules that would govern any arbitration, and (b) was substantively unconscionable because only the employee stated an agreement to arbitrate claims arising out of the employment. As framed by the California Supreme Court, the issue on review is, "Is an arbitration clause in an employment application that provides 'I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application' unenforceable as substantively unconscionable for lack of mutuality, or does the language create a mutual agreement to arbitrate all such disputes?"

See also *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771 [First Dist., Div. Five: holding parties did not clearly and unmistakably delegate the issue of arbitration clause's unconscionability to the arbitrator, such that the issue was for the court to decide, and holding that arbitration clause was (a) procedurally unconscionable because adhesive in nature and (b) substantively unconscionable because it allowed employer to recover liquidated damages but prevented employee from recovering statutory or punitive damages, was governed by New York law and thus deprived employee of unwaivable statutory rights under California law, and New York law allowed employer to recover attorney fees from employee if it prevailed, contrary to California law].

CIVIL PROCEDURE

The court clerk's office has a ministerial duty to file any form or motion presented to it that complies with the California rules of court.

Voit v. Superior Court (Montano) (2011)
201 Cal.App.4th 1285

The plaintiffs sued an incarcerated prisoner who, in response, filed a request that the court appoint counsel to represent him in the case because he was indigent and incarcerated. The court clerk's office rejected the filing on the ground that the prisoner had not enclosed a filing fee, and returned the document to him with a fee waiver form. The prisoner re-filed with a completed waiver form, which the clerk's office again rejected, accompanied by a letter stating that a hearing date must be reserved prior to filing motions, but that a civil court does not appoint counsel. The prisoner sent a letter to the clerk's office to reserve a hearing date. The clerk's office returned the prisoner's letter, accompanied by its own letter stating that the court does not set for hearing requests for appointment of counsel for civil cases. The prisoner wrote another letter to the clerk's office, stating that there was precedent for the court to assign incarcerated inmates with counsel. The clerk's office sent another rejection letter, which reiterated that the court does not assign counsel for civil cases, and requesting precedent for further consideration. After receiving this last rejection letter, the prisoner petitioned for a writ of mandate directing the court to file his motion and grant his request for appointment of counsel.

The Court of Appeal (Sixth District) granted the petition, directing the trial court to file the prisoner's motion and rule on its merits. The court observed that "[t]he actions of the court's clerk's office are quite troubling" and concluded that whether the prisoner's motion "has legal merit is a determination to be made by a judge, not the clerk's office. No statute, rule of court, or case law gives the court clerk's office the authority to demand a [party] cite or quote precedent before his motion will be filed.... [¶] The clerk's office's actions violated [the prisoner's] rights under both the federal and state Constitutions to access the courts."

Physician's communication to Department of Motor Vehicles stating that patient was fit to drive was protected by the litigation privilege.

Wang v. Heck (2012)
203 Cal.App.4th 677

A plaintiff who suffered injuries in a vehicle accident allegedly caused by another driver who was epileptic sued a neurologist who had previously treated the epileptic driver as her patient. The neurologist had provided a written evaluation to the Department of Motor Vehicles

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(DMV), clearing her patient to resume driving. The DMV, relying on the evaluation, reinstated the patient's license. Shortly thereafter, the patient failed to take his epilepsy medications properly, suffered a seizure while driving, and struck the plaintiffs. The plaintiffs sued the neurologist for negligence and medical malpractice. The neurologist moved for summary judgment on the ground that her communication to the DMV was protected by the litigation privilege – California Civil Code section 47(b), which protects litigants from tort liability based on communications in official proceedings. The trial court granted the motion and the plaintiffs appealed.

The Court of Appeal (Second District, Division Four) affirmed. The plaintiffs conceded that the litigation privilege immunized the neurologist from any suit based on her written submission to the DMV. Nonetheless, the plaintiffs argued that the neurologist's treatment and care of her patient, which included her allegedly negligent failure to warn her patient not to drive, was independent of her DMV submission, and, therefore, not protected by the litigation privilege. The court disagreed, holding that the litigation privilege immunized the neurologist from suit because her "noncommunicative conduct prior to completing the DMV evaluation form ... was necessarily related to the form itself" and the plaintiffs had "not demonstrated that there was any wrongful act independent of" the neurologist's completion and submission of the DMV evaluation form.

See also ***Nesson v. Northern Inyo County Local Hospital Dist.*** (2012) 204 Cal.App.4th 65 [Fourth Dist., Div. Two: applying *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, which held that hospital peer review procedures constitute an "official proceeding authorized by law, and holding that claims by plaintiff doctor against defendant hospital for breach of contract, breach of the covenant of good faith and fair dealing, violation of Health and Safety Code section 1278.5, violation of the Unruh Act, and violation of the Fair Employment and Housing Act (FEHA), all arose from the summary suspension of Nesson's privileges through the peer review process and are therefore covered by the anti-SLAPP statute]

Where a medical provider has gratuitously written off a portion of a patient's medical bill, the amount written off constitutes a benefit to the patient that may be recovered from a third party tortfeasor under the collateral source rule.

Sanchez v. Strickland (2011)
200 Cal.App.4th 758

In this personal injury action, following a jury verdict in favor of the plaintiff, the defendants moved to reduce the amount awarded for past medical expenses to the actual amounts paid or owed to the medical providers by the plaintiff or his health insurer. The verdict included amounts the medical provider had nominally billed, but had written off gratuitously. The trial court granted the motion and the plaintiffs appealed the reductions.

The Court of Appeal (Fifth District) amended the judgment and affirmed. In *Howell v. Hamilton Meats & Provision, Inc.* (2011) 52 Cal.4th 541, the California Supreme 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." Here, the court concluded that "the limitation on recovery set forth in *Howell* does not extend to amounts gratuitously written off by a medical provider;" and adopted the following rule: "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." Finding that a portion of the plaintiffs' past medical expenses had been a gratuitous write-off, the court modified the judgment by increasing the damages award in line with the rule it had adopted but reducing that amount to account for the plaintiffs' comparative fault.

Costs recoverable on appeal do not include interest expenses incurred to borrow funds to provide security for a letter of credit.

Rossa v. D.L. Falk Construction, Inc. (2012)
53 Cal.4th 387

In this breach of contract action, following a jury trial in favor of the plaintiffs, the defendant appealed the judgment. To stay enforcement of the judgment pending appeal, the defendant filed a bond issued by a surety insurer for one and one-half times the judgment. After the Court of Appeal reversed the judgment and remanded to the trial court for further proceedings, the defendant filed a cost memorandum seeking appellate costs. Among the costs sought, pursuant to California Rules of Court, rule 8.278(d)(1)(F) – which provides that a successful appellant may recover "the cost to obtain a letter of credit as collateral" for an appeal bond – the defendant requested recovery of bank fees for a letter of credit guaranteeing payment of the appeal bond; and the interest paid on the sums borrowed to secure the bank's letter of credit on the bond. The trial court denied recovery of the interest payments and the bank fees related to the line of credit. The defendant appealed and the Court of Appeal affirmed.

The Supreme Court affirmed. The court ruled that extending rule 8.278(d)(1)(F) "to defendant's interest payments and fees related to its line of credit would be inconsistent with the historic principle that cost provisions are to be strictly construed.

TORTS

A general contractor who directs a subcontractor to take actions that ultimately cause plaintiff's injury, and who rejects plaintiff's attempts at safety measures, can be liable for a negligent exercise of retained control over safety conditions that affirmatively contributes to plaintiff's injury.

Tverberg v. Fillner Construction, Inc. (2012)
202 Cal.App.4th 1439

Plaintiff was an independent contractor of a subcontractor at a construction project, who was hired to construct a metal canopy over fuel-pumping units. A different subcontractor drilled holes nearby for concrete posts. Plaintiff asked the on-site supervisor for defendant general contractor to cover the holes, but the necessary equipment was not available that day. The next day, plaintiff fell into one of the holes

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and was injured. In plaintiff's personal injury and premises liability suit against the general contractor, the trial court granted summary judgment under the Supreme Court's ruling in *Privette v. Superior Court* limiting vicarious liability to others' employees, and the court found no direct liability because plaintiff had been aware of the holes, which defendant never promised to cover.

After two trips to the California Supreme Court, the case ended up in the Court of Appeal (First Dist., Div. Four), which was directed to review the trial court's direct liability analysis in light of a recently decided Supreme Court case (*Seabright Insurance Co. v. U.S. Airways, Inc.*). The Court of Appeal reversed the trial court ruling for the defense. Although *Seabright Insurance Co.* foreclosed plaintiff's breach of nondelegable regulatory duty theory, the court held that plaintiff established triable issues of fact on his negligent exercise of retained control theory, precluding summary judgment. Plaintiff presented a prima facie case that defendant retained control over safety conditions on the construction site, as evidenced by the fact that defendant had directed another subcontractor to dig the hole into which plaintiff fell, which was in plaintiff's work area but was not needed for him to complete his work. Evidence of defendant's determination that there was no need to cover the holes, and that defendant twice refused plaintiff's request to cover the holes, constituted additional evidence of retained control over safety conditions.

A product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product, unless the defendant's own product contributed substantially to the harm or the defendant participated substantially in creating a harmful combined use of the products.

