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verdict

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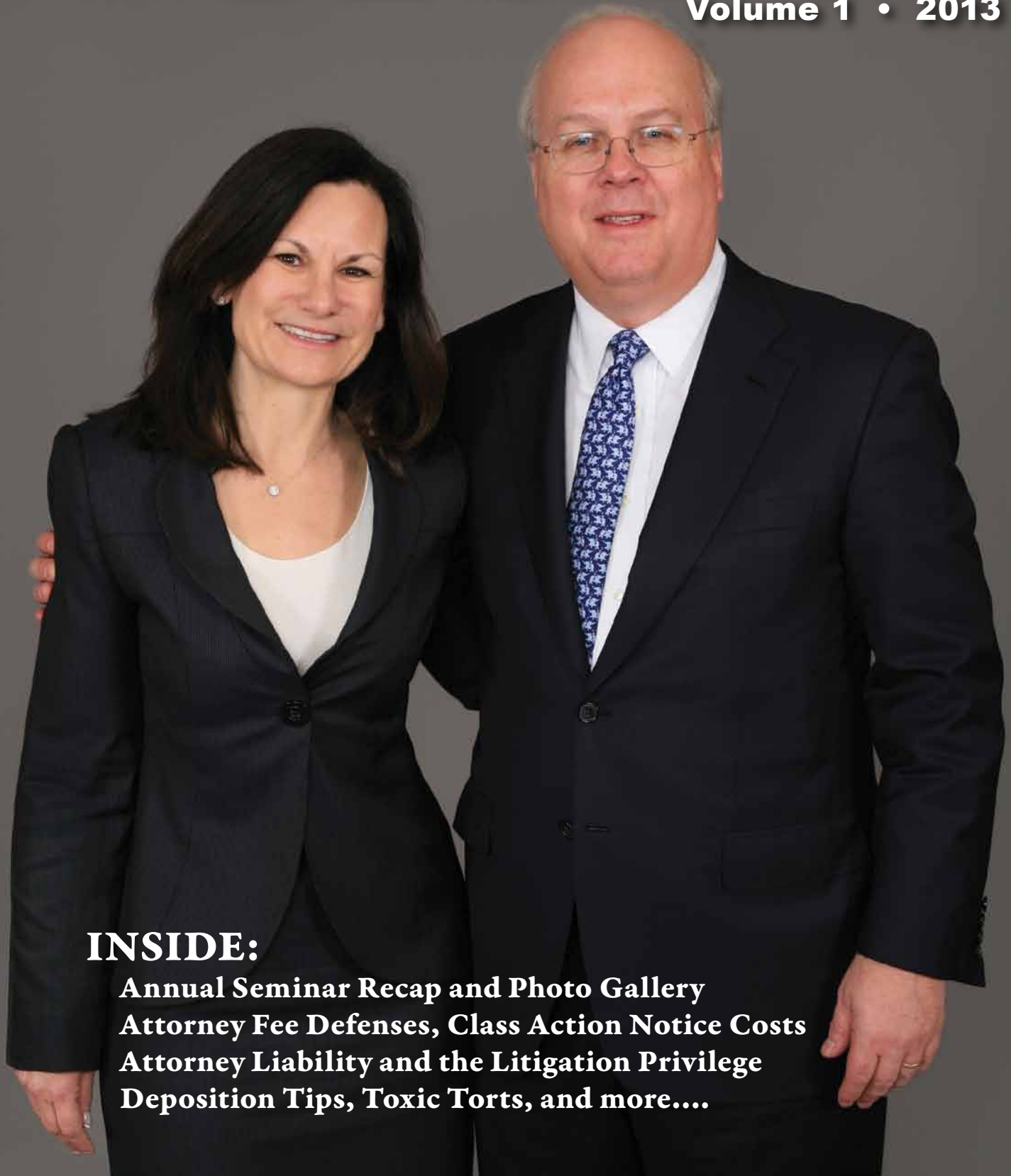

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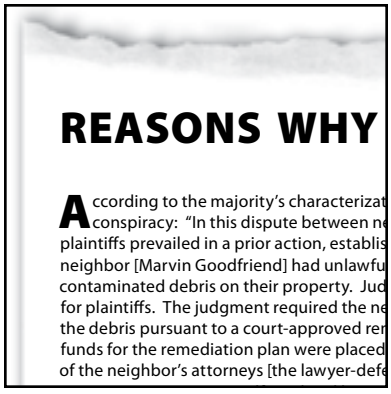
features

departments

Karl Rove, 10

Attorney Fees, 17

Opt-Out Notice, 21



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president's message

N. Denise Taylor
ASCDC 2013 President

It is my privilege to be ASCDC President. We have a lot of important work to do this year but with the assistance of my fellow officers and board, we are up to the task.

As I said in my remarks at the Annual Seminar, this is a most challenging time to practice law in California, not just for defense lawyers but for everyone. After our courts sustained $105 million of budgetary cuts last year, which resulted in both courthouse and courtroom closures and significant layoffs of court personnel, we are now facing between $56 million to $85 million in additional cuts to the court budget by June.

Our biggest court, Los Angeles, has been hit the hardest. In an effort to deal with these budget cuts, the court has made drastic changes that as of this writing are still in the process of being finalized and implemented. These changes will fundamentally alter the way that a large percentage of our members – those who defend personal injury cases, including medical malpractice, products liability and general liability cases – practice. These cases will no longer be managed by one judge from filing to trial, nor will defendants get their day in court before a jury of their peers in their neighborhood courthouse. Instead, all PI cases will be filed downtown in one of three PI departments, and when it's time for trial, the case will be assigned out to one of 31 trial courts in seven different courthouses throughout the county. There will inevitably be confusion in the coming months. At this point, no one knows how this is really going to work.

What are we doing at ASCDC to help the courts with this most difficult problem?

And, what are we doing to keep you, our members, informed?

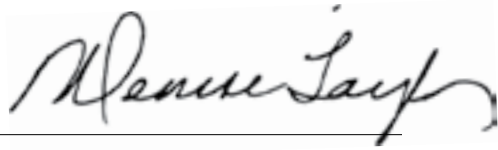
First, we have been at the table with presiding Judge Dan Buckley to provide input on how to make this difficult situation as palatable to the defense bar as possible, by attending regular meetings of the PI Case Advisory Committee, formed last December. With the funding for the court ADR service gone, we are now working with the court on ways to get our members involved in a voluntary ADR service, to supplement the dedicated MSC judges for the PI cases.

This year we have already co-sponsored a seminar with CAALA to introduce this restructuring of the court and how it will impact our practices. Judge Buckley has agreed to speak to us again on July 18, 2013 to let us know how it's going so far. Look for ASCDC e-mails or check our website for further details in the coming months. Through informational seminars and e-mail blasts we will keep our members updated on these important changes.

Through the California Defense Counsel (CDC), we continue to make our presence known in Sacramento. CDC serves as a lobbying effort for both ASCDC and ADC, our colleagues in the North. On February 15 we met with Chief Justice Tani Cantil-Sakayue and her staff. The Chief Justice, as always, was welcoming and genuinely interested to know how the courts can help us as civil defense lawyers. Equally important was her request for feedback from us on ways we can help the courts get through this budget crisis. CDC gives us a voice in Sacramento as a counter-balance to the plaintiffs' bar. The plaintiff attorneys have more money, but we have Mike Belote to help get issues that are important to us and our clients in front of our lawmakers. If you haven't made a donation to CDC, please do so today.

ASCDC has never had more to offer our members. Just read this issue of Verdict and see all that membership brings. I have been a member my entire career and I can honestly say that one of the best things I have done is to get involved in ASCDC. I have met life-long friends through this organization, and so much of my success as a lawyer is related to the connections that I have made through ASCDC. The networking opportunities and friendships made through membership are invaluable.

I encourage you to call or e-mail me if you need help from our Amicus Committee, have a suggestion for a seminar or know a speaker or subject that would be interesting to our members, or if you want to volunteer for a committee. You are ASCDC. Our board is active, energetic, and committed to serve you. We will be even stronger with your participation. Although this year will be a challenge, with your help I am looking forward to a great year.



Lots'a Bills

Michael D. Belote
Legislative Advocate
California Defense Counsel

The California Legislature was once famously referred to as a "bill factory," and not in a positive way. The reasons for the prodigious output of the Assembly and Senate are open to debate, but two big culprits are no doubt our full-time legislature, and the fact that California is a highly codified state with a great deal of statutory law to manage.

When the bill introduction deadline passed on February 22, state legislators had introduced a total of 2189 new proposals. And this total is *down* from recent years, probably due to the fact that almost exactly one-third of all legislators were brand new in January. When you realize that bills are often amended four or five times before passage or defeat, sometimes making bills of no interest into bills of great interest, that is one big pile of legislation.

Over 100 of the 2189 bills have been identified of potential interest to defense practitioners. All are available for viewing through the ASCDC website. Virtually every possible area of defense practice is addressed by one or more bills, including medical malpractice, construction defect, employment, disability, and many more. But here is the spoiler alert: at least as of now, no bill is pending on *Howell,* or *Concepcion*, or MICRA. If any of these highly controversial issues are addressed this year, it will have to be through bills amended between now and September 13. And the amendments could happen *right before* September 13.

Thus far CDC has been active in discussions on AB 715 (Dickinson), which would specify a de novo standard of appellate review for evidentiary issues in summary judgment matters. CDC expressed opposition to the proposal, and the hearing on the bill has been cancelled. We have also been involved in AB 648 (Jones-Sawyer), relating to charges for court reporters in law and motion matters, and on AB 788 (Wagner), relating to ownership and transfer of court transcripts.

As summer approaches, however, the overriding issue continues to be funding challenges facing the courts. An astonishing 61 courthouses have been closed due to budget reductions, virtually all satellite courts have been closed in a number of counties, including San Bernardino, and ASCDC members are aware of very dramatic changes in civil case processing in Los Angeles. That is just a small subset of the bad news when general fund support for the courts is reduced by over 30%.

There is some limited good news, however. Legislators of both parties are expressing very broad agreement that court budget cuts have been devastating. A new plan for allocating funds to the trial courts has been adopted by the Judicial Council, which has been viewed to some degree as a condition precedent for obtaining increased state support. Third, tax revenues continue to come in above projections.

CDC has been constant in advocating for state reinvestment in the court system, and we have been one of the major participants in a broad-based legal coalition known as the "Open Courts Coalition." The mission now is to turn the consensus that courts have been underfunded into concrete reinvestment for budget year 2013-2014. Obviously, with news that tax receipts are increasing, advocates for all types of programs will be seeking restoration of cuts.

The next major budget action will be release of the Governor's revised spending proposal for next year, known as the "May Revision." Budget lobbying will continue until the expected enactment of an on-time budget prior to the beginning of the next fiscal year on July 1.

ASCDC members will shortly receive a request to visit, call and write state Senators and Assembly members to help spread the message about court funding. The courts have few natural allies other than lawyers, and grassroots lobbying is essential. The request for assistance also will include talking points about the need for reinvestment.

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Inspiration From a Flick

Patrick A. Long

He wasn't a member of our association. Nope, he never joined ASCDC, but he was apparently one heck of a defense attorney, primarily representing railroads. While it would have been nice had he joined our association, he had two good reasons why he couldn't. First, he practiced in Illinois, and second, he practiced a hundred and ten years before this association was founded. Yep, Abe is a role-model for all of us.

In the interests of full disclosure, I was born in Springfield, Illinois, and my parents' house was within walking distance of Mr. Lincoln's grave. I occasionally visited Oak Ridge Cemetery, and have always considered myself something of a Lincoln freak. When I finished my tour as a DRI officer they gave me, knowing I had a strong interest in Mr. Lincoln, as a going-away gift a thirteen volume biography of Mr. Lincoln. This biography is never mentioned when books about Lincoln are discussed, primarily because it was published in 1894, that's right, 1894. Where DRI found these thirteen volumes I will never know.

This is all by way of background to what I wanted to discuss with you. This year's Academy Awards are now long-since passed, but I find it remarkable how many of our membership fell in love with the film "Lincoln," and were impressed with the performances of the actors involved, including Daniel Day-Lewis, Sally Field, Tommy Lee Jones, and all the others. Many of our members still discuss the film today although it began its general release in November, 2012. I can't recall another recent movie that struck home to so many of our membership as did "Lincoln." I wondered why, and not given to shyness, I asked.

Many colleagues noted what they perceived as the very careful attention to period detail, the recreation of offices and living spaces, lighting limited to that provided by kerosene or oil lamps and fireplaces, period clothing (particularly hats), etc. Others spoke about phenomenal performances by the actors. Almost everyone with whom I spoke mentioned the fine screenplay dealing with Mr. Lincoln's efforts to see that Congress passed the 13th Amendment to the Constitution, and the concern he felt that if the Civil War ended before its passage the Emancipation Proclamation of 1863 would be discarded by the courts and slavery reinstated by the returning Southern states.

The term I heard used over and over about "Lincoln" was that it was *realistic*. Now think about it. "Lincoln" is most definitely a period-piece, an historical drama. Generally I suspect that most of the films we see which purport to depict events happening in the past, say more than fifty or sixty years ago, are not usually described as realistic. More often than not, care is not taken to craft backdrops, scenery, details, even matters of speech, that accurately reflect what we would have seen and heard had we been present in such times past. To be specific about these lapses in realism, a couple of months ago I saw a film which purported to depict the adventures of a group of high school students in the late 1950s. It was an okay flick, nothing special, but what really put me off was when one leading character said to another, "Hey dude, let's skip football practice today and drop by Loretta's house." I can truthfully claim to have been a high school student during the late 1950s, and I can accurately affirm that the only use of the term "dude" in those years was to identify a man living in the western United States who was not familiar with the way of the cowboy. Hearing that term used I suddenly lost some of the enjoyment that comes with watching a portrayal of times past.

"Lincoln" seems to have avoided this kind of mistake. Essentially everyone with whom I spoke seemed to feel that the film truly took us back to that time, to that place. The locutions used, the political issues, the familial relationships, Lincoln's stovepipe, medical discussions, all made us feel we were there, in the room as it happened.

I join our many colleagues who have seen the film in thanksgiving that the entertainment industry occasionally sends something like "Lincoln" our way. "Lincoln" is a reminder to us to consider the concept of the rule of law, the vagaries of war, the duties of lawyers, temptations to dishonesty, and how a single man of honor can affect the course of history.

I'm reasonably certain that had Mr. Lincoln lived in Southern California in the last half of the 20th century he would have been a member of our association.

Stovepipe deprived,

Patrick A. Long
palong@ldlawyers.com

52nd Seminar Luncheon Highlights — *By Carol Sherman*

The Biltmore Bowl banquet room was electrifying as ASCDC members and Past Presidents, judges, and guests gathered for the much-anticipated Friday luncheon. The luncheon has become an ASCDC tradition, featuring a high profile keynote speaker, awards and recognition, but more importantly, it's the moment when the leadership role of the Association is passed to the incoming President.

The 52nd luncheon opened with the National Anthem, beautifully sung by Stanford student Caitlin Olson, daughter of ASCDC Vice President Robert Olson. Incoming President Denise Taylor welcomed everyone and acknowledged the Board of Directors and Committee Chairs, as well as the judges and Past Presidents in attendance. She thanked ASCDC Executive Director Jennifer Blevins and her staff for their efforts in making this event a huge success.