O'Neil v. Crane Co. (2012)
53 Cal.4th 335

Defendant manufactured and supplied valves to the Navy in the 1940's for incorporation into the steam propulsion systems on Navy ships. The Navy required the use of asbestos-containing gaskets and packing inside the valves, and the Navy covered the exterior of the valves with asbestos-containing insulation. The asbestos materials were not necessary for the valves to function, but the Navy preferred asbestos over other types of insulating materials. Plaintiff served on a Navy ship in the 1960's. The ship contained valves manufactured by defendant, but by the time of plaintiff's service, the Navy had removed the original gaskets and packing that defendant supplied with its valves and replaced them with asbestos parts made by third parties. Decades later, plaintiff's family sued defendant, alleging that plaintiff was injured by his exposure to asbestos on the ship. The trial court granted defendant's motion for nonsuit, but the Court of Appeal (Second Dist., Div. Five) reversed, holding that manufacturers are liable for injuries caused not only by their own products, but also by products of others that will be foreseeably used with their products.

The Supreme Court reversed the Court of Appeal, recognizing that the Court of Appeal's holding represented "an unprecedented expansion of strict products liability." Product manufacturers cannot be held liable in strict liability or negligence for harm caused by another manufacturer's product, even if the defendant manufacturer could have foreseen that its product would be used alongside the injury-causing products. Public policy would not be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell. Although foreseeability is a consideration in product liability cases, it is not alone a basis for imposing liability. Rather, liability must be premised on evidence that the defendant's own product contributed substantially to the plaintiff's harm or the defendant participated substantially in creating a harmful combined use of the products.

A supplier of raw materials cannot be held liable to the employees of the manufacturer to whom those materials are supplied under negligence or strict products liability theories, unless the materials are inherently dangerous, the materials are contaminated, or the supplier exercises substantial control over the manufacturing process.

Maxton v. Western States Metals (2012)
203 Cal.App.4th 81

Plaintiff alleged that he was injured as a result of working with metal products produced by defendant and supplied to plaintiff's employer for incorporation into a manufactured product. He claimed his exposure to the metal dust produced by sanding, cutting, and grinding defendant's metal products during the manufacturing process caused him to develop pulmonary fibrosis and other lung conditions. The trial court sustained some defendants' demurrers and granted other defendants' motions for judgment on the pleadings, on the ground that the component parts doctrine precluded liability.

The Court of Appeal (Second District, Division Three) affirmed, holding that liability was barred under the component parts doctrine, which provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm. Generally, suppliers of raw materials to manufacturers cannot be held liable for negligence or strict products liability by the manufacturers' employees who sustain personal injuries as a result of using the raw materials in the manufacturing process. Such a supplier could be held liable in extraordinary circumstances where: (1) the raw materials are contaminated; (2) the supplier exercises substantial control over the manufacturing process; or (3) the supplier provides inherently dangerous raw materials. No such extraordinary circumstances existed in Maxton's case. The metal products themselves were not inherently dangerous, plaintiff's employer was a sophisticated buyer, the products were substantially changed during the integrated manufacturing process, and defendants played no role in developing or designing the integrated products.

The court distinguished prior decisions that had imposed liability on suppliers of raw materials in cases involving asbestos, which the court said was an inherently dangerous product, unlike the raw materials in Maxton's case.

Manufacturer's compliance with industry standards and regulations can be relevant to defending against claims alleging negligence and strict products liability design defect.

Howard v. Omni Hotels Management Corp. (2012)
203 Cal.App.4th 403

Plaintiff filed negligence and strict products liability claims against the manufacturer of a bathtub, alleging that the slip-resistant coating of the bathtub did not comply with applicable standards. The trial court granted summary judgment in favor of the manufacturer.

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The Court of Appeal (Fourth Dist., Div. One) affirmed, rejecting plaintiff's argument that the manufacturer could not defend against his claims with evidence that the manufacturer met industry customs or standards on safety. "[T]he admissibility of expert evidence about a manufacturer's compliance with regulations or trade custom varies with the types of theories under which liability is sought." Thus, a manufacturer's 'compliance with regulations, directives or trade custom "constitutes evidence for jury consideration with other facts and circumstances'"; "[w]here the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not 'irrelevant,' but instead properly should be taken into account through expert testimony as part of the design defect balancing process." Here, no competent evidence submitted by plaintiffs rebutted defendant's showing regarding the adequacy of the product design.

Riding a motorcycle on a public highway as part of an organized, noncompetitive, recreational motorcycle riding event is subject to the primary assumption of the risk doctrine, and the event organizer has no duty to participants other than to avoid increasing the risks inherent in such an activity.

Amezcua v. Los Angeles Harley-Davidson (2011)
200 Cal.App.4th 217

Plaintiffs participated in an organized, noncompetitive, recreational motorcycle riding event sponsored and organized by defendant. While riding their motorcycle on the freeway as part of the event, plaintiffs collided with a car and were injured. The trial court threw out plaintiffs' personal injury suit against the event organizer on summary judgment under the primary assumption of the risk doctrine.

The Court of Appeal (Second District, Division Eight) affirmed, holding that participation in such an event falls within the range of activities as to which the primary assumption of risk doctrine has been found to apply. The risk of being involved in a traffic collision while riding in a motorcycle procession on a Los Angeles freeway is apparent. Traffic slowing and other drivers not paying attention are inherent risks of riding in an organized motorcycle ride on public highways. Event organizer did not increase the risk inherent in this activity by failing to arrange for a police escort.

Note that the scope of the assumption of risk doctrine is an issue now pending before the California Supreme Court in *Nalwa v. Cedar Fair* (case no. S195031), in which the court will address these questions: 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'? And, are owners of amusement parks subject to a special version of the doctrine that imposes upon them a duty to take steps to eliminate or decrease any risks inherent in their rides?

Hospital that performs lab tests for a patient's personal physician is not liable under ostensible agent theory for the physician's failure to inform the patient of the lab results.

Walker v. Sonora Regional Medical Center (2012)
202 Cal.App.4th 948

Plaintiff Amber Walker gave birth to a child with cystic fibrosis approximately one year after her personal physician, defendant Donavon Teel, M.D., failed to inform her that she tested positive as a carrier of cystic fibrosis. The trial court granted summary judgment for the Hospital based on its limited role in the laboratory testing and reporting process.

The Court of Appeal (Fifth Dist.) affirmed, rejecting plaintiff's claim that her physician was the Hospital's ostensible agent: "The evidence in this case plainly negated any possibility of ostensible agency. Amber selected and made her appointments with Dr. Teel, who became her personal physician for purposes of managing her pregnancy. She was not treated by Dr. Teel at the Hospital (in the emergency room or otherwise) or referred directly to Dr. Teel by the Hospital. Although Dr. Teel had medical staff privileges at the Hospital, he was an independent contractor. The Hospital had no property ownership or interest in Dr. Teel's office or building, nor was any of the nurses or other personnel at Dr. Teel's office employed by the Hospital. There was no evidence that the Hospital ever said or did anything to lead the Walkers to believe that Dr. Teel was an agent or employee of the Hospital. Moreover, Amber signed a document at the time the laboratory test was performed acknowledging that the physicians who were on staff with the Hospital were not employees or agents of the Hospital, but were independent contractors." The fact that Dr. Teel was on staff at the Hospital in the sense that he had the privilege of using the Hospital facilities for certain medical purposes (e.g., to deliver babies) did not, by itself, create an inference of ostensible agency.... Likewise, the facts that Dr. Teel's office happened to be located in the vicinity of the Hospital and that Amber desired to eventually have her baby delivered at the Hospital, were insufficient to create a triable issue of fact. More had to be shown. Specifically, the Walkers had to show that Amber looked to the Hospital for her prenatal care (of which laboratory tests were a part) rather than to her personal physician, and that there was conduct by the Hospital that would cause a reasonable person to believe that Dr. Teel was an agent of the Hospital."

A tenant to a commercial lease may agree to limit the implied covenant of fair dealing and the scope of the covenant of quiet enjoyment, whether express or implied, and may agree to limit the lessor's liability for ordinary negligence.

Frittelli, Inc. v. 350 North Canon Drive, LP (2011)
202 Cal.App.4th 35

In this real estate action, the owners of a shopping center and a tenant at the center entered into a commercial lease that contained an express guarantee of quiet enjoyment of the premises for the plaintiff, and a potentially conflicting clause granting the owners a right to remodel the shopping center. The remodeling clause contained a limitation on the owners' liability for damages to the renovations. The lease also contained a separate provision exempting the owners from liability for damages from "conditions arising upon the Premises or upon other portions of the building of which the Premises are a part," and "injury to

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Lessee's business or for any loss of income or profit therefrom." After the owners began large-scale renovations of the shopping center – placing scaffolding on the center's façade and creating dust and dirt in much of the commercial space – the owners began an unlawful detainer action against the plaintiff tenant; which in turn sued for breach of the lease and negligence, alleging the renovations made it impossible to operate its business. The actions were consolidated. The owners moved for summary judgment on the plaintiff's claims based on the lease's exemptions for lessor liability. The trial court granted summary judgment and the plaintiff appealed.

The Court of Appeal (Second District, Division Four) affirmed. The court explained that "[t]o the extent the exemption[s] ... purport[] to shield the lessor and its agents from liability for breaches of the covenants in the lease, it is well established that the tenant to a commercial lease may agree to limit the scope of the covenant of quiet enjoyment, whether express or implied ... as well as the implied covenant of fair dealing." To determine whether the lease's exemptions also shielded the property owners from negligence liability, the court examined those exemptions in light of Civil Code section 1668, which expresses the public policy that contracts may not exempt anyone from responsibility for fraud, willful injury, future intentional wrongs, gross negligence, illegal acts, and ordinary negligence that implicates "the public interest." Where an exemption forecloses liability for ordinary negligence not implicating the public interest, the exemption is still strictly construed. After closely scrutinizing the exemptions, the court held "the lease exempts the lessor from liability for breach of the lease and ordinary negligence under the facts alleged in [the plaintiff's] complaint."

Employee acts within the course and scope of his employment, for respondeat superior purposes, when he moves his personal vehicle at a construction site to get it out of the way of another subcontractor's operations.

Vogt v. Herron Construction, Inc. (2011)
200 Cal.App.4th 643

An employee of defendant framing subcontractor parked his car on the construction site, where it was in the way of the operations of a concrete subcontractor. Plaintiff, an employee of the concrete subcontractor, asked defendant's employee to move his car, which he did. In the process of moving the car, defendant's employee struck and injured plaintiff. The trial court granted summary judgment to defendant on the ground that its employee was not acting within the course and scope of his employment when he injured plaintiff.

The Court of Appeal (Fourth District, Division Two) reversed. It held that defendant's employee did act during the course and scope of his employment, since his vehicle was in the way of the concrete subcontractor's operations and moving it enabled the advance of the construction of the overall project. Alternatively, the court held that moving the car was an act necessary to defendant's employee's comfort, convenience, health, and welfare while at work, which is encompassed within the course and scope of the employee's employment.

LABOR AND EMPLOYMENT LAW

Employees, including certain insurance adjusters, are exempt from overtime and minimum wage laws if their work is qualitatively administrative and is quantitatively of substantial importance to the management or operations of the business.

Harris v. Superior Court (2011)
53 Cal.4th 170

Plaintiffs, claims adjusters employed by two insurance companies, brought multiple class actions against those companies, asserting claims for unpaid overtime compensation and alleging that they were misclassified as administrative employees exempt from the overtime laws. The trial court consolidated the class actions and granted class certification. Plaintiffs then moved for summary adjudication of the defendants' affirmative defense that they were exempt administrative employees, and defendants moved to decertify the class. The trial court denied summary adjudication and partially decertified the class. It decertified the class for the period after October 1, 2000 – the operative date of a revised version of the applicable wage order, Wage Order 4-2001 – but kept the class intact for the period before that date, concluding it was bound by *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805 (*Bell II*) and *Bell v. Farmers Insurance Exhange* (2004) 115 Cal. App.4th 715 (*Bell III*), which applied an "administrative/production worker dichotomy" in interpreting the wage order and classified claims adjusters like plaintiffs as non-exempt production workers. Both sides sought review via writ petition in the Court of Appeal. The Court of Appeal mechanically applied the administrative/production worker dichotomy from *Bell II* and *Bell III* to all parts of plaintiffs' claims, and thus reversed the trial court's partial decertification of the class for the period after October 1, 2000.

The California Supreme Court reversed and remanded for the trial court to apply the proper standard for the administrative exemption. Under Wage Order 4-2001, a person generally can be considered an administrative employee if he or she is engaged in the performance of work directly related to management policies or general business operations of his or her employer's customers. An insurance adjuster's work satisfies the "directly-related" standard in these circumstances: "First, it must be *qualitatively* administrative[, and] [s]econd, *quantitatively*, it must be of substantial importance to the management or operations of the business." Administrative operations include work done by "white collar" employees engaged in servicing a business, such as advising the management, planning, negotiating, representing the company and, in the context of insurance adjusters, interviewing witnesses, making recommendations regarding coverage and value of claims, determining fault, and negotiating settlements. The administrative/production worker dichotomy is not a dispositive test, and a court instead should consider the particular facts of the case and apply the language of the relevant statutes and wage orders at issue to decide whether employees are exempt. Significantly, the Supreme Court distinguished *Bell II* and *Bell III* on the ground that those decisions were limited to their facts, and the *Bell* court did not have the benefit of the current test for determining whether work is administrative.

California overtime and unfair competition law applies to work performed by out-of-state employees of a California-based employer within California, but unfair competition law does not apply to work by such employees performed in other states.

Sullivan v. Oracle Corporation (2011)
51 Cal.4th 1191

Out-of-state employees of defendant software company based in California brought a class action in federal court against the company for unpaid overtime compensation for work performed in California and elsewhere. Specifically, plaintiffs asserted claims under the California Labor Code for work performed *in California*, under the Unfair Competition Law (UCL) based on the alleged Labor Code violations for work performed *in California*, and under the UCL based on violations of the federal Fair Labor Standards Act (FLSA) for work performed *outside of California*. The federal district court granted summary judgment to the defendant on all three claims. On appeal, the Ninth Circuit initially reversed as to the first and second claims (Labor Code and UCL violations for work performed in California) and affirmed on the third claim (UCL violations predicated on FLSA violations for out-of-state work), but later withdrew its opinion and certified questions with respect to all three claims to the California Supreme Court.

The California Supreme Court held that the California Labor Code applies to overtime work performed in California for a California-based employer by out-of-state employees, where the employer was headquartered in California, had its principal place of business there, made the decision to classify plaintiffs as exempt and deny them overtime pay there, and had plaintiffs perform work there. There is no plausible Dormant Commerce Clause violation when California has chosen to treat out-of-state residents equally with its own. The plaintiffs are also permitted to assert claims under the UCL based on the alleged Labor Code violations for work performed in California. But the plaintiffs could not assert UCL claims based on FLSA violations for work performed in other states since nothing in the text, legislative history, or purpose of the UCL overcame the presumption against extraterritorial application of California statutes.

PAGA does not authorize recovery of civil penalties set by wage orders.

Thurman v. Bayshore Transit Management Co. (2012)
203 Cal.App.4th 1112

The trial court awarded the plaintiff civil penalties under the Private Attorneys General Act of 2004 (PAGA) for violations of California's Labor Code. In doing so, however, the court concluded that plaintiff could not recover penalties that the plaintiff claimed were set by an Industrial Welfare Commission (IWC) wage order.

The Court of Appeal (Fourth Dist., Div. One) affirmed. PAGA authorizes recovery of civil penalties only for violations of the Labor Code. Although PAGA actions can serve indirectly to enforce certain wage order provisions by enforcing statutes that require compliance with wage orders, PAGA does not create a private right of action directly to enforce a wage order.

EVIDENCE

An appellant who relies on the "futility" exception to the requirement that evidentiary objections cannot be made for the first time on appeal generally must demonstrate that the trial court made an adverse ruling which indicates a further objection to the ruling challenged on appeal would have been be futile.

Duronslet v. Kamps (2012)
203 Cal.App.4th 717

The plaintiff sought an injunction prohibiting the defendant from harassing her or her immediate family. In support of the injunction request, the plaintiff and her attorney each submitted declarations and attaching different documents reflecting similar information. At the hearing on the injunction request, the defendant's attorney did not object to admission of the material attached to the plaintiff's declaration, but did object unsuccessfully to admission of the material attached to the attorney's declaration. After the trial court issued the injunction, the defendant appealed.

The Court of Appeal (First District, Division Five) affirmed. On appeal, the defendant asserted that the injunction required reversal because it was based solely on hearsay evidence contained in the plaintiff's declaration. Not having objected to that declaration, the defendant asserted such an objection would have been futile in light of the trial court's overruling of the objection to the attorney declaration, which contained substantially the same information. The court found the futility doctrine did not apply because the hearsay the defendant challenged on appeal "was offered and received without objection *before* the attorney declaration was offered, which did draw [the defendant's] objection. There was no prior ruling that would have suggested an objection to [the plaintiff's] declaration and its attachment would be futile."

See also People v. Borzakian (2012) __ Cal.App.4th __ [Second Dist., Div. Seven: traffic conviction reversed – police officer who issued citation based on photos from a red-light camera rather than based on personal observations at the scene could not provide foundation for photos, as he could not properly testify that the camera was properly maintained; the business records exception to hearsay did not apply because the photos were a record of the red light camera company, and he was employed only by the city]

INSURANCE

Insurer that agreed to provide a defense for its insured is permitted to intervene in the case where its insured has defaulted, in order to defend its own interests, and it must be permitted to litigate all issues of liability and damages without being limited to issues its insured would be able to raise.

Western Heritage Insurance Company v. Superior Court (Parks) (2011) 199 Cal.App.4th 1196

Plaintiffs brought a wrongful death action against a home health care company and its employee after plaintiffs' father died in a car accident

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while a passenger in a car driven by the defendant employee. The home health care company's insurer provided a defense under a reservation of rights and filed an answer on defendants' behalf. When the defendant employee failed to respond to discovery requests or to appear for her deposition, the trial court entered her default. The insurer was allowed to intervene at that point to defend its interests in light of the employee's default, but the scope of its intervention was subsequently restricted to contesting the amount of plaintiffs' damages (i.e., it was not allowed to contest liability). The insurer filed a petition for writ of mandate.

The Court of Appeal (Second District, Division Three) reversed, holding that the insurer had a sufficient interest to justify intervention and that it had the right to litigate issues of both liability and damages. The court explained that an intervening insurer has the right to assert, on its own behalf, all defenses that otherwise would be available to the insured, whether as to liability or damages; the intervening insurer is not limited to those defenses to which its insured might be restricted due to the insured's procedural default, but may pursue its own interests. Additionally, the court held that the intervening insurer was not required to move to vacate the insured's default as to itself because the insured's default simply had no effect on the insurer. And the fact that the insurer provided a defense under a reservation of rights did not create an irreconcilable conflict of interest because coverage issues were not being decided in this proceeding.