In keeping with Friday luncheon traditions, Pat Long, Past President of ASCDC and the Defense Research Institute (DRI), presented Diane Mar Wiesmann with DRI's President's Award for outstanding service. In a lighthearted moment, Long promised Wiesmann that the plaque commemorating the honor would arrive once the Chicago weather permitted.

Incoming President Taylor also honored Wiesmann with the awarding of the ASCDC president's plaque for her dedicated service to the Association and the legal community. "I've had the time of my life," said Wiesmann. "I'm very proud of the things we did this past year."

The Friday luncheon also saw the start of a new tradition, the ASCDC President's Award. This honor is bestowed upon a member who has gone "above and beyond for the organization." The recipient of the first ASCDC President's Award is Lisa Perrochet, editor of *Verdict* magazine and the Green Sheets, the popular insert highlighting recent decisions. "Lisa is recognized for her steady commitment to quality and outreach," noted Wiesmann.

In her final duty as President, Wiesmann introduced incoming President Taylor by highlighting many of her accomplishments spanning a 30-year law career. Turning the program over to Taylor, Wiesmann called her colleague and friend, "A stellar attorney and a brilliant human being."

Taylor began her remarks by addressing the younger attorneys in the audience. "I've made some of my best friendships through this organization. I have been so personally uplifted by ASCDC and it has been such a good thing for my law practice. So those of you out there, particularly our young members, please get involved and stay involved. It can only help your life and your career."

She quickly turned her attention to the challenges ahead this coming year; in particular, the budget cuts impacting the California courts. "The courts have been hit very badly. There's already been $105 million in cuts. Because of that, courthouses and courtrooms throughout the state have been closed." She noted Los Angeles County where attorneys now must provide court reporters, a service previously provided by the courts. She noted that the courts are facing additional cuts this year and implementing drastic measures to stay afloat. One such measure is a plan to consolidate Los Angeles County personal injury (PI) cases into a single downtown department with three courtrooms and five judges. "All cases pending will be transferred downtown to PI court, starting early next month." She noted that more complex cases might be the exception. "No one is going to be pushing us to trial. When a case is ready for trial, it will be shipped out to one of 31 dedicated trial courts. Delays are inevitable." She encouraged members to be patient with the court and its staff during the transition period.

She also talked about the efforts of lobbyist Mike Belote and California Defense Counsel (CDC) who have been working diligently with members of the Legislature and the Chief Justice on issues important to the civil defense practice.

"Our Amicus Committee is the hardest working committee," she said. "Last year, they participated in 12 successful appeals in either getting opinions published or de-published. If you have an issue that you would like our organization to help you with by sending a letter or Amicus brief, let us know."

She went on to announce the recipients of the upcoming Hall of Fame dinner and awards ceremony planned for June 20 at the Millennium Biltmore Hotel. This year's recipients include Robert Baker, ASCDC past President (1989). She concluded by announcing ASCDC's busy seminar schedule for the year and encouraged everyone to participate.

GOP Strategist, Karl Rove, Addresses the 52nd Annual Seminar

By Carol Sherman

Karl Rove, "the Architect" of President George W. Bush's 2000 and 2004 campaigns, delivered the keynote address at the 52nd Annual Seminar, held at the Millennium Biltmore Hotel in Los Angeles on March 1, 2013. Always candid, Rove shared his keen, and often provocative, insights into the political battles being waged over government spending, the national deficit, entitlement programs, and economic growth that will provide jobs Americans want and need.

Rove served as President Bush's Senior Advisor and Deputy Chief of Staff, and coordinated the White House policy-making process. Since leaving the White House, the outspoken conservative and GOP strategist is a *Fox News* contributor, *Wall Street Journal* columnist and bestselling author.

Speaking before a packed ballroom, Rove made light at having his name added to the long and illustrious list of past luncheon speakers, including former U.S. presidents, world leaders, noted politicians, and most recently, his political sparring partner and good friend, James Carville. He joked, "After all of those speakers, how did you get to Carville and Rove?"

Turning his remarks to the present-day gridlock and finger-pointing between the White House and Congress, he lashed out at the current administration's leadership over the federal budget crisis and economic recovery.

"Washington D.C. is the smallest town you've ever seen in the world, and it's a company town. Its business is politics. But occasionally you need to put it aside and get things done. And the country needs to get things done. The country is not growing at the pace it needs to grow."

continued on page 12

Karl Rove – continued from page 11

He called the partisan debates over "sequestration," the automatic, across-the-board cuts to government agencies in an effort to control growth of the U.S. national debt, a "political football used for the purposes of scaring people." He pointed out that even with the cuts, this year's budget will still be bigger than last year's budget. "This is not a good way to run the U.S. government. The impact of this has been overplayed."

He pointed to another battle on the horizon between the White House and Congress over a proposed addition to a Republican-supported resolution to fund the government through the end of the fiscal year. This addition would give the Secretary of Defense flexibility to avoid across-the-board cuts and make cuts on a more thoughtful basis. "I hope the Democrats are smart and say, 'Okay, we'll take that flexibility for the Department of Defense as long as you give us flexibility on the domestic side."

Either way, he noted, the government has to be funded by the end of March, making it the fourth year in a row the federal government has been without an annual budget. "We've been running the government on a series of resolutions and yet, we still expect the men and women to run these departments and to make critical decisions not with, 'Here's a plan for the next year,' but, 'Here's how much money you have for the next month or two.' It's not the way to run a government. We've been doing it for four years."

He said that these budget battles obscure the larger issues facing the country. "We have a deep divide in our leadership over what our problem is. Is our problem a spending problem, or is it a revenue problem?" He added, "Do we spend and tax our way out of it or do we actually do what families and businesses have done, and that is put their fiscal house in order."

A "numbers guy," he shared the staggering cost to each American of the growing national deficit. According to Rove, in January 2009, the deficit of the U.S. amounted to $34,782 per every American, and has since risen to over $54,200 for every American.

Turning to Social Security retirement and Medicare costs increasing with the addition of tens of thousands of retiring baby-boomers to these entitlement programs every day, he said, "These systems are unsustainable."

He cited a bipartisan report stating that Social Security retirement will run out of funds in 2037. Once that occurs, a law goes into effect that reduces the average American's Social Security payment by 25%. Medicare healthcare has no back-up legislation to continue to pay healthcare benefits if the program runs out of money. "We're doing nothing about this."

Rove also lashed out at what he considered to be a gross underestimation of the cost of the Affordable Care Act signed into law by President Obama. "This is a huge entitlement now on the books that's going to come crashing down on us within the decade."

To further make a case for the lack of focus in government leadership, Rove believed the slow economy and lack of jobs are the biggest problems facing the American people. "We're in a recovery. Since June 2009, the economy has been growing an average of 1.9% a year. I used to say it's the weakest recovery since World War II." Now he argued that a respected economist has called it the weakest recovery in recorded American history, stretching back over 100 years. "It's also the first recovery in modern history in which medium family income has declined. In recoveries, we all start to get up on our feet. In January 2009 before the recovery began in June, median family income in America was $51,190. As of last December, several years into the recovery, median household income was $50,054. This has never happened before. We're an optimistic country. When we get up and get going, everybody tends to rise. But not this time."

He pointed the finger at the lack of jobs for much of the economic troubles. "At the current rate of job creation, it will take us until July of next year to get back to the same number of people working in America that we had when we went into the recession in December of 2007." He noted that, in the meantime, there are upwards of eight million people entering the job market, including college and high school graduates, or parents

continued on page 13

Karl Rove – continued from page 12

re-entering the workforce after raising a family.

"Last year, we created 12,000 manufacturing jobs a month on average. Do you know how long to get back to where we were in December 2007? It's only going to take us until December 2024. What happened? We're still manufacturing a lot of things. People are saying, 'Rather than hiring someone, let me buy a robot. Let me automate my system, let me outsource it. Let me do something different that lets me be economically competitive.'"

He also pointed to construction job numbers. "At the current level, it will take us until December 2030 to get back to the same level of people working in construction as December 2007. This is simply insufficient for a great country like ours. This is a country that promises opportunity to people and lets people rise from nothing to greatness by being a dynamic economy that provided opportunity. If you wanted to work hard and think big, this is the place to be."

In conclusion, he said, "Generally I'm an optimistic kind of guy but I'm not sure how we get out of this unless we have a change in Washington.

"It's going to take something big to get out of it. We will get out of it, though. We continually screw it up until the last minute. We find some way to look like idiots and then pull it out. I guess that's part of the American psyche."

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Judges' Power to Deny Inflated Attorney Fee Requests In Code of Civil Procedure Section 1717 Cases

Hon. Alex Ricciardulli

INTRODUCTION

The general rule in civil cases is that each party must pay for his own attorney's fees. "Under the American rule, as a general proposition each party must pay his [or her] own attorney fees. This concept is embodied in section 1021 of the Code of Civil Procedure, which provides that each party is to bear his own attorney fees unless a statute or the agreement of the parties provides otherwise." (*Gray* v. *Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504.)

Nonetheless, this rule is riddled with exceptions, with dozens of statutes specifically providing that judges may require one side to pay the other's attorney fees. (See, e.g., Civ. Code, §§ 55 [California's Disabled Persons Act]; 1942.4, subd. (b) [landlord's breach of warranty of habitability]; 3496 [specified nuisance cases]; Code of Civ. Proc., §§ 425.16, subd. (c) & 425.18, subd. (f) [anti-SLAPP].) The potential to recover fees is no small matter. In many situations, the amount of attorney fees spent on a case will easily dwarf the amount of the judgment.

One of the most common attorney fee statutes that arises in litigation is the one that permits a court to award fees pursuant to the parties' contracts: Civil Code section 1717. This provision provides for an award of attorney fees in favor of the "party prevailing on the contract, whether he or she is the party specified in the contract, or not." (Civ. Code, § 1717, subd. (b).) The court will award fees under this provision to "the party who recovered the greater relief in the action on the contract." (*Ibid.*)

Alas, the devil is in the details. To obtain an award of attorney fees, whether under Civil Code section 1717 or other provisions, it is not enough to prevail in the underlying litigation, the party must convince the judge to award the fees. Of course, documenting the hours spent defending the case using a lodestar method and providing the judge a complete record are critically important. (See *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 448-449.)

This article will focus on the judge's authority to deny an award of attorney fees altogether when a party submits an unreasonably inflated claim. This authority derives from the California Supreme Court's opinion in *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 (*Serrano IV*), and, although there are no published appellate cases on the topic, should be applicable to attorney fee requests made under Civil Code section 1717.

THE POWER TO DENY INFLATED CLAIMS

In contexts other than Civil Code section 1717, it has been held that, even though a litigant incurred attorney fees, the judge has power to award no fees because the fee request was unreasonably inflated. A judge's power to deny an award based on an inflated fee request was first set forth in this state by the California Supreme Court in *Serrano IV*.

The Supreme Court in *Serrano IV* considered a court's power to award attorney fees under California's Private Attorney General statute in Code of Civil Procedure section 1021.5. This statute provides that when a party's litigation has conferred a significant benefit on the general public and other criteria are satisfied, "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest ...." (Code Civ. Proc., ' 1021.5.)

Serrano v. Priest (1977) 20 Cal.3d 25, 50, had previously remanded the case for the trial court to determine the amount of attorney fees recoverable under this section for litigation involving an equal protection challenge to the financing of public schools. *Serrano IV* reviewed the trial court's ruling regarding whether a party could be compensated for attorney fees incurred in litigating the underlying attorney fee request. *Serrano IV* held that parties are entitled to compensation for all hours reasonably spent by their attorneys, including those incurred in litigating an attorney fee request. (*Serrano IV, supra,* 32 Cal.3d at pp. 632-633.)

continued on page 18

Serrano IV cautioned, however, that a full fee award may not be appropriate when "special circumstances would render such an award unjust." (*Serrano IV, supra,* 32 Cal.3d at p. 633, quoting *Newman v. Piggie Park Enterprises* (1968) 390 U.S. 400, 402.) The Court reasoned that the ability to seek attorney fees "does not license prevailing parties to force their opponents to a Hobson's choice of acceding to exorbitant fee demands or incurring further expense by voicing legitimate objections." (*Serrano IV, supra,* 32 Cal.3d at p. 635.) *Serrano IV* determined that a court should have the ability to curb such excesses: "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (*Ibid.*)

The rationale for a judge's power in this situation was aptly articulated by the California Supreme Court: "If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful." (*Serrano IV, supra,* 32 Cal.3d 621, 635, quoting *Brown v. Stackler* (7th Cir. 1980) 612 F.2d 1057, 1059.)

Serrano IV's special circumstance authorizing the total denial of an attorney fee request due to an inflated claim has been cited with approval in cases applying various California attorney fees provisions. (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990-991 [Gov. Code, ' 12965, subd. (b), California Fair Employment and Housing Act attorney fee claim]; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137 [Code of Civ. Proc., ' 425.16, subd. (c)(1), Anti-SLAPP attorney fee provision]; *Christian Research Institute v. Alnor* (2008) 165 Cal. App.4th 1315, 1329 [same]; *Meister v. Regents of University of California, supra,* 67 Cal. App.4th at p. 455 [Civ. Code, ' 1798.46, subd. (b), attorney fee provision relating to cause of action against a public agency for public disclosure of personal information]; *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1995) 165 Cal.App.3d 378, 388 [Civ. Code, ' 3496 attorney fee provision due to improper government action relating to pornographic materials].)

CIVIL CODE SECTION 1717

When a contract between parties specifies that attorney fees can be awarded to a prevailing party in an action on the contract, a party can seek recovery of the fees either as costs under Civil Code section 1717, or as damages under the contract. (*M. C. & D. Capital Corp. v. Gilmaker* (1988) 204 Cal.App.3d 671, 676; *Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal. App.3d 227, 231-232.)

Civil Code section 1717, subdivision (a), provides that, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

A judge has broad discretion in determining the reasonableness of the attorney fees to be awarded under Civil Code section 1717. "[T]he court considers such factors as the nature of the litigation, the difficulty of the litigation, the amount of money involved, the level of skill required and employed in the handling of the litigation, the attention given to the issues, the success of the attorney's efforts, and time consumed." (*PLCM Group, Inc. v. Drexler* (1998) 72 Cal.App.4th 693, 708, citing *Clayton Development Co. v. Falvey* (1988) 206 Cal.App.3d 438, 447.)

JUDGES' POWER IN CIVIL CODE SECTION 1717 CASES

Litigants sometimes argue that once a judge has determined that a party is a prevailing party in a Civil Code section 1717 attorney fee claim, that judge has no discretion to refuse to make an award. There are cases that support this contention. For example, *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1538, stated: "When a party obtains a 'simple, unqualified win' by completely prevailing on, or defeating, the contract claims in the action and the contract contains a provision for attorney fees, the successful party is entitled to attorney fees as a matter of right, eliminating the trial court's discretion to deny fees under section 1717. [Citation.]" The Court of Appeal in that case relied on *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876, which held that when a party that has obtained an unqualified victory, "The trial court has no discretion to deny attorney fees to the defendant ...."