See also *Clark v. California Ins. Guarantee Assn.* (2011) 200 Cal.App.4th 391[Fourth Dist., Div. Three: affirming trial court's grant of summary judgment to CIGA where injured plaintiff obtained judgment against the insured of an insolvent insurer, and subsequently filed a direct action under Ins. Code section 11580 against CIGA to recover court costs and interest on the judgment; Claims for such sums under supplemental payment provisions are based on defense obligations owed only to the insured, and thus are not "covered claims" that can be asserted against CIGA under Insurance Code section 1063.1, subdivision (c)(1)(A).

A party who settles his case may be liable to his opponent's attorney if the settlement reduces the opponent's prospective recovery absent the settlement, and thus reduces the value of the attorney's contractual lien on the recovery.

Little v. Amber Hotel Co. (2011)
202 Cal.App.4th 280

The plaintiff and defendant *in an underlying case* engaged in direct client-to-client settlement discussions while the plaintiff's appeal was pending from a defense judgment. The defendant had obtained a fee award for approximately $150,000, and, to protect itself against exposure on that award, the plaintiff (Amber Hotel) apparently agreed to pay $100,000 to the defendant, who in turn agreed to forgo any further claim for attorney fees awarded to him in the judgment. The defendant's *lawyer* then successfully sued Amber Hotel (now the defendant in this action), claiming intentional interference with the lawyer's ability to collect his hourly fee through enforcement of the lien on his own former client's recovery. The lawyer collected nearly $200,000 for the lawyer's claimed hourly fees, plus another almost $700,000 in special damages for interference with the fee contract. Amber Hotel appealed.

The Court of Appeal (Second Dist., Div. Four) affirmed the judgment in favor of the lawyer, holding the trial court did not err in instructing the jury that "[w]hen there exists a valid attorney's lien, neither the attorney's client nor the opposing counsel or opposing counsel's clients can settle or otherwise compromise a litigated subject matter so as to defeat the attorney's rights." Plaintiff thus proved a valid claim for tortious interference with the fee lien, notwithstanding the fact that lawyers have long been on notice that their clients are free to negotiate directly with each other at any time to settle their case (Rules Prof. Conduct, rule 2-100, discussion; ABA Standing Com. on Ethics & Prof. Responsibility, formal opn. No. 11-461 (2011)) Although a lawyer who takes on a client based on the assumption that payment will be made out of any recovery the client receives arguably accepts the risk that the client will compromise his or her claim, reducing the lawyer's contingency fee or lien rights, the Court of Appeal essentially created a new duty on the part of every litigant to protect the ability of *the opponent's lawyer* to collect on a fee agreement that the litigant was not a party to.

CASES DEPUBLISHED BY CALIFORNIA SUPREME COURT

May a defendant settle all potential wrongful death claims by entering into an agreement with all known heirs where no wrongful death complaint has yet been filed?

Moody v. Bedford (2012)
202 Cal.App.4th 745

In this wrongful death action, the adult child of a woman killed in a vehicle collision made a claim against a driver involved in the collision. Before any lawsuit was filed, the driver's insurer settled for policy limits after the adult child represented she was the decedent's sole heir. Once the settlement was paid, the decedent's minor children filed a wrongful death action against the driver. The trial court granted summary judgment for the driver, ruling that the one-action rule, which requires all heirs to join in a single wrongful death action, barred the minor children's lawsuit. The minor children appealed.

The Court of Appeal (Second District, Division Five) reversed, holding that the one-action rule applies only after a wrongful death action has been filed, and is inapplicable to the pre-litigation settlement of a wrongful death claim by one heir – even where that heir secures the settlement by fraudulently misrepresenting that she was the decedent's sole heir. The court held that to gain the protection of the one-action rule, an insurer must require a wrongful death claimant to file suit before settling that claim.

The California Supreme Court depublished the opinion, which is no longer citable as precedent. However, defendants and their insurers in future actions should consider taking steps to avoid similar problems when attempting to finally resolve wrongful death claims.

Note that this is one of five opinions depublished so far in 2012, notwithstanding the California Supreme Court's extreme reluctance in recent years to depublish cases.

After *Brinker,* Can Meal Break Claims be Certified for Class Treatment?

By Felix Shafir and John F. Querio

The number of class actions filed in California courts has increased sharply over the past decade. (Judicial Council of Cal., Admin. Off. of Cts., Findings of the Study of Cal. Class Action Litigation, 2000-2006, First Interim Rep. (2009) pp. 3, 5, 7 [class action filings in California trial courts increased by 81% between 2000 and 2004 alone and the number of employment class actions filed between 2000 and 2005 grew by a stunning 313.8%, of which more than half were class actions alleging wage and hour violations].) Lawsuits alleging violations of California law governing meal breaks have been among the most popular of this ever-rising tide of class actions. (*Id.* at pp. 7-8 [indicating claims alleging wage and hour violations of California meal and rest break law were not a popular basis for class actions until 2003, when the success of class actions asserting such claims against Wal-Mart "may have contributed to the increased popularity" of such suits "in California in and after 2003"].)

One of the most hotly-disputed issues in such meal break class actions has long been whether, under California law, employers must ensure their employees take their meal breaks. On April 12, 2012, the California Supreme Court decided this long-contested issue in *Brinker Restaurant Corp. v. Superior Court* (California Supreme Court case no. S166350).

In *Brinker*, the Supreme Court unanimously held that employers need not ensure their employees take meal breaks. (See *Brinker Restaurant Corp. v. Superior Court* (Apr. 12, 2012, S166350) __ Cal.4th __ [2012 WL 1216356, at pp. *14-*18] (*Brinker*).) This decision is likely welcome news to many, including employees who prefer the flexibility of deciding for themselves whether to take a meal break or skip it for any number of countless personal, work-related, and financial reasons.

But this determination raises a different important question: if employers need not ensure meal breaks are taken, and employees are free to skip meal breaks for their own reasons, may courts properly certify claims based on missed meal breaks for class treatment? Or will those cases now require a close inquiry into the particular events surrounding each missed break in order to decide whether the employer has met its Labor Code obligations, thus precluding effective class-wide litigation? Given that class certification can often mean the difference between whether or not an employer faces the risk of enormous class damages – especially in these difficult economic times when many employers may strive to conserve resources to support their operations and minimize the prospect of layoffs – this class action issue is of vital importance to employers and employees alike. The Supreme Court in *Brinker* did not speak to this issue, and remanded the meal subclass certification question to the trial court for reconsideration in light of a different legal determination. (See *Brinker*, *supra*, 2012 WL 1216356, at pp. *24-*25.)

Plaintiffs like those in *Brinker* have often insisted that their meal break claims should be certified for class treatment even if employers need not ensure meal periods are taken. (E.g., Opening Brief on the Merits 116-132, *Brinker Restaurant Corp. v. Superior Court*, No. S166350 [available at The UCL Practitioner, *Brinker Briefs* <http://www.uclpractitioner.com/Brinker.html> (as of Mar. 21, 2012)].) But class certification cannot be granted if the party seeking class treatment is unable to show "that questions of law or fact common to the class *predominate* over the questions affecting the individual members" (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913), and many courts have declined to permit class certification of meal break claims on the ground individual issues predominate if employers are not obligated to ensure meal periods are taken.

For example, before the California Supreme Court granted review in *Brinker*, California's Fourth District Court of Appeal, Division One, held there that "because meal breaks need only be made available, not ensured, individual issues predominate[d]" and thus the plaintiffs' "meal break claim [was] not

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amenable [to] class treatment." (*Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, 58, review granted Oct. 22, 2008, S166350.) The Court of Appeal reached this conclusion because "[t]he reason meal breaks were not taken can only be decided on a case-by-case basis. It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the [defendants'] restaurants were so inadequately staffed that employees could not actually take permitted meal breaks." (*Ibid.*) Although the plaintiffs maintained statistical evidence could nonetheless justify class certification, the intermediate appellate court held that this statistical evidence "could only show the fact that meal breaks were not taken, or were shortened, not why. It will require an individual inquiry as to all [defendants'] employees to determine if this was because [defendants] failed to make them available, or employees chose not to take them." (*Ibid.*)

Similarly, California's Second District Court of Appeal, Division Eight, has repeatedly affirmed trial courts' refusal to certify meal break claims for class treatment after determining that employers need not ensure meal breaks are taken, although several of this court's decisions, like the Court of Appeal's opinion in *Brinker*, were depublished by operation of law when the California Supreme Court ultimately granted review pending its decision in *Brinker*. (See, e.g., *Lamps Plus Overtime Cases* (2011) 195 Cal. App.4th 389, 400-407, review granted July 20, 2011, S194064; *Tien v. Tenet Healthcare Corp.* (2011) 192 Cal.App.4th 1055, 1062-1064, 1066-1069, 1071, review granted May 18, 2011, S191756; *Hernandez v. Chipotle Mexican Grill, Inc.* (2010) 189 Cal.App.4th 751, 760-763, 765-768, review granted Jan. 26, 2011, S188755.) As the Second District, Division Eight, has explained, "common-sense" confirms that "individual questions about the reasons an employee might not take a meal period are more likely to predominate if the employer need only offer meal periods, but need not ensure employees take those periods." (*Tien*, at p. 1064.)

Numerous California federal district courts have equally refused to certify meal break claims for class treatment based on the conclusion that the predominance requirement for class certification could not be satisfied where California law did not require employers to ensure meal breaks were taken. (See, e.g., *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 644-647; *Kimoto v. McDonald's Corp.* (C.D.Cal. Aug. 19, 2008) 2008 WL 4690536, at pp. *4-*7; *Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 531-534; *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal. Aug. 4, 2008) 2008 WL 3200190, at pp. *2-*4.)

As these district courts emphasized, "'individual issues predominate'" when employers are not obligated to ensure meal periods are taken since "'[l]iability cannot be established without individual trials for each class member to determine why each class member did not clock out for a full 30-minute meal break on any particular day.'" (*Salazar*, *supra*, 251 F.R.D. at p. 534, quoting *Kenny*, *supra*, 252 F.R.D. at p. 646; accord, e.g., *Gabriella*, *supra*, 2008 WL 3200190, at pp. *3-*4 [denying class certification since "defendants' liability turns on whether meal and rest periods were made available and the reasons why breaks were missed" and thus "individual issues predominate" because, "[i] n order to determine defendants' liability, the parties would be required to litigate each instance of an alleged violation"].)

This is not to say that meal break claims will never be amenable to class certification. For example, a trial court might grant class certification where an employer has an express written policy uniformly barring employees from taking a meal break, notwithstanding California law requiring employers to provide meal breaks to non-exempt employees. Such a uniform written policy may decrease the likelihood that, ordinarily, numerous individualized determinations will be necessary to ascertain *why* each putative class member did not take a meal break. (Cf. *Brinker*, *supra*, 2012 WL 1216356 at pp. *12-*13 [upholding trial court's certification of rest break subclass due to employer's express, uniform rest break policy that allegedly violated California law].) As *Brinker* observes, if a plaintiff can show the existence of a uniform policy that was consistently applied to an ascertainable class of employees, then claims based on the allegation that the policy violates wage and hour laws "are of the sort routinely, and properly, found suitable for class treatment." (*Id.* at p. *13.)

On the other hand, there could well be a substantial reduction in the number of lawsuits where class certification of meal break claims is found to be proper now that *Brinker* has held that employers are not required to ensure employees take meal breaks. It is now beyond doubt that the mere fact that some employees have failed to take such breaks is not in and of itself proof of wrongdoing

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by the employer. Indeed, *Brinker* confirms that in the absence of a uniform company policy, class certification is inappropriate where a wage and hour claim would require individualized inquiries. (See *Brinker*, *supra*, 2012 WL 1216356, at pp. *25-*26 [affirming Court of Appeal's decertification of plaintiffs' off-the-clock claims where neither a common policy nor a common method of proof was apparent and proof of liability required employee-by-employee determinations].)

Brinker explained that when an employee works "for five hours, the employer is put to a choice: it must (1) afford an off duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay." (*Brinker*, *supra*, 2012 WL 1216356, at p. *18.) In other words, whether an employer is liable for violating the meal break laws turns on, among other considerations, individualized questions as to whether the employee was afforded a meal period during which the employee "was actually reliev[ed] ... of all duty." (*Ibid.*) And a plaintiff cannot satisfy the predominance requirement for class certification where liability can be decided only through individual determinations class member-by-class member. (See *Friedman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 40-42; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 810-814; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 669.)

A recent California Court of Appeal decision, *Duran v. U.S. Bank National Assn.* (2012) 203 Cal.App.4th 212, highlights a serious impediment to certifying a meal break claim for class treatment for the purpose of determining liability. To secure class certification, plaintiffs often rely on evidence obtained from what they contend is a representative sample of putative class members—known as sampling—to try to secure class certification. In *Duran,* the First District Court of Appeal, Division One, emphasized that "the use of sampling to extrapolate liability" in a wage and hour case "can be problematic." (*Id.* at p. 256.) Although courts have occasionally allowed aggregate *damages* in class actions to be determined based on statistical inferences, *Duran* explained that "courts are generally skeptical of the use of representative sampling *to determine liability*, even in cases in which plaintiffs have proposed using expert testimony and statistical calculations as the foundations for setting the sample size." (*Duran*, *supra*, 203 Cal.App.4th at pp. 252, fn. 54, 258, emphasis added.)

Since plaintiffs alleging meal break claims often rely on sampling as a substitute for direct class-wide evidence that an employer improperly caused employees to miss meal breaks, meal break claims based on such evidence cannot properly be certified for class treatment for the purpose of deciding liability. *Duran* supports the conclusion that, at least where a plaintiff relies on sampling to press for class certification, meal break claims generally should not be certified for class treatment after *Brinker* since meal break liability will typically turn on each employee's individualized reasons for not taking a break or for taking a shortened break, and a defendant will thus be entitled to a trial on that individualized issue. *Duran* says that "representative sampling may not be used to prevent employers from asserting individualized" defenses. (*Duran*, *supra*, 203 Cal.App.4th at p. 259, fn. 65.)

The *Duran* Court reached this conclusion based on the persuasive analysis in the U.S. Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes* (2011) ___ U.S. ___ [131 S.Ct. 2541, 180 L.Ed.2d 374]. (*Duran*, *supra*, 203 Cal.App.4th at pp. 258-259 & fn. 65.) As *Duran* observed, *Wal-Mart Stores* rejected the notion that a class action could be certified based on the prospect of a "'Trial by Formula'" predicated on sampling, since a class cannot be certified where it would prevent a defendant from litigating its defenses to individual claims. (*Ibid.*, citing *Wal-Mart Stores, Inc.*, at p. 2561.) According to *Duran*, "[w]hile innovation [in class actions] is to be encouraged, the rights of the parties may not be sacrificed for the sake of expediency." (*Duran*, at p. 248.) *Duran*'s reliance on *Wal-Mart* proved prophetic since, not long after, the California Supreme Court in *Brinker* also cited *Wal-Mart*'s class action principles with approval. (2012 WL 1216356, at p. *6.)

In a concurrence in her own opinion for the court, Justice Werdegar (joined only by Justice Liu) argued that, in the absence of detailed employee time records the burden is on the employer to show an employee voluntarily waived a meal break, and that an employer's assertion that its employees waived their meal breaks is an affirmative defense, rather than an element of the employees' claims. (See *Brinker*, *supra*, 2012 WL 1216356 at pp. *26-*27 (conc. opn. of Werdegar, J.).) Justice Werdegar acknowledged that an employer's affirmative defense that "hinges liability *vel non* on consideration of numerous intricately detailed factual questions" can support denial of class certification. (*Id.* at pp. *26-*28.) Nonetheless, without addressing *Duran*, Justice Werdegar hinted that, in her view, individual issues raised by a meal break waiver defense would not necessarily render a meal break claim unsuitable for class treatment, given the availability of representative testimony, surveys, and statistical sampling as tools to facilitate management of wage and hour class actions. (*Id.* at pp. *27-*28.) Justice Werdegar's concurring views did not command the support of a majority of the court, however, and thus do not represent California law.

Now that the Supreme Court in *Brinker* has clarified the substantive requirements imposed by meal break law and remanded for the trial court to decide in the first instance whether class certification is improper under those newly-clarified meal break standards, the California Courts of Appeal will have to address the interplay between those standards and class certification standards, given the number of pending class actions alleging meal break claims. Given the importance of that issue and the distinct possibility that the Courts of Appeal will develop various and conflicting approaches in order to resolve it, it is conceivable that the issue could return to the California Supreme Court for further refinement.

Felix Shafir *and* ***John F. Querio*** *are appellate lawyers at Horvitz & Levy LLP, where they have handled a wide variety of civil appeals and writ proceedings. Both have extensive expertise in defending clients faced with class action litigation.*

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Benefits of Small-Dollar Structured Settlements

By Patrick C. Farber and Patrick E. Stockalper

An individual is injured in a car accident and both defense and plaintiff attorneys agree to a $45,000 settlement. Instead of a lump sum payout, a structured settlement is put in place that will pay the settlement over a set period. Structured settlements for large-dollar claims are commonplace, but surprisingly, so are structures for settlements under $200,000.

During the first three quarters of 2011, 21,846 cases were structured, totaling approximately $3.633 billion in annuity premiums. The average case size was about $166,000. These results are based on figures released independently by 11 life insurance companies that issue structured settlement annuities.

Over the past 20 years, more than 50 percent of the structured settlements facilitated by Ringler Associates, a national structured settlements brokerage firm, were less than $50,000. Another approximately 17 percent were between $50,000 and $100,000. These figures are typical of most annuity brokerage firms.

In most cases, neither plaintiff or defense want to see cases go to trial, particularly with small cases where small-dollar structured settlements makes more financial sense than a protracted, unpredictable jury trial. If defense counsel can highlight the advantages of structured settlement benefits to the plaintiff, these cases are more likely to be resolved in the client's best interest.

Tax Advantages

Although smaller annuities are more difficult to justify today because of historically low interest rates, plaintiffs are seeing them as a way to bolster their retirement. Many have had their retirement savings take a beating over the last 10 years. Small annuities can subsidize retirement savings--even with today's low interest rates. The money accrues tax-free and plaintiffs have the peace of mind of knowing they will have these additional funds when they retire.

Small settlements can be structured so they combine a lump sum payout to pay for immediate needs and an annuity for possible expenses down the road. Let's say a worker injured his hand at his job and received a $60,000 settlement. He can go back to work, but only part time while receiving medical treatment. It is determined that it will take six to eight months of physical therapy for his hand to improve so he can resume working fulltime. A settlement is reached in which he receives a $40,000 lump sum at the time of settlement to cover medical costs and living expenses while he is working part time. The remaining $20,000 will or can be paid out in future years for use if additional surgery is needed. If the injured party finds that surgery is not required, the money is still received tax-free.