However, these cases do not deal with inflated fee requests. *Hsu v. Abbara, supra,* 9 Cal.4th 863, 876, merely found that the trial court abused its discretion in refusing to make an award "by finding that there was no party prevailing on the contract." The same situation existed in *Silver Creek, LLC v. BlackRock Realty Advisors, Inc., supra,* 173 Cal.App.4th 1533, 1538, where the Court of Appeal found that there was a clear prevailing party and therefore the trial court abused its discretion by determining that there was no prevailing party. Other cases which have found that a court has no discretion to refuse to make an award in Civil Code section 1717 attorney fee requests have also not dealt with inflated fee requests. (See, e.g., *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247; *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1388-1399.) "Opinions are not authority for propositions not considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

There does not appear to be any valid reason to not apply *Serrano IV's* special circumstance in inflated attorney fee situations to Civil Code section 1717 requests. "Prevailing counsel are entitled to compensation for all hours 'reasonably spent unless special circumstances would render an award unjust' [Citations]." (*MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 12.) Filing an inflated claim is a special circumstance allowing a court to deny it altogether.

continued on page 19

Attorney Fees – continued from page 18

The attorney fee provision in *Serrano IV* provided that "a court *may* award attorneys' fees to a successful party" (Code Civ. Proc., '1021.5, emphasis added), whereas Civil Code section 1717, subdivision (a), states that the prevailing party "*shall* be entitled to reasonable attorney's fees" (emphasis added). Nonetheless, the authority to refuse to make an award in an inflated fee situation is not dependent on the language of the statute at hand.

For example, while the Anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (c)(1), states a party "*shall* be entitled to recover his or her attorney's fees" (emphasis added), courts have cited *Serrano IV*'s special circumstance with approval. (*Ketchum v. Moses, supra,* 24 Cal.4th 1122, 1137; *Christian Research Institute v. Alnor,* 165 Cal.App.4th 1315, 1329.) The same is true regarding the attorney fee statute relating to a cause of action against a public agency for public disclosure of personal information in Civil Code section 1798.46, subdivision (b), which states that "The court *shall* assess against the agency reasonable attorney's fees" (emphasis added). (*Meister v. Regents of University of California, supra,* 67 Cal.App.4th 437, 455.)

Civil Code section 1717 was "meant to prevent 'oppressive use of one-sided attorney's fees provisions' [Citation.], not to abolish the general rule that each party pay its own attorney fees." (*Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 308.) Civil Code section 1717 "reflects a general policy to prevent one-sided attorney fee provisions. Thus, it promotes certainty, and prevents overreaching both in the negotiation of a contract and in the use of the courts during litigation." (*ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 218.) These goals would be furthered by giving judges power to deny inflated claims in Civil Code section 1717 cases.

CONCLUSION

The special circumstance rule was intended to deter greed and dissuade attorneys from making unreasonable fee demands. Without the potential threat of a judge denying fees altogether, unscrupulous attorneys would have strong incentive to claim substantially inflated fees in any Civil Code section 1717 case. Even if there was only a remote chance a judge would award the inflated fee claim, attorneys would have nothing to lose by claiming an unjustified figure and therefore have no disincentive to make outrageous claims. This would be the very type of behavior *Serrano IV* attempted to deter and would mean an increased burden on courts and opposing parties. Applying the special circumstance rule to Civil Code section 1717 claims would not contravene the intentions of the California Legislature in enacting the statute and it would further the stated purpose of the special circumstance rule in *Serrano IV.*

Hon. Alex Ricciardulli is a judge in the Los Angeles County Superior Court assigned to the court's Appellate Division. He is co-author of California Criminal Law, The CALCRIM Handbook, *and* California Criminal Motions *(West 2012), and runs the Daily Journal and Center for Judicial Education and Research's MCLE and Judicial Education Articles Series.*

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CIVIL PROCEDURE

Doctrine of continuous accrual applies to UCL statute of limitations.

Aryeh v. Canon Business Solutions, Inc. (2013)
55 Cal.4th 1185

In this action under the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., plaintiff claimed that defendant Canon charged excessive amounts for photocopies on leased machines. This practice allegedly occurred over a period of years. The parties disputed when the statute of limitations accrued, and whether it expired before Aryeh filed this action. Lower appellate courts had split regarding the operation of the UCL's 4-year statute of limitations in cases involving a continuing course of conduct, and some decisions had held that equitable exceptions to the normal accrual rules do not apply in the UCL context.

The California Supreme Court held that UCL actions are subject to the same accrual and equitable exception rules governing common law claims. Thus, equitable doctrines such as delayed discovery, continuing violations, and continuous accrual are applicable to UCL actions to the same extent that they would apply in other cases. Applying its holding to the facts of this case, the court held that the plaintiff Aryeh's UCL claim survived in part under the continuous accrual doctrine, which provides that "when an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." Thus, each instance where Canon allegedly charged Aryeh for excess copies constituted an independent UCL violation with its own 4-year limitations period. Aryeh was allowed to seek restitution for excess copy charges Canon imposed within 4 years before the filing of Aryeh's original complaint.

Denial of an anti-SLAPP motion in federal court is subject to interlocutory appeal.

DC Comics v. Pacific Pictures Corp., et al.
(9th Cir. Jan. 10, 2013, No. 11-56934)
F.3d [2013 WL120807]

In this action arising out of the transfer of intellectual property rights involving the character Superman, plaintiff DC Comics sued defendants for a variety of state and federal claims, including intentional interference with contractual relations and prospective economic advantage, as well as violation of California's unfair competition law (UCL). Defendants moved to strike DC's intentional interference and unfair competition claims pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. The district judge denied the motion, holding that defendants had failed to show that any of DC's claims arose from conduct falling within the protection of the anti-SLAPP statute. The defendant filed an interlocutory appeal.

The 9th Circuit ruled that it had jurisdiction to hear the appeal, consistent with its earlier opinion in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), which held denial of a motion brought in federal court under California's anti-SLAPP statute is subject to interlocutory appellate review as a collateral order. The court concluded that holding was still valid despite the ruling, six years later, by United States Supreme Court in *Mohawk Industries v. Carpenter* (2009) 130 S.Ct. 599. There, the high court limited the scope of collateral order review, holding that orders to produce potentially privileged documents are no longer subject to interlocutory appellate review as collateral orders. In *DC Comics*,

continued on page ii

continued from page i

the Ninth Circuit observed that anti-SLAPP orders are materially different from orders to produce privileged documents, for purposes of the collateral order doctrine.

This case serves as an important reminder that litigants can take advantage of California's anti-SLAPP statute to defeat state-law claims brought in federal court and seek immediate interlocutory appellate review if the motion is denied.

Compare *Nunag-Tanedo v. East Baton Rouge Parish School Board* (9th Cir) 711 F.3d 1136) [9th Cir.: Court of Appeals had no jurisdiction, via interlocutory appeal, to review denial of a motion to dismiss federal court action on grounds of immunity under the *Noerr-Pennington* doctrine, which bars actions based on conduct protected by the First Amendment right to petition for redress of grievances; unlike anti-SLAPP dismissals, a dismissal under the *Noerr-Pennington* doctrine is not appealable under the collateral order doctrine, nor was it reviewable under pendent appellate jurisdiction where an appeal from an anti-SLAPP order has been filed].

Complaint by property owner alleging slander and trade libel was subject to dismissal under the anti-SLAPP, but cross-complaint based on allegedly false accusations of criminal activity was not.

City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal.App.4th 358
(Petition for Review filed 04/19/13, case no. S210098)

In this nuisance abatement action, a commercial property owner was sued by the City of Costa Mesa, and cross-complained to assert claims that city employees unlawfully told potential business tenants they would not be able to obtain licenses to perform business activities at the property because of criminal activity by the cross-complainant. The city moved to dismiss the action on the ground it implicated free speech rights in connection with pending public judicial and regulatory proceedings, and thus must be dismissed under the anti-SLAPP statute. The trial court partially granted and partially denied the motion.

The Court of Appeal (Fourth Dist., Div. Three) reversed in part, holding the trial court was required to dismiss more of the action than it had dismissed under the anti-SLAPP motion. The court should have granted the motion as to certain cross-defendants where the cross-complainants failed to offer evidence from which a trier of fact could find those cross-defendants had made false statements. However, the court affirmed the trial court's denial of the anti-SLAPP motion as to cross-defendants who, some evidence indicated, had falsely accused cross-complainant of having a criminal record, in a statement that was not protected by the litigation privilege or public entity immunities.

See also *Hawran v. Hixson* (2012) 209 Cal.App.4th 256 [Fourth Dist., Div. 1: in action arising out of defendant's allegedly defamatory press release about plaintiff and his corporation, the trial court properly denied the defendant's anti-SLAPP motion to dismiss causes of action for defamation, invasion of privacy, unfair business practices, as well as breach of contract as to the corporation, because the plaintiff proffered evidence from which a trier of fact could find merit in his claims, and defendants did not show the press release was sufficiently tied to an SEC investigation as to be protected by the fair reporting privilege, qualified common interest privilege, or litigation privilege. However, the court properly granted the anti-SLAPP motion to bar plaintiff's claims for interference with prospective economic advantage and misrepresentation, as well as breach of contract as to the individual defendants, because those causes of action arose from a writing in connection with an official proceeding, and the plaintiff's actions did not fall within the commercial speech exemption from the anti-SLAPP statute, because the representations made were not related to the company's business operations];

See also *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267 [First Dist., Div. 3: trial court erroneously denied anti-SLAPP motion strike breach of contract complaint based on plaintiff police officer's action against his ex-wife alleging that her statements to internal affairs investigators and in family court documents violated anti-disparagement provisions of a settlement agreement; the claim arose from protected activity within the meaning of the anti-SLAPP statute, and plaintiff raised no triable issue of fact to defeat the litigation privilege];

See also *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697 [Fourth Dist., Div. 2: trial court proper granted anti-SLAPP motion to strike complaint under 42 U.S.C. section 1983 alleging that defendant family therapist, who owed statutory duty to report suspected child abuse or neglect, conspired to falsely accuse plaintiff of sexually abusing his daughter; defendant's acts in connection with official government investigations were in furtherance of the rights of free speech or petition, and plaintiff did not proffer nonspeculative evidence from which a trier of fact could find, by reasonable inference, in favor of his claim that defendant was a state actor or conspiring with state actors under section 1983];

See also *Young v. CBS Broadcasting, Inc.* (2013) 212 Cal.App.4th 551 [Third Dist.: trial court erroneously denied, in part, defendant broadcasting company's anti-SLAPP motion to strike defamation claim by a court appointed conservator who objected to a CBS telecast showing her in a bad light; because plaintiff acted as a public official for purposes of defamation law and failed to show that defendant broadcaster's report was made with actual malice, she could not demonstrate a likelihood of prevailing—i.e., she did not proffer substantial evidence by which a trier of fact could find in her favor by clear and convincing evidence];

Compare *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97 (Petition for Review denied 04/10/13)[Second Dist., Div. 3: trial court erred in party by granting defendant's anti-SLAPP motion to strike a complaint alleging violation of Los Angeles Rent Stabilization Ordinance, and that alleged violation was not a protected activity, and with respect to plaintiff's malicious prosecution claim, plaintiff made a prima facie showing sufficient to defeat dismissal by offering evidence that defendant voluntarily dismissed without prejudice the underlying claim they had failed against plaintiff, and the evidence of hostile communications between the parties satisfied the "minimal merit" showing needed to oppose an anti-SLAPP motion].

Union protesters have no constitutional right to picket on the privately owned walkway in front of the customer entrance to a supermarket.

Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8 (2012)
55 Cal.4th 1083

In an action by a supermarket to enjoin union picketing in front of the store's customer entrance, the trial court denied relief, but the Court of Appeal reversed, finding that the walkway was not a public forum, and was therefore subject to regulation of speech by the property owner in that area.

The California Supreme Court concluded the protesters had no constitutional right to picket on the privately owned walkway. Unlike the common areas of a mall, the entrance to a store is not a public forum. However, the picketing activities enjoyed some protection under the Moscone Act (CCP 527.3) and Labor Code section 1138.1, regulating labor relations.

This decision represents a limitation on the court's prior holding in *Robbins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, and clarifies that private shopping centers can exercise greater control of speech activities in those areas of a mall or similar establishment that are not "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation."

CLASS ACTIONS

U.S. Supreme Court holds class certification is improper absent a damages model capable of calculating damages on a classwide basis.

Comcast Corp. v. Behrend (2013)
569 U.S. _____ [133 S.Ct. 1426]

Federal Rule of Civil Procedure 23(b)(3) permits class certification only if a court "finds that 'the questions of law or fact common to class members predominate over any questions affecting only individual members.' "

The U.S. Supreme Court held that Rule 23(b)(3)'s predominance requirement cannot be satisfied, and therefore class certification would be improper, where a plaintiff's damages model fails to "establish[] that damages are capable of measurement on a classwide basis." Absent such a methodology for calculating damages, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." A damages model may serve as a means of computing an award in a class action only if the model measures those damages specifically attributable to the liability theory for which class treatment is sought. "[A]t the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case.' " "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible to measurement across the entire class for purposes of Rule 23(b)(3)." While earlier authorities had suggested a trial court has some discretion to deny class certification where some common questions of liability exist but the remedy is not suitable for classwide determination, a persistent generalization before the *Comcast* decision was the individualized questions as to damages was never sufficient to defeat certification. That concept is presumably laid to rest by *Comcast*.

See also *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974 [Fourth Dist., Div. 1: trial court properly denied class certification in wage-and-hour case because, although some common questions were presented, the claim that managers and assistant managers were misclassified as exempt employees raised individualized questions not amenable to proof on a classwide basis; plaintiff's expert's statistical sampling method was insufficient to support certification: "A trial court does not err in rejecting a proposed statistical sampling procedure when the class action proponent fails to "explain how the procedure will effectively manage the issues in question." "];

See also *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341 [First Dist., Div. 2: trial court properly denied class certification in wage-and-hour case where employees' claims to reimbursement for travel expenses and the cost of purchasing merchandise from the employer could not be resolved on a class-wide basis; plaintiffs demonstrated no written or uniformly followed company policy requiring employees to purchase company merchandise or failing to reimburse for mileage; in rendering its order, the trial court properly "considered the merits of plaintiffs' causes of action only for the limited purpose of assessing whether substantially similar question were common to the class and predominated over individual questions"];

See also *Wang v. Chinese Daily News, Inc.* (2013) 709 F.3d 829 [9th Cir.: jury award of $2.5 million in damages reversed because district court erred in certifying a class action under FRCP 23(b)(2) where newspaper employees sought monetary relief due to alleged Labor Code and consumer law violations; moreover, the named class representatives lacked standing to seek injunctive relief because they were no longer in defendant's employ; however, appellate court remanded for determination whether monetary claims could be certified under rule 23(b)(3) – on that issue, the 9th Circuit quoted the United States Supreme Court's decision in *Walmart v. Dukes,* which held, "What matters to class certification is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation"; 9th Circuit disapproved any sort of "presumption that class certification is proper when an employer's internal exemption policies are applied uniformly to the employees"];

U.S. Supreme Court holds a defendant may obtain dismissal of a putative FLSA representative action on mootness grounds by offering to fully satisfy the named plaintiff's claims (i.e., with a "pick off" offer).

Genesis Healthcare Corp. v. Symczyk (2013)
569 U.S. _____ [133 S.Ct. 1523]

Plaintiff, a registered nurse, brought a collective action under the Fair Labor Standards Act, alleging a violation of meal break wage rules. She ignored the defendant's offer to pay her claim under FRCP 68, and the trial court dismissed the action as moot. The Third Circuit Court of Appeals reversed.

continued on page iv

continued from page iii

The U.S. Supreme Court held the trial court had properly dismissed the action because the named plaintiff conceded she had no continuing interest in the case, and no other workers had opted in to join her representative action. The court distinguished class actions brought under FRCP rule 23 in which a named representative's interest is lost only after class certification, or after the erroneous denial of class certification.