Another structured settlement advantage is that the funds cannot be spent quickly by the injured party (as can be the case with a lump sum payout) so there is the

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opportunity for financial management and tax planning. Guaranteed, scheduled payouts are not subject to market whims or economic calamities. Funds are placed in AAA rated bonds and Treasury securities by the life insurance carrier. For plaintiffs who can easily succumb to demands from friends and family for cash, or from well meaning individuals with the latest can't miss investments, a structured settlement is the protective answer.

Protecting Medi-Cal and Medicare Benefits

Cases involving injured parties who are eligible or soon-to-become eligible for Medi-Cal can use a special needs trust (SNT) annuity to protect their government benefits while still enabling them to collect tax-free settlement payouts. Individuals who are eligible for Medi-Cal and receive a litigation recovery will lose Medi-Cal coverage until the litigation recovery's balance is below $2,000 for an individual or $3,000 for a couple (the resource limits for Medi-Cal).

The most common solution to protect Medi-Cal government benefits and settlement proceeds is to place the litigation settlement into a qualifying first party SNT – either an individual SNT or a pooled SNT with money paid to the injured party from the trust.

Much like an SNT used to preserve a plaintiff's eligibility for Medi-Cal, a Medicare Set Aside Arrangement (MSA) is used to preserve a plaintiff's future eligibility for Medicare. For example, a 35-year-old male slips and falls at a grocery store and injures his back resulting in multiple surgeries including future surgeries. He sues the grocery chain and the case settles for $230,000. An MSA would be created for a portion of the settlement to pay for future medical costs related to the injury. Why? In cases that involve a claim for future medical costs resulting from an injury, the plaintiff is required to use settlement funds allocated for future injury-related medical costs first to pay for the medical care. Until that allocated amount is spent, Medicare will not cover the plaintiff for treatment related to those injuries involved in the settlement.

In the above example, the MSA could be set up to receive $7,500 in cash and $2,500 a year for 20 years to pay for future back treatments. An annuity would cover the $2,500 a year payments. The MSA's present value would actually be $30,000, but the annuity could be purchased for as little as $19,500 for a savings to the defendant of $10,500.

Small Structures and Minors

The majority of smaller structured settlements are for minors. In fact, when minors are involved, judges often require that settlements be structured before approval regardless of the settlement amount.

With structures, parents can ensure that their children are unable to access the funds until they turn 18 or age of majority. They

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also give parents a chance to plan financially for their child's college years and beyond. In the case of young children, settlements of as little as $5,000 or $10,000 can be structured so the money is available in later years. Be aware, however, that some life insurance companies charge "small case fees" if the structured amount is very small. These fees eat up a large percentage of the settlement.

The negative consequences of an older child receiving a lump sum injury settlement as the child nears college age are significant. He or she may not be eligible for state grants and low interest loans because the worse off the financial situation a young person is in when applying for financial aid, the better chance for qualifying for these grants and loans.

If an older child nearing college age receives a lump sum payout, say for $50,000, the income would be counted against the child when seeking to qualify for college financial aid. Instead, if structured, the family could decide on a minimum payment per year for incidentals at school and wait until the child graduates to receive the remainder of the settlement. This could be used to pay off low interest college loans that are required to be paid after graduation. Here, not only do the parents see tax savings, but also have the opportunity to have their child qualify for grants and low-interest loans that would not be available if the settlement had been paid in a lump sum prior to the child's entering college.

The Big Picture on Small Structures

Structured settlement annuities help smooth out investment ups and downs for the injured party. The regular income that even a small annuity brings can be used to supplement money from other sources, pay for everyday living expenses or to see the injured party through until recovery.

For the defense, expenses associated with small claim payments are eliminated with structured settlements since the payment obligation and all liability are transferred to the insurance company managing the annuity. Defendants can close the books on these cases as soon as the settlement papers are signed.

Still, the results of a 2007 survey by the National Structured Settlement Trade Association (NSSTA) of attorneys involved in structured settlements estimated that only 7 percent of all personal injury settlements between $75,000 and $100,000 were structured, even though 95 percent of the attorneys surveyed said they were proponents of structured settlements. This means many smaller settlements that can be structured are still being handed out in lump sums.

Ultimately, the amount of the structured settlement is not as critical as is creating a settlement that meets the needs of the injured party. An annuity paid over a set number of years offering guaranteed tax-free income can be an attractive alternative to low interest bearing bank accounts or higher yielding, but riskier investments.

Patrick C. Farber *is a structured settlements broker in California. He specializes in settling medical malpractice, physical injury, non-physical injury, product liability, workers' compensation, mass torts, punitive damages, employment and elder abuse cases with structured settlements in court hearings, arbitrations and settlement conferences. 800-734-3910,* pat@patrickfarber.com.

Patrick E. Stockalper *is a partner with the firm of Reback McAndrews Kjar Warford & Stockalper and specializes in the areas of medical/dental/professional liabiltiy defense and personal injury defense. Mr. Stockalper, an ASCDC Board of Directors member, is the 2009-2010 President of the Litigation Counsel of America.*

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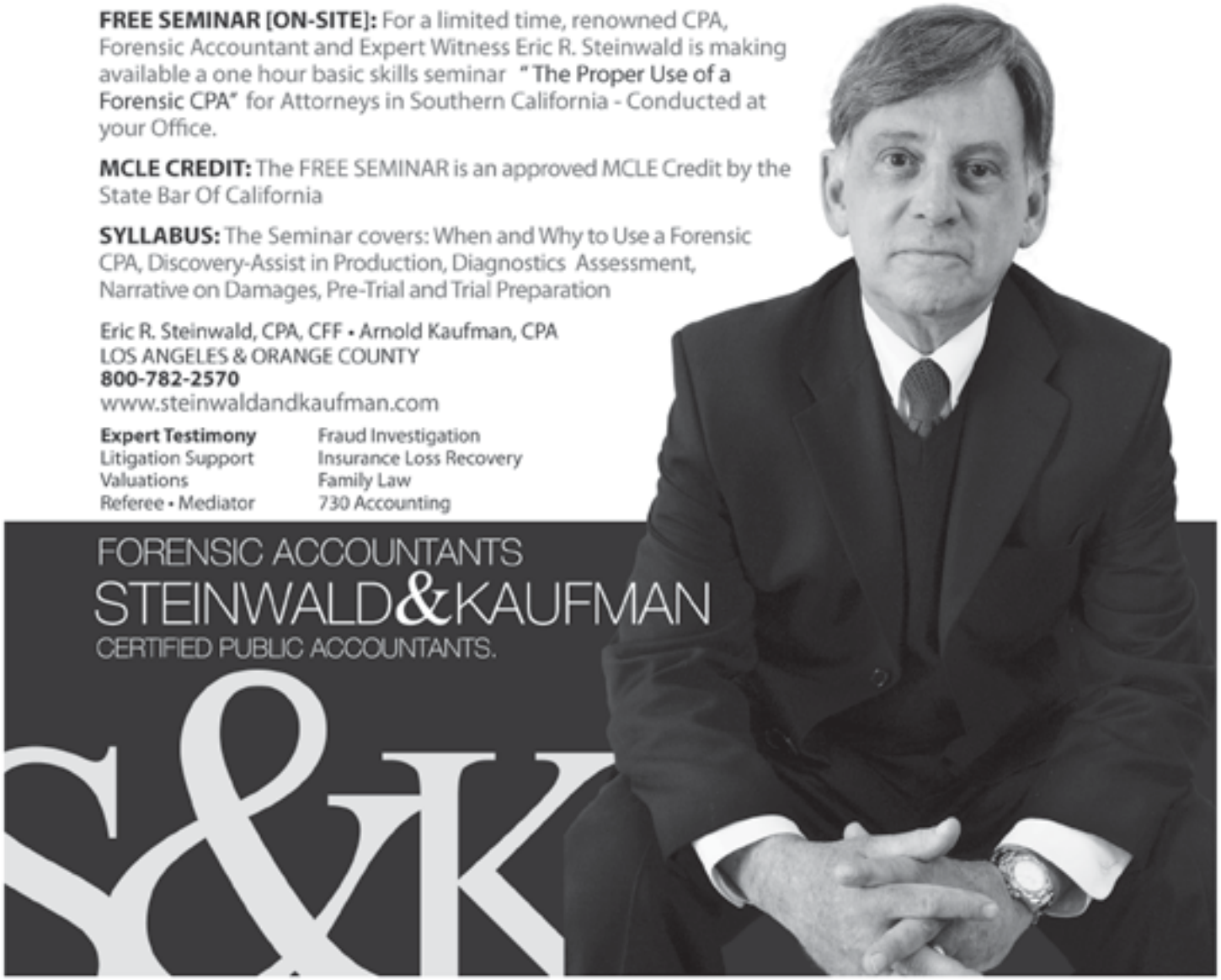

"Attorneys' Pet Peeves about Mediation" seminar. L to R: Mike St. Denis, Hon. Joe Hilberman, (Ret.), Daniel Ben-Zvi, Lisa Maki, and Randy Dean.

Mediation Tips Based on Attorneys' Pet Peeves

By The Hon. Joe Hilberman

I recently had the pleasure of participating in a panel discussion at the Strauss Institute at Pepperdine Law School sponsored by the Southern California Mediation Association. My co-panelists included Randy Dean, Lisa Maki, Daniel Ben-Zvi and Michael St. Denis, discussing the topic "Pet Peeves of Attorneys About Mediation."

It came as no surprise that there were many! I would like to highlight a few and make some suggestions about how attorneys can assist the mediator in ensuring a meaningful and successful mediation. The following "peeves," and my comments regarding them, are addressed in no particular order.