U.S. Supreme Court holds a class representative cannot prevent removal of a putative class action from state to federal court by stipulating to forego damages that would otherwise make the case removable.

Standard Fire Ins. Co. v. Knowles (2013)
568 U.S. _____ [133 S.Ct. 1345]

Class representative Knowles filed a proposed class action in Arkansas state court against Standard Fire Insurance Company. In an effort to defeat removal to federal court under the Class Action Fairness Act (which allows removal in certain cases where the potential value of the claim exceeds $5 million) Knowles stipulated that the class would seek less than $5 million in damages. Standard Fire nonetheless removed the case, arguing that the amount in controversy exceeded $5 million and that Knowles' stipulation could not bind the class. The federal district court found that the amount in controversy did exceed $5 million, but ruled that Knowles' stipulation validly limited the scope of relief. The Eighth Circuit agreed, and the action was remanded to state court.

The U.S. Supreme Court reversed in a unanimous opinion. The Court held that a plaintiff who files a proposed class action cannot legally bind members of the proposed class before a class is certified, and Knowles lacked authority to seek less than $5 million in damages for the class. Absent a valid stipulation, Standard Fire had properly removed the case.

Class action lawyers in Arkansas and elsewhere have used such stipulations and comparable loopholes to evade federal jurisdiction over their cases. The Supreme Court's decision eliminates a tactic frequently used by class action lawyers to defeat federal jurisdiction and furthers Congress' objective of ensuring that federal courts are available to adjudicate large class actions.

See also *Kuxhausen v. BMW Financial Services NA LLC* (2013) 707 F.3d 1136 [9th Cir: reversing district court's remand of plaintiff's proposed class action to state court; removal by defendant car dealership was timely where the amount in controversy was not sufficiently stated by the initial pleading and plaintiff had not pled all the facts necessary for diversity jurisdiction under the Class Action Fairness Act, so that the removal clock under Section 1446(b) was not triggered].

See also *Radcliffe v. Experian Information Solutions Inc.* (9th Cir. Apr. 22, 2013, Nos. 11-56376, 11-56387, 11-56389, 11-56397, 11-56400, 11-56440, 11-56482) F.3d [2013 WL 1715422] [9th Cir.: District court erred in approving settlement of class action against credit reporting agencies because the class representatives and their counsel did not adequately represent the class, where agreement conditioned incentive awards on the class representatives' support for the settlement, and provided representatives with recoveries that significantly exceeded what absent class members would receive];

U.S. Supreme Court holds that individual questions as to whether misrepresentations are "material" in securities fraud cases is not a barrier to class certification.

Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds (2013)
568 U.S. _____ [133 S.Ct. 1184]

To recover damages in a private securities fraud action under section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission rule 10b-5, a plaintiff must prove reliance upon the defendant's material misrepresentations or omissions. The U.S. Supreme Court has previously endorsed a "fraud-on-the-market" theory that permits certain plaintiffs alleging securities fraud violations to invoke a rebuttable *presumption* of reliance on "material" misrepresentations aired to the general public. Courts have disagreed over the effect of this rule in the context of plaintiffs seeking to certify a class action under rule 23(b)(3), and whether individualized issues raised by the reliance element preclude class certification under Federal Rule of Civil Procedure 23(b)(3).

In *Amgen*, the Supreme Court held that proof of materiality is not needed to satisfy rule 23(b)(3)'s predominance requirement for class treatment of federal securities actions because the potential immateriality of the misrepresentations and omissions is no barrier to class treatment. Interestingly, four of the justices – Justices Scalia, Kennedy, Thomas, and Alito – signaled that they might be amenable to reconsidering the propriety of the "fraud-on-the-market" theory in an appropriate future case.

EVIDENCE

California Supreme Court overturns prior case law regarding fraud exception to parol evidence rule.

Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association (2013)
55 Cal.4th 1169

Plaintiffs sued their credit association for fraud and negligent misrepresentation in connection with plaintiffs' default on a loan. The trial court granted summary judgment, because plaintiffs' claims depended on parol evidence that the court found was inadmissible under the rule set forth in *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, which held that the fraud exception to the parol evidence rule (Code of Civil Procedure section 1856, subdivision (f)), did not apply when the party asserting fraud claimed a promise "directly at variance with the promise of the writing." The Court of Appeal reversed based on a very narrow reading of *Prendergrass.*

The California Supreme Court overruled its longstanding decision in *Prendergrass,* noting that the "*Pendergrass* limitation finds no support in the language of the statute codifying the parol evidence rule and the exception for evidence of fraud. It is difficult to apply. It conflicts with the doctrine of the Restatements, most treatises, and the majority of our sister-state jurisdictions. Furthermore, while

continued on page v

continued from page iv

intended to prevent fraud, the rule established in *Pendergrass* may actually provide a shield for fraudulent conduct. Finally, *Pendergrass* departed from established California law at the time it was decided, and neither acknowledged nor justified the abrogation." The Court concluded *Pendergrass* should be set aside in favor of allowing fraud claims to be made even when they are based on representations at variance with the terms of a written integrated agreement. However, the terms of the agreement or evidence of a failure to read the agreement may demonstrate a lack of reasonable reliance on the alleged representations. Accordingly, the Court remanded for further proceedings on the summary judgment motion.

LABOR AND EMPLOYMENT LAW

Plaintiff's recovery for discrimination in violation of California law is limited where employer proves it would have made the same allegedly discriminatory decision to terminate the plaintiff for lawful reasons.

Harris v. City of Santa Monica (2013)
55 Cal.4th 203

The plaintiff bus driver alleged sex discrimination in violation of California's Fair Employment and Housing Act (FEHA), which generally prohibits employers from discharging employees because of their sex or, relatedly, because of a pregnancy. The defendant City employer argued it fired plaintiff for poor job performance, and asked that the jury be instructed to find no liability if its legitimate motive alone would have led it to make the same decision. The trial court refused the instruction and the jury found for plaintiff. The Court of Appeal reversed due to instructional error.

The California Supreme Court held that even after a plaintiff proves that discrimination was a substantial factor motivating his or her termination from employment, the employer is still entitled to prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons would have led it to make the same decision at the same time. If the employer prevails on that issue, the plaintiff cannot be awarded damages, backpay, or an order of reinstatement. The plaintiff may, however, still be awarded declaratory relief, injunctive relief, and statutory attorney's fees and costs.

ATTORNEY FEES AND COSTS

Attorney fee awards to prevailing defendants under California's Disabled Persons Act are mandatory and are not preempted by federal law under Americans with Disabilities Act.

Jankey v. Lee (2012)
55 Cal.4th 1039

In this action asserting violations of both federal and state anti-discrimination laws, the defendant prevailed, and the trial court awarded fees under Civil Code section 55, part of the California Disabled Persons Act (Civ. Code, § 54 et seq.). That statute provides for an award of fees to the prevailing party in an action to enjoin disability access violations. The Court of Appeal affirmed.

The California Supreme Court affirmed, holding that a defendant who prevails in such an action is entitled to a *mandatory* award of attorney fees. The plain language of section 55, which provides that "[t]he prevailing party in the action *shall* be entitled to recover reasonable attorney's fees," makes clear that such fees are mandatory for *any* prevailing party, including a prevailing defendant. The federal Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) does not preempt this reading of section 55. While the discretionary fee provision of the ADA allows fees to prevailing defendants only where they were required to respond to "frivolous" claims, the ADA does not preempt state laws that afford protection equal to or better than that afforded by ADA. The Court reasoned that section 55 qualifies as a state law that affords, in at least some respects, greater protection than its federal counterpart. In so holding, the court disagreed with the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC* (9th Cir. 2009) 554 F.3d 742.

See also *Marx v. General Revenue Corp.* (2013) 568 U.S. [133 S. Ct. 1166] [U.S. Supreme Court: in plaintiff's unsuccessful action under the Fair Debt Collection Practices Act, a district court retains discretion to award costs to a prevailing defendant under FRCP 54(d)(1), even if there is no showing of bad faith by the plaintiff; the statute is not contrary to, and thus not displaced by, 15 U.S.C. Sec. 1692k(a)(3), which permits an award of attorney fees and costs to a prevailing defendant where the suit is brought in bad faith];

Compare *Lefemine v. Wideman* (2012) 568 U.S. [133 S. Ct. 9, 184 L.Ed 2d 313] [U.S. Supreme Court: in an action alleging unconstitutional conduct by government officials, a plaintiff who obtained no monetary relief but obtained a permanent injunction requiring the defendant officials to change their behavior in a way that directly benefited the plaintiff, the plaintiff was a "prevailing party" who would generally be entitled to reasonable fees under 42 U.S.C. Sec. 1988];

And see *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556 (Petition for Review granted 03/14/12) [Second Dist., Div. 2: Where trial court properly granted summary judgment in action by employee asserting wage-and-hour claims alleging a right to additional "reporting time" and "split shift" pay, the former was a claim for unpaid wages subject to Sec. 218.5, which allows a prevailing defendant to recover attorney fees, while the latter was a claim for unpaid minimum wage compensation subject to Labor Code Sec. 1194, which does not permit recovery of attorney fees by a prevailing defendant. The defendant employer was entitled to an allocation of its fees incurred on each claim, so as to obtain an award of fees on the former claim];

And see *Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269 [Second Dist., Div. 1: law firm cannot recover prevailing party fees where it is represented by firm members, and since "of counsel" attorneys have a "close, personal, regular, and continuous" with the firm, the same rule applies to deny fees for "of counsel" services].

CCP 998 offer is valid despite having been made jointly to plaintiffs in a wrongful death action.

McDaniel v. Asuncion (2013)
214 Cal.App.4th 1201

In this wrongful death action, the trial court awarded expert witness fees to the defendant who made an offer to the plaintiffs under CCP 998 before trial. The court found that the usual rule invalidating such offers where made jointly to multiple plaintiffs did not apply in wrongful death actions.

The Court of Appeal (Fifth Dist.) affirmed, concluding, "Although joint offers may be invalid, such was not the case here. In a wrongful death action, a single joint cause of action is given to all heirs and the judgment must be for a single lump sum. A unitary verdict can easily be compared to a joint offer to determine whether the offering party has achieved a more favorable judgment. Thus, there is little, if any, justification for invalidating a joint offer made in a wrongful death case." Other appellate courts have reached different conclusions on this issue.

See also *Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103 [Second Dist., Div. 8: trial court properly found a CCP 998 offer was valid in that it was not made in bad faith despite the timing of the offer only two weeks after discovery responses were served and, with respect to the statutory requirement that an offer include means of acceptance, the statute was satisfied by the enclosure of an acceptance form on a document separate from the document reflecting the terms of the officer, but referencing the offer and served on the defendant in the same envelope].

TORT LAW

Primary assumption of risk doctrine applies to all inherently dangerous recreational activities, not only to active sports.

Nalwa v. Cedar Fair (2012)
55 Cal.4th 1148

The plaintiff in this action sued an amusement park after she sustained a fractured wrist during a bumper car ride. The trial court granted summary judgment, but the Court of Appeal reversed.

The Supreme Court held that the primary assumption of risk doctrine applied to bar the claim. The doctrine "applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity.' [Citation.] ... Allowing voluntary participants in an active recreational pursuit to sue other participants or sponsors for failing to eliminate or mitigate the activity's inherent risks would threaten the activity's very existence and nature." The court rejected the argument that safety regulations governing amusement park rides exempted them from the primary assumption of risk doctrine. While the regulations were designed to prevent serious injuries, "[a] small degree of risk inevitably accompanies the thrill of speeding through curves and loops, defying gravity or, in bumper cars, engaging in the mock violence of low-speed collisions."

The court also clarified that the bar to liability applies not only to participants but also to sponsors (such as the amusement park defendant) who derive economic benefits from recreational activities. "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity."

Patient's fall because of collapsing hospital bed rail does not involve "professional negligence" within the meaning of MICRA.

Flores v. Presbyterian Intercommunity Hospital (2013)
213 Cal.App.4th 1386

In this action by a patient injured when she fell from a hospital bed after the bed's rail collapsed, the trial court sustained the defendant's demurrer, finding the action was barred by the one-year statute of limitations (Code Civ. Proc., § 340.5) under the Medical Injury Compensation Reform Act (MICRA). That statute applies "[i]n an action for injury or death against a health care provider based upon such person's alleged professional negligence." "Professional negligence" is defined in part as "a negligent act or omission to act by a health care provider in the rendering of professional services."

The Court of Appeal (Second Dist., Div. Three) held MICRA did not apply under the facts of this case, concluding that the plaintiff's action "sounds in ordinary negligence because the negligence did not occur in the rendering of professional services." The court distinguished other cases in which the falls "result[ed] from the failure to properly secure or supervise the patient while on a hospital bed or gurney." In *Flores* the plaintiff "alleges she was injured by an *equipment failure*, i.e., a collapsed bed rail." (Original emphasis.) The court further observed, "We reject ... dictum that a negligently maintained, unsafe condition of a hospital's premises which causes injury to a patient falls within professional negligence."

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing whether the primary assumption of risk doctrine apply to a care giver suing an Alzheimer's patient for injuries caused by the patient.

Gregory v. Cott, case no. S209125
(formerly published at 213 Cal.App.4th 41)

This is an action by an in-home caregiver against an Alzheimer's patient for negligence, battery, and premises liability against a patient with Alzheimer's disease and the patient's husband. A divided Court of Appeal held that the doctrine also applies to bar a claim by caregiver hired to provide care and supervision in a private home to an Alzheimer's patient known to be violent.

The Supreme Court granted review on April 10, 2013 to address the following issue: "Did the doctrine of primary assumption of the risk bar the complaint for damages brought by an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the patient lunged at her?"

Addressing the meaning of "advertising injury" in the coverage clause of a general liability insurance policy.

Hartford Casualty Insurance Company v. Swift Distribution, Inc., case no. S207172
(formerly published at 210 Cal.App.4th 915)

In this insurance coverage dispute, the insurer's liability policy promised to defend the insured (Swift) against lawsuits that sought damages for an "advertising injury." The policy defined "advertising injury" as an injury arising from the publication of material that disparages a person's product. Swift was sued for damages that allegedly resulted from its advertisements, and asked the insurer to defend the lawsuit. The insurer denied coverage and filed a declaratory relief action to establish that it owed no duty to defend Swift. The trial court granted summary judgment for the insurer, and the Court of Appeal affirmed, finding the Swift advertisement did not disparage the products of the plaintiff in the underlying law suit. The court held that disparagement requires an injurious falsehood which specifically refers to the derogated product. In this case, Swift's advertisement made no mention of the plaintiff's product. In reaching its holding, the *Swift* court disagreed with the reasoning in *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969.

The Supreme Court granted review on February 13, 2013, to address whether an "advertising injury" provision in a general liability policy required the insurer to provide a defense against a claim that the insured's advertisements disparaged another company's product, when the advertisements contained no false statements and did not mention the other company's product.

Addressing the scope of court's review of arbitration awards and of the "honest belief" defense under California Family Rights Act.

Richey v. Autonation, Inc., case no. S207536
(formerly published at 210 Cal.App.4th 1516)

This case involves a terminated employee's claims against his employer for violation of the California Family Rights Act (CFRA), and the propriety of court review of the substance of an arbitrator's award resolving those claims. The arbitrator in this case ruled that, because the termination was based on the employer's "honest belief" that the employee was violating leave policies by working in a second job while on family leave, the employer was protected against liability under the CFRA. The trial court confirmed the award. The Court of Appeal reversed and vacated the award after undertaking substantive review of the arbitrator's decision, and rejecting the honest belief defense. The court relied on *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 as support for the proposition that where an arbitrator addresses claims for violation of unwaivable statutory rights, the award in at least some circumstances is subject to de novo judicial review for legal error.

The Supreme Court granted review on February 13, 2013 to address the following issues: "(1) Is an employer's honest belief that an employee was violating company policy or abusing medical leave a complete defense to the employee's claim that the employer violated the Moore-Brown-Roberti Family Rights Act (Gov. Code ?? 12945.1, 12945.2)? (2) Was the decision below to vacate the arbitration award in the employer's favor consistent with the limited judicial review of arbitration awards?"

See also *Oxford Health Plans, LLC v. Sutter*, see (3rd Cir. 2012) 675 F.3d 215 [the U.S. Supreme Court has granted certiorari to decide an issue left open by its earlier decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010), which held that under the Federal Arbitration Act, "a party may not be compelled ... to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." The Supreme Court will determine what "contractual basis" suffices to authorize class arbitration].

Addressing the scope of a business owner's duty to maintain an Automatic External Defibrillator on the premises.

Verdugo v. Target Corp., case no. S207313
(see (9th Cir. 2012) 704 F.3d 1044)

In this a wrongful death lawsuit filed by the heirs of a woman who died after suffering a heart attack in a Target store that did not have an Automatic External Defibrillator (AED), the district court summarily dismissed the action on duty grounds. Plaintiffs appealed, arguing that Target's failure to maintain had an AED on the premises exposed it to liability for common law negligence. Target argued that the Legislature occupied the field with respect to when businesses must maintain AEDs, and Target is not within the class of businesses required by statute to do so. Target further argued that its only duty in responding to a medical emergency is to call 911. Two federal appellate judges on the Ninth Circuit panel hearing this case opined that, because plaintiffs sought to impose "a common-law rule that would require many retail establishments across the state to acquire AEDs," the question posed "implicates strong state interests and could have wide-reaching effects." The panel thus certified the issue to the California Supreme Court.

The Supreme Court granted review on January 16, 2013, to address the following issue: "In what circumstances, if ever, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an Automatic External Defibrillator ('AED') for cases of sudden cardiac arrest?"

Addressing whether a named insured's purported assignment of liability insurance coverage to a spinoff company before claims against the company have matured into a liquidated sum requires the insurer's consent.

Fluor Corporation v. Superior Court (Hartford Accident & Indemnity Co.), case no. S205889
(formerly published at 208 Cal.App.4th 1506)

This insurance coverage action was filed by Fluor Corporation (Fluor-2), which is the second of two independent corporations named "Fluor Corporation," having been created in 2000 by a "reverse spinoff" corporate. The preexisting Fluor Corporation (Fluor-1) has been in existence since 1924. Between 1971 and 1986, Hartford Accident & Indemnity Company (Hartford) offered comprehensive liability insurance to Fluor-1 through 11 different

continued on page viii

continued from page vii

insurance policies. Hartford has defended both Fluor-1 and Fluor-2 in asbestos lawsuits under these policies since 1985, and between 2001 and 2008, Hartford has paid related defense and indemnity costs. In response to the law suit by Fluor-2, Hartford filed a cross-complaint alleging in part that only Fluor-1 was named on the insurance policies at issue, and each policy contained a consent-to-assignment provision, which prohibited any assignment of any interest under the policy without Hartford's written consent. Hartford asserted that it never was asked for and never granted consent; it sought a declaration that it neither had to defend nor indemnify Fluor-2 for asbestos claims; and sought reimbursement for defense costs and indemnity payments already made. Flour-2 relied on Insurance Code section 520—which permitted assignments, with or without insurer consent, after the relevant "loss" occurred—to argue the consent clause was void. Fluor-2 asserted that the losses at issue occurred at least 15 years before the reverse spinoff in 2000. Hartford relied on *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934, which held that such consent-to-assignment clauses were valid and enforceable until the loss matured into a liquidated sum. The trial court agreed with Hartford that *Henkel* precluded summary adjudication for Fluor-2 on the coverage issue.

The Court of Appeal (Fourth Dist., Div. Three) considered the issue in writ proceedings, and affirmed the trial court's ruling, holding that it had neither "the power nor the inclination to reverse *Henkel*." The consent-to-assignment clause at issue was identical to that in *Henkel*, and the mere fact that the events giving rise to liability – exposure to asbestos – occurred before the reverse spinoff does not automatically expand Hartford's coverage to both Fluor-1 and Fluor-2. Insurance Code section 520 was not discussed in *Henkel,* but the court of appeal found no likelihood that the Supreme Court would have reached a different result in *Henkel* if the applicability of the statute had been briefed or argued.

The Supreme Court granted review on December 12, 2012, to address the following issue: "Are the limitations on assignment of third party liability insurance policy benefits recognized in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 inconsistent with the provisions of Insurance Code section 520?"

Addressing terminated employees' right to unemployment insurance benefits.

Paratransit, Inc. v. Unemployment Insurance Appeals Board (Medeiros), case no. S204221
(formerly published at 206 Cal.App.4th 1319)

Unemployment Insurance Code section 1256 disqualifies an employee from receiving unemployment compensation benefits if he or she has been discharged for misconduct. Misconduct involves a willful or wanton disregard of an employer's interests or such carelessness or negligence as to manifest equal culpability. It does not include, among other things, good faith errors in judgment. Where a terminated employee refused to sign a disciplinary memorandum in connection with an incident of misconduct, the trial court (overturning a prior ruling by the Unemployment Insurance Appeals Board) granted a writ of administrative mandamus, finding that refusal constituted work-related misconduct rather than a good-faith error in judgment, rendering the employee ineligible for unemployment compensation. The Court of Appeal (Third Dist.) affirmed.

The Supreme Court granted review on July 24, 2012, to address the following issue: Did the trial court properly find that employee misconduct within the meaning of *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671 disqualified a discharged employee from receiving unemployment insurance benefits?

Addressing exhaustion of remedies doctrine in the context of a doctor's law suit arising out of an adverse hospital peer review ruling.

Fahlen v. Sutter Center Valley Hospitals,
case no. S205568
(formerly published at 208 Cal.App.4th 557)

The plaintiff doctor sued a hospital that declined to renew the doctor's medical staff privileges to see patients at that hospital. The hospital's decision had been upheld by the hospital's board of trustees after internal peer review proceedings. The doctor did not seek judicial review of that administrative decision, however. Instead, he filed a tort action under Health and Safety Code section 1278.5 seeking relief as a whistleblower, claiming that his privileges were denied in retaliation for complaints about nursing issues. The Court of Appeal (Fifth Dist.) held that a tort action under section 1278.5 may proceed independent of medical staff peer review proceedings. This result conflicted with the ruling in *Neeson v. North Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65.

The Supreme Court granted review on September 24, 2012, to address the following question: "Must a physician obtain a judgment through mandamus review setting aside a hospital's decision to terminate the physician's privileges prior to pursuing a whistleblower retaliation action under Health and Safety Code section 1278.5?"

Addressing meaning of "prevailing party" for purposes of contractual attorney fee awards.

Kandy Kiss of California, Inc. v. Tex-Ellent, Inc.,
case no. S206354
(formerly published at 209 Cal.App.4th 604)

The trial court in this case awarded contractual attorney fees under Civil Code 1717 to a defendant who obtained a dismissal due to lack of subject matter jurisdiction, finding the defendant "substantially" prevailed within the meaning of state law defining prevailing parties. The Court of Appeal affirmed, finding that the parties' contract term using a different definition that "included" one who substantially obtains or defeats the relief sought through means different from those by which the defendant prevailed did not preclude application of the common law definition of prevailing party. Moreover, the court found the plaintiff who had sued on the contract was estopped to rely on a ruling in a related proceeding finding that no contract existed.

The Supreme Court granted review on January 16, 2013, to address the following issue: "Is a party who obtains the dismissal of a contract action entirely on procedural grounds entitled to an award of attorney fees under Civil Code section 1717 as the prevailing party in an action on a contract?"

In re Insurance Installment Cases: Opt-Out Notice to Punitive Class Members to Be Paid By Plaintiffs!

By Kim Stone, CJAC

The Supreme Court recently denied a request by the Consumer Attorneys of California to depublish *In re Insurance Installment Fee Cases*, 21 Cal App.4th 1395. This brief note explains a bit about the underlying case and cribs liberally from our successful amicus brief. While I strive to maintain a neutral, lawyerly tone, I must start by noting with glee the end result. The case started as a plaintiff's lawyer's dream – huge class action lawsuit against big bad insurance company, where the insurance company was forced to pay for discovery notice that would allow the plaintiff to mine for additional class members. It ended as a plaintiff's lawyer's nightmare – not only was the case dismissed when the demurrer was upheld, but over $700,000 in notice costs were assigned to the plaintiff.

IN RE INSURANCE INSTALLMENT CASES – THE UNDERLYING CASE

The case, *In re Insurance Installment Fee Cases*, 21 Cal App.4th 1395, held that insurance company State Farm could charge a $1 to $3 service charge to customers who paid their insurance premiums every month, rather than in one lump sum at the beginning of the insurance contract. The court held that the service fee was not an insurance premium and that charging it was not unlawful under any of the plaintiff's theories: breach of contract, fraud, negligent misrepresentation or unfair competition.

The court also held that the $700,000 dollars that the trial court required State Farm to spend notifying its customers that State Farm would share customer contact information and installment fee payment information with the plaintiffs was an abuse of discretion by the trial court and should instead be properly paid by the plaintiffs. State Farm policyholders had an expectation of privacy, required both by law and by court order, warranting an opt-in notice before their contact and payment information would be shared with plaintiffs.

The court distinguished *Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal.4th 360 (2007)*, a case where the judge allowed disclosure of contact information of DVD buyers who had complained to the seller that the product was defective.

KRALOWEC FOR CONSUMER ATTORNEYS REQUESTING DEPUBLICATION

Kimberly Kralowec, of Kralowec Law and the UCL practitioner blog, petitioned the California Supreme Court on behalf of the plaintiff's lawyer lobbying organization for depublication of *In re Insurance Installment Fee Cases*. Their argument was that the case was contrary to *Pioneer Electronics,* which held that the trial court has the discretion to determine if notice is required to potential class members. Kralowec's brief laments:

"The opinion used inaccurate and overbroad language that could lead to an erosion of this Court's holding in *Pioneer Electronics* by steering trial courts to conclude that opt-out notices are required in every class action case in which contact information is sought in discovery. The opinion could lead those courts to abandon the weighing process that *Pioneer Electronics* mandates."

CJAC AND OTHERS OPPOSE REQUEST TO DEPUBLISH

Fred Hiestand, writing for the Civil Justice Association of California, the California Business Roundtable, the California Chamber of Commerce, and the California Bankers Association, urged the Court not to depublish the opinion.

Amici are interested in ensuring that the inalienable constitutional right to privacy of potential class measures is accorded adequate protection from disclosure to

continued on page 22

third party named plaintiffs in a putative class action lawsuit. They argued that the case, along with *Pioneer*, provides clarifying guidance for courts and counsel in future class certifications concerning the scope of discoverable personal and financial information implicating individual privacy rights.

DISTINGUISHING *PIONEER ELECTRONICS*

Pioneer Electronics holds that the named plaintiff in a putative class action against a seller of allegedly defective DVD players is entitled to discover the names and addresses of customers who submitted previous complaints to the seller about the DVD players unless, "following proper notice to them, they registered a written objection" to the disclosure of their contact information. *Pioneer Electronics, supra,* 40 Cal.4th at 374. In other words, the potential class members were entitled to receive only opt-out notice, in part because the class members had already provided defendants with their name and complaint when they complained to the seller about the allegedly defective DVD player.

In *In re Insurance Installment cases*, plaintiffs sought discovery of contact information and financial payment histories of individual insurance policyholders as to whom plaintiffs' class action claimed they were being charged undisclosed service fees in violation of the law. (In contrast to *Pioneer Electronics,* there was no allegation in *In re Insurance Installment cases* that any potential class member previously notified defendant insurers they objected to the undisclosed service fees.)

The appellate court ordered defendant State Farm to disclose this information, provided specified notice and opportunity to object (opt-in) was given to policyholders. State Farm complied with the trial court's order and then sought recovery of the notice costs it incurred, which exceeded $700,000. The trial court disallowed recovery of these costs and the appellate opinion reversed, finding that the notice procedure State Farm used was required by law and court order.

Two different kinds of information were sought through discovery: (1) names and addresses or "contact information" that *Pioneer Electronics* considered; and (2) financial payment history information not considered by *Pioneer Electronics*. The first kind of information – the contact information – is analogous to the information considered in *Pioneer Electronics*. However, the financial payment history information is substantively different from the information sought in *Pioneer. In re Insurance Cases* held that the financial payment history information is, absent a compelling state interest, protected from disclosure by the California Constitution. 211 Cal.App.4th 1428-1429. While the appellate opinion recognizes "the release of the policyholders' identifying information to plaintiffs ... was not a serious invasion of [their] privacy, it was sufficiently invasive to warrant providing [them] notice and an opportunity to object" in the same manner as *Pioneer Electronics* provided, an "opt-out" notice. 211 Cal.App.4th at 1428.

Moreover, *In re Insurance Installment Cases* explains that "even if the trial court in the reasonable exercise of its discretion arguably could have allowed the discovery of the policyholders [contact information] without the opt-in notice [sought], ... notice to policy holders and an opportunity to object unquestionably [is] required for plaintiffs' requested discovery of the policyholders' ... payment history information." *Id.* Thus, two forms of notice to putative class members in this case were prescribed for two different categories of information, the result of "balancing" comparative privacy interests implicated by class action certification that *Pioneer Electronics* found befitting of courts: an "opt-out" notice for initial contact information (i.e., names and addresses); and an "opt-in" notice for confidential financial payment histories of individual policyholders.

TWICE AS NICE: CONSTITUTIONAL PRIVACY AND FOLLOWING A COURT ORDER

Another wrinkle the *Insurance Installment* opinion presents different from *Pioneer Electronics* is its finding that the notice required for protection of individual privacy is based on two independent grounds: the constitutional right of privacy recognized by *Pioneer Electronics;* and construction of the court order directing the form of notices State Farm was required to provide policyholders. There was no construction of a court order involved in *Pioneer Electronics*. The order there notified complaining customers their contact information would be provided to plaintiff unless they affirmatively objected to its release – an opt-out provision. *Pioneer Electronics, supra,* 40 Ca1.4th at 366.

But *Insurance Installment Cases* also analyzes the text of the trial court's order and finds its "directive that policyholders be given opt-in notice regarding disclosure of their [service fee] payment information" compelling of the conclusion "that the order required notice to the policyholders ..." 211 Cal.App.4th at 1430. To construe the trial court's order as optional for State Farm in the manner urged by plaintiffs would, the opinion explains, be "illogical" because if the notice was merely permissive then policyholders would have had to opt-out rather than opt-in. *Id.* at 1430-1431.

The *Insurance Installment Cases'* construction of the trial court's order and its explanation of why that order, as a matter of law, required State Farm to provide the specified notice to its policyholders, entitles State Farm to recover from plaintiffs the more than $700,000 in costs it incurred in complying with the order.