"A mediator who does not strongly encourage sharing briefs."

Always serve a brief, even if the other side does not serve one, and even if an additional confidential brief is served only on the mediator. If you are asking for something, tell the other side why you are legally entitled to it. If you are denying something, tell the other side why. And if you have a thought about how to resolve the matter, express your thoughts.

The purpose of the exchange of briefs is to let the other side know where you are coming from before the mediation so the decision-makers can have an opportunity to prepare for a meaningful discussion, allowing you to get to the substance of the discussion as quickly as possible.

If there are issues you do not want the other side to know, such as potential impeachment evidence, serve that information on the mediator as a separate, confidential document, or explain that information to the mediator in person, although he/she would appreciate having the information in advance of the hearing. As to the briefs that are exchanged, remember that they, too, are protected by the mediation privilege regarding use outside of the mediation. (See Evid. Code, §§1115-1128.)

"A mediator who won't talk with an attorney before the mediation."

The panel was uniformly in agreement that it is the responsibility of the mediator to be available to counsel in advance of the mediation to discuss the case. In my experience, the mediator can be far more effective when the attorneys provide a "heads up" on the issues in dispute, and perhaps more importantly, insight into the personalities of the parties involved.

This is particularly significant when "what the dispute is about" is really not what is alleged. Often there are significant

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personality, familial, ethnic or societal issues involved that are not evident from the briefs; when the mediator is advised of these issues it creates the opportunity for greater understanding and better defines the manner in which a successful mediation can be conducted.

The bottom line here is that counsel should not view contact with the mediator as prohibited "ex parte" communication.

"A mediator who insists on / refuses to convene a joint session."

As a mediator, I am not generally a believer in convening a joint session. My experience has shown that parties engaged in litigation seldom want to sit down across from each other and listen to the other side explain why the case is a slam-dunk winner/loser, or why they are completely right/wrong, or, well, you have been there and understand.

In high conflict cases it may be especially important to be able to assure one's client that he or she will not be in the same room with the opposing party, as there is often concern about an unwanted confrontation.

This is an excellent example of when a call to the mediator in advance is appropriate, as you may want to have the parties together, or not, and you should let the mediator know in advance. Again, you know your case far better than the mediator and should share with the mediator your thoughts on how the mediation will be most successful.

I do utilize the "joint session" in cases where the matter has been resolved and it is necessary to have the parties "buy-in" to the agreement in person and together, such as a homeowners association case or neighbor dispute. This is, of course, always with the consent and agreement of all counsel and the parties.

"A mediator who does not meet with the attorney outside of the presence of his or her client."

At the outset of the mediation I always tell the clients that I will be meeting privately with the attorneys – not to hide information but to speed the process. When we speak privately I have the opportunity to be more candid than in front of the client, as the mediator should never get between the client and his or her attorney. Additionally, a private meeting provides the opportunity for the attorney to give the mediator insight into how he or she *really* feels about the case and how resolution can be attainted.

Often the complexion of the case has changed from the time of the attorney's retention and the initial analysis of the risks and benefits of proceeding to trial are different as the trial date nears. The attorney may need the assistance of the mediator to "deliver the message" to a client that the attorney knows he or she needs to hear, but the attorney is having difficulty getting across to the client.

"A mediator who goes too fast."

One of the benefits of private mediation, as distinct from a court settlement conference, is the luxury of time. I have written before of my observation that when sitting as a Los Angeles Superior Court judge I was fortunate to get an hour or two to hold a settlement conference. With private mediation the parties control how much time will be available for the proceedings, and cases in mediation have gone as quickly as an hour or two and as long as three days.

It is not the role of the mediator to dictate to the parties the length of the negotiations. Counsel may sometimes have to be patient, however, if a mediator suggests continuing with discussions that have appeared to stall. Part of a successful mediation process is allowing the parties an opportunity to fully explain his or her position, and affirming the fact that the mediator has "heard" that position. Often this process itself is the most significant factor in progressing to resolution. Going "too fast" reduces the probability of success, and may lead to an impasse when

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more time would allow for progress in the negotiation.

All mediators and counsel have had the experience of thinking that the negotiations had come to an end, only to find that by allowing a bit more discussion a pathway to resolution appears.

"A mediator who does not determine what the dispute is really about."

This goes back to an earlier point about communication between the attorney and the mediator. By utilizing the opportunity for the mediator and counsel to speak before the mediation, or privately during the mediation, counsel can assist in the determination of what the dispute is really about. Sometimes it becomes clear to the mediator that one party or the other has not appreciated what the dispute is really about, and great effort should go into making that determination. Once the "real issues" are determined, efforts can turn to real solutions.

"A mediator who relies too heavily on 'cost of litigation' or 'risks of trial' as an argument for settlement in a certain range.

When I was a young lawyer, many, many years ago, it was not uncommon for the defense to offer the "cost of litigation" as a viable settlement amount in cases where they felt liability was unlikely. With the advent and expansion of house counsel and law firms whose attorneys are employees of the insurance companies, the carriers became less willing to engage in such offers, as the costs of the defense was part of the budgeted operating expenses of the company rather than an outside expense.

With this development, the financial motivation of avoiding the expense of the outside attorneys has diminished in many cases where insurers are involved, and pressing the defense to make such offers is less viable as a negotiating tool. There may also be an increase in willingness to try cases where the defense sees little merit, making plaintiffs "prove their case" to a jury.

On the other side of the "*v*," plaintiffs' counsel who bring a case felt to have merit have shown an increasing willingness to let a jury decide the case, recognizing that every trial has risk, an inherent factor of any plaintiff's case.

On our panel, defense counsel were adamant that they and their clients and principals were uniformly put off by the "cost of defense" argument. Similarly, the panel members who primarily represent plaintiffs universally appreciate the risk of litigation, and are not keen on advising their clients to "give up" on a case in which they have confidence.

While recognizing the validity of both of these positions, I often find myself quoting Judge Lawrence Waddington, before whom I had the pleasure of trying several cases in the '80's, who would always remind counsel before the start of jury selection that "Settlement buys certainty." Still true today, but I also say to both sides, "It's your case and your money, so you can do what you want."

"A mediator who makes a 'mediator's proposal' too early in the negotiations."

Mediation is a process, and the parties are there in good faith to try to shape a consensus as to what resolution should look like. Indeed, one of the great selling points of a mediated settlement is the recognition by the parties that it may be their last opportunity to have meaningful input into what the outcome will be.

It is only after the process has had an opportunity to run its course that the mediator should consider making a proposal for settlement. I require two things before I make a mediator's proposal. First, all parties need to express the desire to have a mediator's proposal. If you think the discussion has progressed to the point where a mediator's proposal is worthwhile, go ahead and privately ask the mediator about

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that option; broaching the subject will not be viewed as a "sign of weakness," and as counsel who has been living with the case for months or years, you may have insights into the negotiating dynamic that is helpful to the mediator to understand.

Second, I need to feel that whatever resolution I propose has a strong probability of being accepted by both sides. Without that, any proposal will probably fail and may be destructive to the settlement process by cementing one party or the other in their position because it is more aligned with the proposal.

Finally, making a proposal, even when asked by all sides, when it is unlikely to be accepted diminishes the opportunity to return to the negotiating table, as a party may conclude that by making the proposal the mediator has expressed his or her opinion on value or terms of resolution, so there is no need to continue the discussion.

"Failing to reduce the settlement terms to writing."

I have found that many times counsel will arrive at the mediation with the outline of a settlement agreement already in his or her computer. That is of great help when the case settles, as it may be used to format at least a memorandum of understanding if not the settlement document itself.

Most commonly, we use a "fill in the blank" generic form that expresses the boiler plate terms such as each side to bear its own costs, waiver of certain Civil Code Sections, the essential terms of the agreement (parties, amount, case number, etc.) and the fact that a more detailed agreement would be prepared. In the absence of such a further agreement the Court may enter judgment on the matter pursuant to CCP Section 664.6 consistent with the essential terms as set forth on the agreement, signed by the parties. Before going into a mediation, counsel may want to refresh their memories about what is required in a writing to be enforced under the terms of CCP Section 664.6.

While there was some feeling by certain members of the panel who were willing to let the parties go home from the mediation without a signed agreement to "think about it," I generally do not want the parties and counsel to leave the mediation after an agreement has been reached without signing the document! Parties go home, talk with family and friends outside of the good counsel of their attorneys, and change their minds. Not good. Attorneys should not be shy about asking the mediator to ask that the parties spend just a little more time at the end of the session if necessary to get a signed outline of the settlement in place.

If there is an agreement to a fair and equitable resolution, it should be memorialized and signed by the parties, bringing closure to the matter. That closure itself has value to all of the settling parties. Of course, the exception is where there is a mediator's proposal under consideration.

Conclusion

The "pet peeves" raised by counsel were appropriate and thought provoking. One clear lesson was the need for honest and open communication, under the clear privilege of the mediation, between counsel and the mediator, thereby creating a positive environment for meaningful discussion, negotiation and, ultimately, resolution.