CONCLUSION

When you combine *In re Insurance Installment Fee Cases* with *Pioneer Electronics*, you get a good explanation of what kind of information requires only opt-out notice (contact information only) and what kind of information requires opt-in notice (financial payment information). Additionally, the court's explanation in the *Insurance Installment Cases* of who should bear the burden of paying for that notice should prove useful to defense attorneys in class action cases.

Rickley v. Goodfriend: a New Opinion that Expands Lawyers' Liability, and What ASCDC Is Doing About It

Introduction by Lisa Perrochet

ASCDC's Amicus Committee monitors appellate decisions that affect the practice of law. And, in appropriate cases, our volunteer members of the committee, including past ASCDC President Harry Chamberlain, weigh in on those cases to present a viewpoint consistent with the charge of our Association to promote the administration of justice and enhance the standards of civil litigation and trial practice in this State.

In one recent decision, *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136 the majority held (over a strong and well reasoned dissent) that an attorney owes an *adversarial* party an independent duty not to "interfere" with a judgment entered *against the attorney's own client*. In an amicus curiae letter supporting the defendant attorney's petition for review, Chamberlain observed, "[T]he *Rickley* majority suggested that a 1991 legislative amendment of the 'screening' statute applicable to alleged lawyer-conspiracy claims, Civil Code section 1714.10, had somehow rendered that salutary process dead-letter. Section 1714.10 is a Legislative 'gatekeeper' screening provision that requires the plaintiff seeking to sue an attorney for civil conspiracy to initially demonstrate a 'reasonable probability' of prevailing on the merits." However, "according to the *Rickley* majority, screening is no longer required and the broad scope of California's absolute litigation privilege can be abrogated whenever the plaintiff merely asserts that the opposing lawyer acted for an improper purpose unrelated to the lawsuit, or owed an 'independent' legal duty not to injure the plaintiff's interests under a judgment or post-judgment order."

For your reading pleasure, below is the legal argument from Chamberlain's amicus letter, explaining why the California Supreme Court should grant review to resolve the uncertainty in the law on the issues raised in *Rickley*. If review is granted, ASCDC can be proud to have been part of that process. And, if review is not granted, Chamberlain's letter outlines arguments that attorneys can borrow to demonstrate why *Rickley* conflicts with the leading Supreme Court precedent in this area, *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, and should not be followed in future cases.

Editor's Note: The petition for review was denied as this issue went to print.

REASONS WHY REVIEW SHOULD BE GRANTED

According to the majority's characterization of the alleged conspiracy: "In this dispute between next-door neighbors, plaintiffs prevailed in a prior action, establishing that their neighbor [Marvin Goodfriend] had unlawfully dumped contaminated debris on their property. Judgment was entered for plaintiffs. The judgment required the neighbor to remove the debris pursuant to a court-approved remediation plan. The funds for the remediation plan were placed in the trust account of the neighbor's attorneys [the lawyer-defendants at Procter representing Marvin Goodfriend and his wife]. The neighbor failed to remove the contaminated debris, and the attorneys disbursed the funds in a manner contrary to plaintiffs' interest in remediating the debris on their property. Plaintiffs then filed this action, alleging that the neighbor [Marvin Goodfriend] and his wife had not complied with the prior judgment, resulting in a continuing nuisance." (Maj. opn. at p. 2, bracket added.) After the judgment, plaintiffs amended their pleadings to sue the lawyers at Procter for allegedly "conspiring" with the Goodfriends "to interfere with the court-approved remediation plan and to disburse the funds from the trust account so as to avoid remediating the contaminated debris on plaintiffs' property. The trial court allowed the amendment." (*Ibid.*; see also *id.* at pp. 9–10.)

Specifically, each of claims of conspiracy liability asserted against Procter was premised upon the notion that "the

continued on page 24

Attorney Defendants, and each of them, formed and operated a conspiracy with their clients intended to, without limitation, thwart compliance with Plaintiffs' Judgment[] and postjudgment orders." (Maj. opn. at p. 9, brackets in the original text.) Three "new" causes of action were also alleged against the lawyers for the Goodfriends involving duties ostensibly owed *to the plaintiffs* after the judgment: (1) breach of fiduciary duty, (2) negligence, and (3) accounting. (*Id*. at 10.)For sound policy reasons, the recognized duties giving rise to a civil cause of action that may be asserted by adversaries in litigation against opposing counsel are few and far between. Under most circumstances, "an attorney's duty depends on the existence of an attorney-client relationship: 'If that relationship does not exist, the fiduciary duty to a client does not arise.'" (*Thayer v. Kabateck, Brown & Kellner, LLP* (2012) 207 Cal.App.4th 141, 161 (*Thayer*), citing *Daniels v. DeSimone* (1993) 13 Cal.App.4th 600, 607; accord, *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 82-83.) Applying these principles, the courts have observed that "We are wary about extending an attorney's duty to persons who have not come to the attorney seeking legal advice" or adversaries with whom the attorney deals at arms-length, as in virtually every litigation context. (*Hall v. Superior Court* (2003) 108 Cal.App.4th 706, 714; see also *Chang v. Lederman, supra*, 72 Cal.App.4th at pp. 82-83 [describing the limited nature of duties owed by attorneys to third parties and rejecting the expansion of "third party beneficiary" claims];[1] *Thayer*, *supra*, 207 Cal.App.4th at 157-161 [digesting cases and dismissing "fraud" and "breach of fiduciary duty" claims asserted by a non-client against litigation attorneys for conduct in representing their "actual clients"].)

The threshold for demonstrating an actionable duty against a lawyer during the course of representing clients who are opposing claims in litigation – at any stage of the proceedings – is much higher. That is particularly true in light of the policies underlying the absolute litigation privilege – and that is precisely the role that Procter was serving on behalf of the Goodfriends throughout the underlying real estate litigation.

While the majority barely pays lip service to substantial policy interests underlying the litigation privilege (maj. opn. at pp. 26-30), it does acknowledge that:

> The litigation privilege ... serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the 'occasional unfair result' in an individual case …. [T]he litigation privilege applies to subornation of perjury because 'it is in the nature of a statutory privilege that it must deny a civil recovery for immediate wrongs — sometimes even serious and troubling ones – in order to accomplish what the Legislature perceives as a greater good.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 324.) In sum, "'the purpose of the litigation privilege is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation.'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1496.)

(Maj. opn. at p. 30.)

"[T]he privilege *is not limited to statements made during a trial* or other proceedings, but may extend to steps taken prior thereto, *or afterwards*. Because the alleged misconduct is all reasonably related to the [underlying real estate litigation between the Goodfriends and their neighbors], it is subject to the litigation privilege bar." (*Kearney v. Foley & Lardner, LLP* (9th Cir. 2009) 582 F.3d 896, 908–909, emphasis added.) Thus, in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (*Rusheen*), this court applied the absolute privilege to dismiss tort claims asserted against an attorney who procured a defective default judgment by means of the perjured declaration of a process server, and thereafter engaged in "conduct" – e.g., levying and executing on the patently void judgment after its entry – again suborning perjury when he opposed the motion to vacate the judgment. (*Id*. at pp. 1053-1054.)

The majority argues that *Rusheen* is distinguishable because this court applied the litigation privilege to postjudgment *enforcement* activities, but in this case, the Procter defendants were *obstructing* rather than *enforcing* a judgment. (Maj. opn. at pp. 28-29.) The dissent persuasively responds that "the difference between enforcement and obstruction, however, is often in the eye of the beholder." (Dis. opn. at p. 36.)

The majority offers a "distinction" without a material difference. Its reasoning is based upon the false premise that the privilege should be inapplicable because the lawyers' alleged conduct and communications (following the entry of judgment) were not undertaken to "achieve the objects of the litigation." (Maj. opn. at p. 29.)

The application of the privilege is not dependent upon the "label" placed upon the plaintiff's lawsuit or the "motive" attributed to the lawyers in representing their clients. As this court instructed in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 214: "the endorsement of [such a subjective] 'interest of justice' requirement would be tantamount to the exclusion of *all* tortious publications from the privilege, *because tortious conduct is invariably inimical* to the 'interest of justice.' Thus, the exception would subsume the rule." (Second emphasis added.)

continued on page 25

The allegedly unethical or improper character of the "acts" or communications complained of in no way abrogates the absolute nature of the privilege: "While one might believe the communications ethically unacceptable, we conclude the present derivative causes of action were based solely on *communicative* acts done in a judicial proceeding by litigants, to achieve the objects of litigation, and had a logical relation to the action." *Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal. App.3d 1326, 1331–1332.)

The privilege is absolute "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions," like Rickley's conspiracy lawsuit. (*Silberg, supra,* 50 Cal.3d at p. 214, brackets in the original text; accord, *Rubin*, *supra*, 4 Cal.4th at p. 1202; cf. dis. opn. at pp. 36-39.) Illustrating the broad scope of the litigation privilege in a case involving *proven* "attorney misconduct" is *Kachig v. Boothe* (1971) 22 Cal.App.3d 626 written by Justice Kaufman (also the author of *Silberg*) while on the Court of Appeal. In *Kachig,* an attorney named Jones was convicted of subornation of perjury and offering false evidence in a prior lawsuit Jones brought against the Kachigs. (*Id.* at pp. 630–631; see also, *People v. Jones* (1967) 254 Cal.App.2d 200.) Jones was suspended from the practice of law by this court for his part in an illegal conspiracy with his clients to manufacture false evidence because he had committed crimes of "moral turpitude" in violation of Business & Professions Code section 6068. (See *In Re Jones* (1971) 5 Cal.3d 390, 400.)

Although each of these egregious facts had already been *proven* in the criminal case, *Kachig* concluded that the conduct of Jones and his clients remained privileged from civil liability under former subdivision (2) of section 47: "[W]e recognize that the wrong in this case is a most grievous one, and we should be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse." (*Kachig, supra,* 22 Cal. App.3d at pp. 641-642, emphasis added, first brackets in original text].)

Numerous other cases support the view that even allegedly unethical or illegal conduct "in furtherance of litigation" that might be labeled as "conspiracy" nonetheless remain privileged under section 47. (*See, e.g., Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 491 [forgery and subornation of perjury]; *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 915-916 [expert allegedly gave perjured testimony and manufactured false evidence]; *see also, Silberg, supra,* 50 Cal.3d at pp. 218–219; *Scalzo v. Baker* (2010) 185 Cal. App.4th 91, 101–102.)

However, immunity from tort liability does not mean that parties or attorneys who engage in conduct punishable by law will go scot-free. Criminal and administrative sanctions remain available in cases where for, public policy reasons, the privilege operates to bar any civil remedy. (See *Rusheen*, *supra*, 37 Cal.4th at pp. 1063–1064; *Rubin*, *supra*, 4 Cal.4th at pp. 1198–1199; *Cedars-Sinai Medical Center v. Superior Court,* (1998) 18 Cal.4th 1, 13 ["nontort remedies [for spoliation of evidence and obstruction of justice] are both extensive and apparently effective"].)

In rejecting the necessity of establishing tort liability for "spoliation of evidence" or other misconduct amounting to "obstruction of justice," this court "weighed the social benefits of creating a tort cause of action ... against the costs and burdens it would impose[.]" (*Rusheen*, *supra*, 37 Cal.4th at p. 1063.) "We concluded that the benefits of creating a tort remedy for intentional first party [or third party] spoliation were outweighed by: (1) the policy against creating derivative tort remedies for litigation-related misconduct; (2) the strength of existing nontort remedies for spoliation within the underlying action itself rather than through an expansion of the opportunities for initiating one or more additional rounds of litigation after the first action has been concluded; and (3) the uncertainty of the fact of harm in spoliation cases." (*Ibid.*, citing *Cedars-Sinai Medical Center, supra,* 18 Cal.4th at pp. 8–9, 11, 13, 15 ["first party" spoliation by the litigants themselves]; see also *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 469–471 ["third party" spoliation by attorneys, witnesses and other participants to a pending or anticipated lawsuit].)

For example, if a party willfully violates a court order that obstructs or impairs the rights of an opposing party, a citation for contempt of court is available – a remedy imposed against Mr. Goodfriend after an OSC filed by plaintiffs. (Maj. opn. at p. 9.)

"[T]he allegation of conspiracy among the defendants to do the privileged acts does not remove the privilege." (*Pettitt v. Levy, supra*, 28 Cal.App.3d at p. 491.) Those same policy considerations pertain to the limitations recognized by *Doctors' Co.* on the undue expansion of tort liability for alleged "lawyer-conspiracy." (*Doctors' Co.*, *supra*, 49 Cal.3d at p. 43 [no viable claim for "conspiracy" to suborn false medical opinion].) The Legislature's enactment of Civil Code section 1714.10, and the controlling precedents of this court amply demonstrate that lawyer-conspiracy are disfavored, and "liberal rules of pleading" have no place when evaluating the viability of such claims. (See dis. opn. at p. 37.)

Section 1714.10 was originally enacted in 1988 in response to the Court of Appeal's decision in *Wolfrich Corp. v. United Services Automobile Assn.* (1983) 149 Cal.App.3d 1206 which held that although an insurance company's attorneys could not be sued directly for violating Insurance Code section 790.03, they could be sued for "conspiring" with their client to commit unfair or deceptive acts or practices in the resolution of insurance disputes. Its purpose is to prevent the assertion of conspiracy claims against attorneys as a tactical ploy against an adversary's

continued on page 26

counsel. As enacted, section 1714.10 required a prefiling judicial determination of probable merit for any claim against an attorney alleging the attorney had conspired with his or her client – akin to the special motion to strike for cases arising from constitutionally protected petitioning and speech activity (Code Civ. Proc., § 425.16) – its provisions were intended to '"screen out meritless cases at an early stage"' by requiring the plaintiff to demonstrate "a probability of success on the merits." (Maj. opn. at pp. 12–13.)

At a minimum, section 1714.10 contemplates there are two sides to every story and the courts must act as gatekeepers in evaluating the potential merits of lawyer-conspiracy claims. But according to the majority, the facts alleged against the lawyers can be construed in only one way: "Having represented the Goodfriends in the first action and lost, Procter should have left the remediation work to others, directed by an expert, specifically plaintiffs' expert ..." and stayed away from attempting to resolve any continuing disputes on the Goodfriends' behalf, even those that did not necessarily involve remediation. (Maj. opn. at pp. 19–20; cf. dis. opn. at pp. 37-39.) A chilling message for California lawyers who are sworn to vigorously and zealously represent the interests of their *clients*.

The majority is simply mistaken in concluding that because the Legislature amended section 1714.10 in 1991 (after *Doctors' Co.* disapproved *Wolfrich*), this gate-keeping statute "serves no screening function whatsoever." (Maj. opn. at p. 14.) That analysis is unsupported by the plain meaning of the amendment or the Legislative history. As the dissent correctly points out, the plaintiffs must still demonstrate a "reasonable probability" of prevailing on the merits of their claims by showing "the attorney-defendants acted 'in furtherance of [their] own financial gain' (other than earning of attorneys fees), or that the attorney-defendants violated their 'own duty to the plaintiff[s]." (Dis. opn. at p. 34.) They have not done so on this record.

ENDNOTES

1 As *Chang v. Lederman* states the rule: "Whether a lawyer sued for professional negligence owed a duty of care to the plaintiff 'is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances.'" (72 Cal.App.4th at 76, citing *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 [when the litigation privilege does not come into play, an attorney's liability to third parties is generally limited to actionable misrepresentation].)