The Hon. Joe Hilberman, Ret., *is a full time mediator/arbitrator/discovery referee with ADR Services, Inc., where he has been recognized as a "Top Neutral" by the* Los Angeles Daily Journal *every year. Judge Hilberman served on the Los Angeles Superior Court from 2002 until 2009 and was the recipient of the Jurist of the Year award from the Los Angeles Chapter of ABOTA in 2008. Before his appointment to the bench, Judge Hilberman was a civil litigator for 27 years.*

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LA City Hall Supports Mediation Awareness Week

By Connie Lopez

Every year for the past eight years, Daniel Ben-Zvi of ADR Services along with other mediators, lawyers and politicians, have gathered at City Hall to seek support from the city for a mediation day. This year the effort has grown to a Mediation Awareness Week. Councilman Dennis Zine was sponsor and host of the event and Ben-Zvi, as usual, served as chair. They were joined by Diane Mar Wiesmann, president of the Association of Southern California Defense Counsel, Joseph M. Barrett, vice-president of Consumer Attorneys Association of Los Angeles, Renata Valree, director of the city attorney's dispute resolution program, Lucie Barron of ADR Services and Barbara Brown of Brown Mediation. "The purpose is to encourage government use of mediation and to promote the public's awareness of the tremendous value of mediation," Ben-Zvi said.

RESOLUTION
MEDIATION DAY

WHEREAS, conflict is common in our society, and people need forums other than our courts for the resolution of conflict; and

WHEREAS, the resolution of disputes can be unnecessarily costly, time consuming and complex when achieved through court proceedings; and

WHEREAS, in mediation, parties in dispute can often agree on a resolution, under the guidance of a skilled mediator, thereby avoiding the need to seek a decision from a judge, jury or arbitrator; and

WHEREAS, the State of California has promoted mediation efforts through the enactment of several mediation statutes, including the Uniform Mediation Act; and

WHEREAS, the City of Los Angeles now has a substantial number of professionally trained mediators providing dispute resolution services to those in need of such services; and

WHEREAS, in an effort to resolve conflicts amicably, improve relations among people and within neighborhoods and families, and between consumers and businesses and relieve the burden of litigation; and

WHEREAS, increasing numbers of people are turning to dispute resolution services with resulting social, economic, and personal benefits; and

WHEREAS, Mediation Day will increase public awareness and add support for alternative dispute resolution;

NOW, THEREFORE, BE IT RESOLVED that by the adoption of this resolution the Council of the City of Los Angeles joins with the Mayor to pay tribute to Mediation Day and hereby proclaim March 21, 2008 to be Mediation Day 2008 in the City of Los Angeles.

PRESENTED BY: _____
WENDY GRUEL
Councilwoman, 2nd District

SECONDED BY: _____

Daniel Ben-Zvi addresses city council while surrounded by mediation advocates.

From left: Barbara Brown, President of Southern California Mediation Association; Lucie Barron, Director of ADR Services; Joseph M. Barrett, Vice President of Consumer Attorneys Association of Los Angeles; Daniel Ben-Zvi, Mediator with ADR Services; Diane Mar Wiesmann, President of Association of Southern California Defense Counsel; and Renata Valree, Director of the City Attorney's Dispute Resolution Program.

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.

2011 Year in Review

2011 was a busy and productive year for the Amicus Committee. Five published decisions were issued in cases where ASCDC submitted an amicus brief on the merits. Those five cases are:

A. *Howell v. Hamilton Meats & Provision, Inc*. (2011) 52 Cal.4th 541 [addressing whether a plaintiff in a personal injury action can recover damages for medical services billed but not paid; ASCDC's amicus brief is cited in opinion];

B. *Cassell v. Superior Court* (2011) 51 Cal.4th 113 [addressing the mediation confidentiality statute in the context of a legal malpractice claim arising out of a mediation; ASCDC's amicus participation is noted in a footnote];

C. *Kwikset v. Superior Court* (2011) 51 Cal.4th 310 [addressing standing to bring section 17200 claims under Prop. 64];

D. *Fireman's Fund v. Superior Court* (2011) 196 Cal.App.4th 1263 [holding that work product does not have to be written in order to be protected];

E. *State Farm Gen'l Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568 [holding that an insured hitting friend in the groin is not an "accident"].

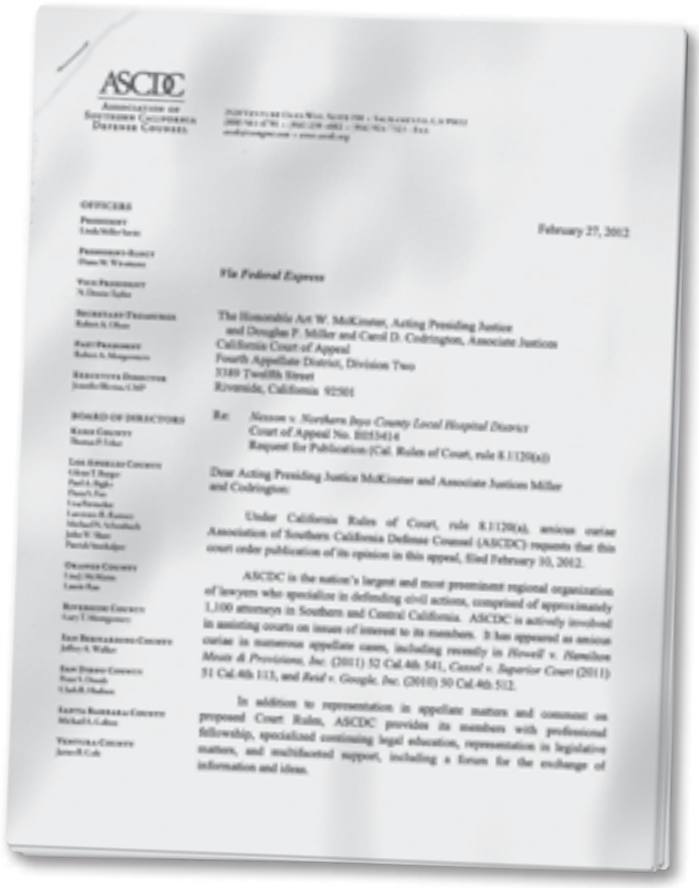
ASCDC also wrote requests for publication which were granted in four cases:

A. *Cabrera v. Rojas*: A *Howell* case in favor of the defense which was later ordered depublished when review (a grant and hold) was granted pending the outcome of *Howell*;

B. *State Farm Mut. Auto. Ins. Co. v. Lee* (2011) 193 Cal.App.4th 34 [holding that the anti-SLAPP statute applies to litigation conduct that occurred during an uninsured motorist arbitration];

C. *Dozier v. Shapiro* (2011) 199 Cal. App.4th 1509 [affirming trial court's exclusion of plaintiffs' expert witness from offering testimony not offered at deposition]; and

D. *Adams v. Ford Motor Co.* (2011) 199 Cal. App.4th 1475 [court affirmed awarding of CCP § 998 costs following defense verdict].


ASCDC

February 27, 2012

Via Federal Express

The Honorable Art W. McKinster, Acting Presiding Justice
and Douglas P. Miller and Carol D. Codrington, Associate Justices
California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, California 92501

Re: *Nesson v. Northern Inyo County Local Hospital District*
Court of Appeal No. E053414
Request for Publication (Cal. Rules of Court, rule 8.1120(a))

Dear Acting Presiding Justice McKinster and Associate Justices Miller and Codrington:

Under California Rules of Court, rule 8.1120(a), amicus curiae Association of Southern California Defense Counsel (ASCDC) requests that this court order publication of its opinion in this appeal, filed February 10, 2012.

ASCDC is the nation's largest and most prominent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous appellate cases, including recently in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, and *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.

In addition to representation in appellate matters and comment on proposed Court Rules, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Recent Victory

On March 6, 2012, Division Two of the Fourth Appellate District of the California Court of Appeal granted ASCDC's request for publication in *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal. App.4th 65. In *Nesson*, the Court of Appeal confirmed that the Supreme Court's opinion in *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, holding that hospital peer review procedures are subject to an anti-SLAPP motion, should be broadly construed to cover a wide range of causes of action challenging various aspects of the peer review process. The Court of Appeal's opinion also confirms that hospitals, in addition to medical staffs, play a critical role in the peer review process.

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

continued on page 37

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.

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:

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
McKenna Long & Aldridge
213-243-6105

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

Fred M. Plevin, *Paul, Plevin, Sullivan & Connaughton LLP*

Jeremy Rosen, *Horvitz & Levy*

Josh Traver, *Cole Pedroza*

Renee Koninsberg, *Bowman & Brooke*

Sheila Wirkus, *Greines, Martin, Stein & Richland*

Christian Nagy, *Collins Collins Muir & Stewart*

Michael Colton and Paul Salvaty, *Glaser Weil*

John Manier, *Ballard Rosenberg Golper & Savitt*

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defense verdicts december – march

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Belsky & Associates

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Taylor Blessey LLP

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Send it in today so that your name will appear in the next issue of verdict

E-mail the details of your verdict to:

ascdc@camgmt.com

ASCDC
Association of Southern California Defense Counsel

Application for Membership

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_____ _____
Signature of Applicant Date

Contributions or gifts (including membership dues) to ASCDC are not tax deductible as charitable contributions. Pursuant to the Federal Reconciliation Act of 1993, association members may not deduct as ordinary and necessary business expenses, that portion of association dues dedicated to direct lobbying activities. Based upon the calculation required by law, 15% of the dues payment only should be treated as nondeductible by ASCDC members. Check with your tax advisor for tax credit/deduction information.

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www.ascdc.org • ascdc@camgmt.com

(Updated 9/19/11)

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2520 venture oaks way, suite 150, sacramento, ca 95833
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June 15, 2012
ASCDC Golf Tournament
Oak Quarry Golf Club, Riverside, CA

June 15, 2012
Riverside and San Bernardino Judiciary Reception
Riverside

September 14-15, 2012
Santa Barbara Seminar and Judiciary Reception