Effectively Preparing for and Taking an Expert Deposition

By John Holcomb, Jr. and Daniel Kramer

The primary goal of an expert deposition is to uncover all the opinions that the expert will offer at trial. How to achieve that primary goal is the subject of this article. Below are procedures necessary to effectively prepare for and take expert depositions.

1. ACQUAINTING YOURSELF WITH THE EXPERT'S AREA OF EXPERTISE

Unlike party or witness depositions, expert depositions by definition require a basic comprehension of a particular field or science outside of the layperson's common knowledge. Therefore, it is imperative that the attorney devote the time necessary to learn about the expert's field as it relates to the opinions the expert will be offering at trial. This does not mean the attorney must have the same level of understanding of the field as the expert, but it does mean the attorney should know enough about the jargon and prevailing theories in the expert's field to competently conduct the deposition.

Expert depositions are governed by Code of Civil Procedure section 2034.210 et seq., and the best place to start preparing for an expert deposition is to review the opposing party's response to the Section 2034.210 demand. The response to a Section 2034.210 demand must include the general substance of the testimony the expert intends to offer at trial, and must be accompanied by an expert declaration signed by opposing counsel pursuant to section 2034.260. The declaration must contain "(1) A brief narrative statement of the qualifications of each expert. (2) A brief narrative statement of the general substance of the testimony that the expert is expected to give. (3) A representation that the expert has agreed to testify at the trial. (4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial. (5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney." *Code of Civil Procedure* § 2034.260(c).

As is set forth in section 2034.260(c)(2) above, counsel must disclose the "general substance" of the testimony expected to be given. "[T]his means the party must disclose either in his witness exchange list or at his expert's deposition, if the expert is asked, the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert's testimony. Only by such a disclosure will the possibility of a reasonable settlement of the case before trial be encouraged." *Kennemur v. State of California* (1982) 133 Cal. App. 3d 907, 919 (decided under former Code of Civil Procedure § 2037.3).

After becoming familiar with the response to the Section 2034.210 demand and declaration, the attorney needs to perform research to develop a basic comprehension of the expert's field and the terminology likely to be used. Narrowly targeted online research using word searches may not always be the best way to get an overview of an unfamiliar field – sometimes skimming the table of contents and index of treatises is a good idea before "drilling down" to specific subjects the expert is expected to cover. The attorney should also consult with the defense expert relative to the opinions that will be offered by the defense. Likely, the defense expert will have prepared a report prior to the plaintiff's expert's deposition, and the defense expert will be able to go through the plaintiff's expert's report with the attorney to point out any inconsistencies or address areas that need clarification.

2. DETERMINING THE EXPERT'S INDIVIDUAL BACKGROUND.

Once the attorney has a basic understanding of the expert's area of expertise, additional research should be done into the expert's individual background. For instance, the attorney should do some research into the expert's firm, if any, the expert's educational and vocational background, and the expert's work history. Deposing an expert who has been in the field many years versus a more academic expert may yield different results, as the experts may have different approaches to the same factual pattern, and a different understanding of the litigation process. The attorney should be fully aware if he is dealing with an academic or an experienced litigation expert.

3. UTILIZING THE ASCDC EXPERT DEPOSITION DATABASE TO PREPARE FOR DEPOSITION

Perhaps one of the most significant benefits that the ASCDC provides to its members is the Expert Deposition Database – *www.ascdc.org/Experts.asp.* The Database (which can also be accessed under the "member services" tab of the main web page at www.ascdc.org) provides members with the ability to review hundreds of deposition transcripts that have been uploaded to the database. ASCDC has for many years collected and organizing expert witness depositions from our Board members and member firms, which enables members to have expert

continued on page 28

specific insight that otherwise could only be gained through experience.

Additionally, the database enables attorneys to determine if the expert is generally plaintiff friendly, or if the expert has consulted with both the plaintiff and defense bar. Certainly, this must be elicited during the deposition, but the Database provides some insight into this before the deposition which otherwise would not be known. (Of course, the Database is a great resource for attorneys looking to retain a good expert as well –this is the place to check out how they hold up under questioning.)

4. EXAMINING THE EXPERT

To reiterate, the primary goal of an expert deposition is to fully uncover all of the opinions which the expert will be presenting at trial. The concern should not be trying to outwit the expert or to get the expert to subscribe to a particular fact pattern. This is not a party or percipient witness deposition during which you are seeking to elicit certain fact statements. Instead, you are seeking to understand all of the expert's opinions so that you will not be surprised at trial, and so that your expert will be prepared to refute them at trial. After all, in all likelihood you will have a similarly skilled expert on the defense that will endeavor to refute all of the opinions of the Plaintiff's expert.
Once sufficient preparation and understanding of the expert's field has been achieved, you are ready to examine the witness. Below is a checklist of topics and questions that should be followed in every expert deposition:

1. Relationship of the expert with the opposing counsel and fees

Before getting into the substance of the expert's testimony, it is important to ask the expert about his relationship with opposing counsel and counsel's firm, and the fees the expert is receiving. The examining attorney should have a full understanding of the expert's history as an expert in litigation, the amount of income the expert receives from litigation work, and whether the expert tends to represent plaintiffs or defendants. The following topics should be addressed, as they may have a bearing on showing the jury that the opposing expert lacks objectivity:

a. What percentage of cases has the expert handled on the plaintiff's side?
b. How many years has the expert worked with plaintiff's counsel?
c. How many clients has the plaintiff's attorney referred to the expert in the last year?
d. What are the expert's fees?
e. What is the expert's income from litigation work and what percentage of the expert's total income is from litigation?
f. How much has the expert been paid by plaintiff's counsel this year and in years prior?
g. Does the expert ever handle cases on a lien?
h. If the expert does handle cases on a lien, what percentage of the lien does the expert customarily write off?
i. Has the expert ever not required satisfaction of the lien if the case has been dismissed or resulted in a defense verdict?

2. Relationship of expert to Plaintiff

After determining the expert's relationship to counsel and testimony trends, it is important to determine the relationship between the expert and the plaintiff. The following topics should be addressed:

a. How was the expert first connected with the plaintiff?
b. Has the expert been retained by the plaintiff in the past in any capacity?
c. How much time did the expert spend with the plaintiff prior to retention?
d. How much time did the expert spend with the plaintiff after retention?

3. Expert's history of testifying in depositions and trials

It is important to know whether or not the expert is experienced in providing testimony. This can be derived from determining the percentage of the expert's total income received from testimony, as set forth above. However, for a full understanding of the expert's history, the following topics should be addressed:

a. How many times has the expert testified in depositions or trials?
b. Does the expert recall the case names of the matters he has testified in recently?
c. Has the expert ever testified in federal court? **Note that this article is based on taking expert depositions in state court. Federal Rules of Civil Procedure, Rule 26 governs expert testimony and discovery in federal court. Understanding Rule 26 is essential when your case is in federal court. It is important to note that Rule 26 was amended in 2010, making changes to the old 1993 Rule. The new Rule (a) forbids the discovery of draft expert reports [Rule26(b)(4)(B)], (b) allows discovery of certain communications with counsel [Rule 26(b)(4)(C)], and (c) requires experts only to disclose " facts or data" utilized in forming opinions [Rule 26(a)(2)(B)(ii)].*
d. What percentage of the expert's testimony given in state versus federal court?
e. How many times has the expert testified for the plaintiff versus defense?

4. What documents did the expert review / rely upon?

The expert's opinions and conclusions will be based on documents and data the expert has reviewed. Therefore, it is important that the expert fully disclose everything that was reviewed or relied upon to form the expert's opinion.

a. Make sure to go through the entire file of the expert at the deposition, page by page, and ask the expert to describe its contents.
b. Ask the expert for any digital information.
c. Once you have completed going through each document, ask the expert if they reviewed absolutely anything else, and if they plan to do so.

continued on page 29

d. Do the documents confirm the plaintiff's theory of the case?

5. Going through the expert report and eliciting all of the expert's opinions

The most important part of the expert deposition is eliciting all of the opinions that the expert intends to offer at trial. It is crucial to go through the entire report prepared by the expert with the expert during the deposition to ensure that all opinions of the expert have been discussed. The report itself is the guideline for eliciting the expert's opinions and properly conducting the deposition. When going through the report with the expert, the following should be addressed:

a. When did the expert prepare the report?
b. How many drafts of the report were made prior to the final report?
c. Does the expert intend to supplement the report prior to trial?
e. Does report contain all of the expert's opinions?

6. Ensuring that all opinions have been discussed

Once your questioning of the expert has been concluded, it is important to make sure to ask the expert two questions in closing:

(1) Have we reviewed all materials that you have relied upon to form your opinions?
(2) Have we discussed all of the opinions that you intend or expect to offer at trial?

Asking these questions provides a safeguard so that no new materials or opinions are presented at trial. It is possible that you have either overlooked an area or that the expert has forgotten to mention materials reviewed or an opinion formed. If the expert provides you with something new after you have asked these questions, it is important to ask the questions yet again once that subject has been fully discussed.

CONCLUSION:

A properly taken expert deposition will allow the deposing attorney to be fully prepared to examine the expert at trial. There should be absolutely no opinion that the expert offers in trial that was not discussed in the expert's deposition. If the above guidelines are followed, and all opinions of the expert and the basis of those opinions are fully explored, the deposition will be successful and attorney can rest confident that the defense will be fully prepared for the expert at trial.

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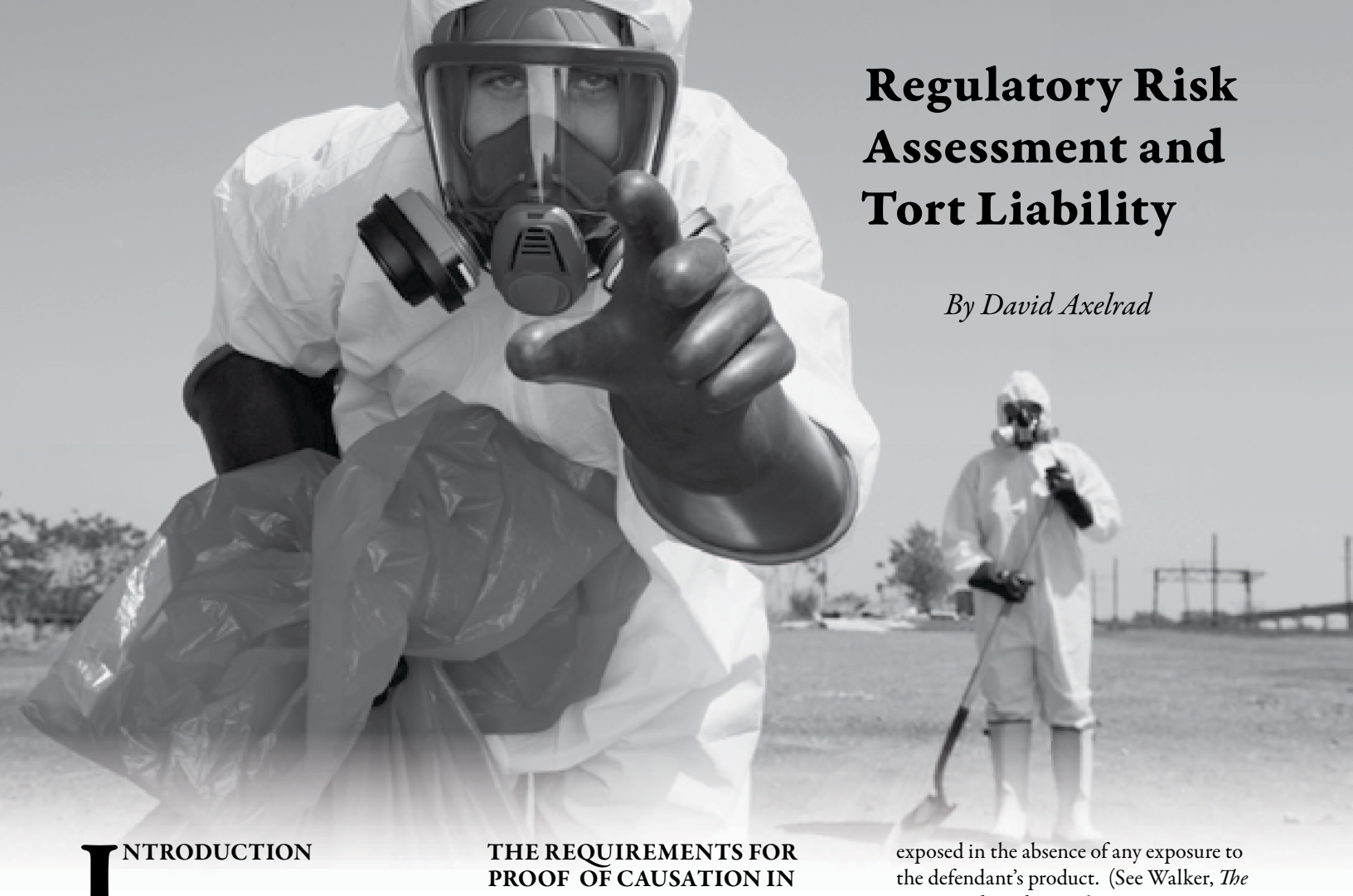

Regulatory Risk Assessment and Tort Liability

By David Axelrad

INTRODUCTION

Regulatory agencies often confront uncertainty or lack of data concerning the causal relationship between exposure to a particular chemical substance and a particular effect on human health. In these situations, regulators use risk assessment to estimate the extent to which exposure to a chemical will increase the incidence of a particular health effect. (See Reference Manual on Scientific Evidence (Third Edition 2011) p. 649; McGarity, On the Prospect of "Daubertizing" Judicial Review of Risk Assessment, 66 Law and Contemporary Problems 155, 157 (2003).)

In controversial areas of toxic torts, where the issue of dose, i.e., "how much is enough" to cause an alleged harm is disputed, plaintiffs frequently turn to regulatory risk assessment standards to fill in the evidentiary gap created by a lack of definitive science on the relationship between exposure to a particular product and the plaintiff's alleged injury. As explained below, these risk assessment standards are not designed and therefore should not be used to measure causal relationships for purposes of assigning tort liability.

THE REQUIREMENTS FOR PROOF OF CAUSATION IN TOXIC TORT CASES

Tort law assigns responsibility for harm to persons or property upon proof that the defendant's breach of a duty of care owed to the plaintiff was a substantial factor in causing harm. (See, e.g., *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 ["The determination of duty . . . is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection' "]; *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239 ["jury instructions on causation in negligence cases should use the 'substantial factor' test [which] subsumes the 'but for' test...."].

In the area of toxic and environmental torts, the law imposes rigorous requirements for proof of causation because of the scientific uncertainties associated with the consequences of human exposure to various chemical substances. Thus, to be held responsible in a toxic tort case, exposure to the defendant's product must have increased the risk of a particular harm above the baseline risk to which everyone is exposed in the absence of any exposure to the defendant's product. (See Walker, *The Concept of Baseline Risk in Tort Litigation* (1991) 80 Ky. L. J., 645-646, 673) ["[I]njuries resulting from the normal risks of life are not compensable because they are part of the danger inherent in living in society. 'Baseline risk' ... [is] the risk of occurrence of the plaintiff's injury or accident in the same or similar circumstances, *but* in the *absence* of any act of the defendant that in fact created an additional, unreasonable risk of the injury or accident.' ... Baseline risk is the floor or threshold risk, above which a defendant must have created an incremental risk in order to be found negligent."]

To satisfy this burden of proof, a toxic tort plaintiff must prove both general and specific causation. (E.g., *In re Hanford Nuclear Reservation Litigation* (9th Cir. 2002) 292 F.3d 1124, 1134 ["In order to prevail on their [toxic tort] claims, ... plaintiffs must establish both generic *and* individual causation" (original emphasis)]; see Bernstein, *Getting to Causation in Toxic Tort Cases* (2008) 74 Brooklyn L.Rev. 51, 52 ["American courts have reached a broad consensus on what a

continued on page 31

plaintiff must show to prove causation in a toxic tort case. First, a plaintiff must show that the substance in question is capable of causing the injury in question. This is known as 'general causation.' Second, a plaintiff must show that this substance caused *his* injury. This is known as 'specific causation. [Fn. omitted.]'"].)]

Proof of "general causation" establishes as a threshold matter that a particular chemical is capable of causing in humans the type of harm suffered by the plaintiff. (E.g., *In re Hanford Nuclear Reservation Litigation, supra,* 292 F.3d 1124 at 1133 ["General ... causation has been defined by courts to mean whether the substance at issue had the capacity to cause the harm alleged"].) If, for example, exposure to Chemical A can only cause headache in humans and plaintiff is complaining about skin rash there is no general causation and plaintiff's claim fails.

If a substance does have the capacity to cause the harm plaintiff claims to have suffered, then the plaintiff must prove "specific causation" by establishing a reasonable medical probability that plaintiff's actual exposure to the chemical in question was a substantial factor in causing this particular plaintiff's harm. (E.g., *In re Hanford Nuclear Reservation Litigation, supra,* 292 F.3d at 1133 ["'individual causation' refers to whether a particular individual suffers from a particular ailment as a result of exposure to a substance"]; *Bonner v ISP Technologies* (8th Cir. 2001) 259 F.3d 924, 928 ["the plaintiff must put forth sufficient evidence ... that the product was capable of causing her injuries, *and that it did*" (emphasis added)]; *Parker v. Mobil Oil Corp.* (N.Y.Ct. App. 2006) 7 N.Y. 3d 434, 448 [857 N.E.2d 1114] ["It is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)"].) The key to proof of specific causation is dose, evidence that the plaintiff was exposed to the chemical at issue in sufficient quantity to produce the harm that particular chemical is capable of producing. (See, e.g., *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation* (N.D. Cal. 2007) 524 F.Supp.2d 1166, 1174 ["'all chemical agents are intrinsically hazardous-whether they cause harm is only a question of dose....'"]; *McClain v. Metabolife Intern., Inc.* (11th Cir. 2005) 401 F.3d 1233, 1242 ["'Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect'"].)

THE DISCONNECT BETWEEN CAUSATION REQUIREMENTS AND REGULATORY RISK ASSESSMENT STANDARDS

Exacting causation standards in toxic tort law ensure that only those specific persons whose conduct or products were a substantial factor in causing harm to a particular person will be held legally responsible to compensate the person harmed. In contrast, regulatory risk assessment standards are not meant to govern the legal relationships and responsibilities between particular plaintiffs and defendants. Instead, regulatory risk assessment standards are, as noted above, adopted to protect public health where there is uncertainty or lack of data concerning the relationship between exposure to a chemical and a particular health effect. (See Latin, *Good Science, Bad Regulation and Toxic Risk Assessments*, Yale J. on Reg. 89, 91-92 (1988) ["Toxic risk assessment suffers from fundamental uncertainties about causal mechanisms for cancer and other hazards.... These uncertainties generally preclude reliable assessments of relevant effects, and there is no scientific consensus on how they should be resolved.... [¶] Under current regulatory practices, Agency scientists produce risk assessments that seldom approach the level of reliability normally expected of scientific findings; indeed, many estimates are little more than educated guesses. [Footnote omitted]...."].) The process by which regulatory risk assessment standards are adopted illustrates the disconnect between such standards and the case-specific standards for proof of causation in a tort case.

continued on page 32

THE REGULATORY RISK ASSESSMENT PROCESS: ILL-SUITED TO PROOF OF CAUSATION

HAZARD IDENTIFICATION

There are four steps in regulatory risk assessment – "(1) hazard identification, (2) dose-response assessment, (3) exposure assessment and (4) risk characterization." (Donald W. Stever, *The Use of Risk Assessment in Environmental Law*, 14 Colum. J. Envtl. L. 329 (1989).) The first step, *identification of the hazard*, is roughly analogous to the general causation inquiry in tort litigation, i.e., can a particular chemical cause an adverse health effect? (See McGarity, *supra*, n. 7 at pp. 157-158.) Because there is little or no data concerning effects on humans (and hence the perceived need for a regulatory risk assessment), this inquiry is often based on an extrapolation from the results of animal studies to the supposed risks to humans. (See Reference Manual on Scientific Evidence (Third Edition 2011) pp. 563, 636, 644; Endicott, Interaction Between Regulatory and Tort Law in Controlling Toxic Chemical Exposure, 47 SMU L. Rev. 501, 504 (1994).)

Extrapolating from animal studies, while perhaps acceptable in the conservative prevention environment of regulatory risk assessment, is notoriously problematic when used as a foundation for proof of causation in a tort action. "Animal studies have two significant disadvantages.... First, animal study results must be extrapolated to another species – human beings – and differences in absorption, metabolism, and other factors may result in interspecies variation in responses." (Reference Manual on Scientific Evidence, *supra*, at p. 563 .) Second, animal studies typically use much higher doses than the doses to which humans are exposed, which makes it necessary to consider "the dose-response relationship and whether a threshold no-effect dose exists." (*Ibid.*) "Those matters are almost always fraught with considerable, and currently, unresolvable, uncertainty." (*Ibid;* see EPA, "Guidelines for Carcinogen Risk Assessment" (1986) at pp. 13-14 ["Low-dose risk estimates derived from laboratory animal data extrapolated to humans are complicated by a variety of factors that differ among species and potentially affect the response to carcinogens. Included among these factors are differences between humans and experimental test animals with respect to life span, body size, genetic variability, population homogeneity, existence of concurrent disease, pharmacokinetic effects such as metabolism and excretion patterns, and the exposure regimen"]; *Lynch v. Merrell-National Laboratories* (1st Cir. 1987) 830 F.2d 1190, 1194 [animal studies "do not have the capability of proving causation in human beings in the absence of any confirmatory epidemiological data"].)

DOSE RESPONSE ASSESSMENT

The second step is a *dose response assessment* involving a determination, for risk assessment purposes, of the dosage level required to produce a particular health effect in humans. It is here that risk assessment is at its most cautious. Because the goal of risk assessment is protection of public health where there is a lack of causation evidence, risk assessors make unsupported conservative assumptions that tend to overestimate the actual risk of harm. "'[R]isk assessors may pay heed to any evidence that points to a need for caution, rather than assess the likelihood that a causal relationship in a specific case is more likely than not' '...." (*McLain v. Metabolife International, Inc.*, *supra*, 401 F.3d 1233 at 1249; see Latin, *supra,* at pp. 91-92, 94 ["Risk assessors often respond to scientific uncertainties by adopting conservative safety-oriented positions on some important issues while they use best-current-scientific-guess, middle-of-the-range, methodological-convenience, or least-cost treatments on other material issues"]; Endicott, *Interaction Between Regulatory Law and Tort Law in Controlling Toxic Chemical Exposure*, 47 SMU L.Rev. 501, 504-505 (1994) ["Generally, risk assessors, ... consciously seek to err on the side of standards that will be more, not less, protective of human health. This is a laudable goal, but the net

continued on page 33

result can be a risk estimate that varies from the actual risk by many orders of magnitude"]; Shapiro, *Politicization of Risk Assessment*, 37 Environmental Law 1083, 1089 ["The mandate of agencies to act on the basis of anticipated harm makes scientific uncertainty an unavoidable aspect of regulatory science...."].)

In short, risk assessors will utilize the most sensitive data sets and the most conservative assumptions in order to achieve the goal of protecting the public against all potential health effects, rather than determining the risk of harm to any actual person under a particular set of facts. (See *Baker v. Chevron USA, Inc.* (S.D. Ohio 2010) 680 F.Supp.2d 865, 880 [" '[R]egulatory levels are of substantial value to public health agencies charged with ensuring the protection of public health, but are of limited value in judging whether a particular exposure was a substantial contributing factor to a particular individuals' disease or illness' ... This is because regulatory agencies are charged with protecting public health and thus reasonably employ a lower threshold of proof in promulgating their regulations than is used in tort cases"]; *Sutera v. Perrier Group of America, Inc.* (D. Mass. 1997) 986 F.Supp. 655, 664 ["a regulatory standard, rather than being a measure of causation, is a public-health exposure level that an agency determines pursuant to statutory standards ... a regulator's purpose is to 'suggest or make prophylactic rules governing human exposure ... from the preventive perspective that agencies adopt in order to reduce public exposure to harmful substances' "]; see also Shapiro, *supra*.) As a result, " 'the procedures commonly used in 'risk assessment, ... are often ... of marginal relevance to estimating 'causation' in an individual—e.g., whether a particular chemical caused or contributed to a particular disease or illness in a given person." (Shapiro, *supra*.)

The process is also affected by the political and social policy bias of the government entity conducting the assessment. For example, the "acceptable" levels of exposure under the Carter and Reagan administrations were starkly different even though the government's knowledge of the risks of regulated chemicals did not materially change over that time. (See Latin, *Good Science, Bad Regulation, and Toxic Risk Assessments*, Yale J. on Reg. (1988) 89, 95-96 ["Under the Carter Administration, risks above one fatality per million exposed people were usually treated as 'unacceptable' if feasible control measures were available. Reagan Administration agencies have concluded that risks as high as one in ten thousand, or even one in a hundred in some settings, are tolerable. These risk-management decisions reflect different ideological preferences and different assumptions about the economic and political effects of toxic substances regulation. Similar considerations implicitly influence risk-assessment practices and resulting estimates of toxic hazards"]; see also Shapiro, *OMB and The Politicization of Risk Assessment*, Environmental Law, 37 Env. L. 1083, 1086 (2007) ["Administration officials at other agencies, however, have also asked or demanded that scientists change risk assessments because the results did not support policy outcomes preferred by the Administration."].)

The threshold levels of exposure used in setting regulatory risk assessment standards are often so low that virtually any exposure is considered significant. Substituting these conservative exposure levels for proof of causation in accordance with traditional tort principles undermines the predictability and fairness of tort law by creating the risk that persons whose conduct was not a substantial factor in causing a plaintiff's alleged harm nonetheless will be held responsible for the plaintiff's injury and required to pay damages. It is therefore not surprising that courts have repeatedly rejected the notion that there is "no safe level" of exposure to a chemical, and that evidence of exposure to any amount, however small, can establish causation. (See, e.g., *Parker v. Mobil Oil Corp.* (N.Y. App.Div. 2005) 793 N.Y.S.2d 434 [16 A.D.3d 648, 653], affd. (2006) 7 N.Y.3d 434 [857 N.E.2d 1114] ["[S]tating that any exposure to benzene is 'unsafe' is not tantamount to stating that any exposure to benzene causes [cancer]"]; *National Bank*

continued on page 34

of Commerce v. Associated Milk Producers (E.D.Ark. 1998) 22 F.Supp.2d 942, 966-967 [criticizing the "no threshold" dose theory of plaintiff's experts, and concluding that "[t]his flawed logic is no substitute for reliable scientific proof of causation"]; *Sutera v. Perrier Group of America Inc.* (D.Mass. 1997) 986 F.Supp. 655, 666 ["[T]here is no scientific evidence that the linear no-safe threshold analysis is an acceptable scientific technique used by experts in determining causation in an individual instance"]; *McClain, supra,* 401 F.3d at pp. 1242-1243 ["O'Donnell offers no opinion about the dose of Metabolife that caused ischemic strokes in three plaintiffs and a heart attack in the other. He only said that any amount of Metabolife is too much, which clearly contradicts the principles of reliable methodology ...."].)

EXPOSURE ASSESSMENT

The third step is an *exposure assessment*, involving analysis of the magnitude, frequency, duration and route of exposure to a chemical for a particular population. The bias in regulatory risk assessment favoring maximum protection of public health generally means that in assessing exposure, the greatest possible exposure for the longest period of time will be assumed to have occurred, regardless of the relationship between that assumption and any actual exposures. (See *Asbestos Information Ass'n/North America v. Occupational Safety and Health Admin.,* (5th Cir.1984) 727 F.2d 415, 425-426 (5th Cir.1984) ["[A]lthough risk assessment analysis is an extremely useful tool, ... the results of its application to a small slice of time are speculative because the underlying data-base projects only long-term risks. Epidemiologists generally study only the consequences of long-term exposure to asbestos"]; Rodricks, *Risk Assessment, the Environment, and Public Health*, Environmental Health Perspectives, Volume 102, Number 3, March 1994, p. 259, *www.ncbi.nlm.nih.gov/pmc/articles/PMC1567122/pdf/envhper00391-0015.pdf* [last visited July 9, 2012]; see also Fitzsimmons, et al., "When 'Likely' Does Not Mean 'More Likely Than Not': The Dangers of Allowing Government Chemical Classifications and Numeric Risk Assessments at Trial," <*www.toxictortlitigationblog.com/uploads/file/Fitzsimmons_Quadrino_Article%5B1%5D.pdf*> [last visited July 9, 2012].)

The assumption will also be that exposures are generic, i.e., that the level of exposure is the same across all populations, regardless of actual differences in exposure that may exist from one group to another. (See Fitzsimmons, et al., "When 'Likely' Does Not Mean 'More Likely Than Not': The Dangers of Allowing Government Chemical Classifications and Numeric Risk Assessments at Trial," *supra*; Rodricks, *Risk Assessment, the Environment, and Public Health*, Environmental Health Perspectives, *supra*.) In the courtroom, however, actual exposure, rather than assumed exposure, governs causation analysis. (See *Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 773 (*Borg-Warner*) ["Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice ... '[I] t is not adequate to simply establish that "some" exposure occurred.... [T]here must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of "causation" can be inferred'"].)

OVERALL RISK CHARACTERIZATION

The final step in the regulatory risk assessment analysis is an *overall risk characterization*. Here, because the risk assessment is dealing with inherent uncertainties, risk assessors make assumptions concerning *theoretical* lifetime risks, i.e., what might occur given the conservative assumptions adopted for purposes of protecting public health. (See *Asbestos Information Ass'n/North America v. Occupational Safety and Health Admin., supra*; Rodricks, *supra*, Fitzsimmons, *supra*.) The resulting "acceptable" risk assumes maximum levels of exposure (at which no regulatory action is required) that are often negligible or near zero. This assumption has no place in a courtroom where, as noted above, exposure must be causally related to the plaintiff's injury.

CONCLUSION

The end result of regulatory risk assessment is a picture of what might be possible but not what is probable, or even likely for any particular person or population under any particular set of factual circumstances, or in other words, a result which does not satisfy the requirements for proof of causation in a tort case.

David Axelrad is a partner at Horvitz & Levy and a California State Bar Certified Appellate Specialist. He has handled hundreds of civil appeals in state and federal courts, including a wide variety of toxic tort cases.

defense verdicts january – march

Sean D. Beatty
Beatty & Myers, LLP
Charles Kuniyoshi v. Toyota Motor Sales, U.S.A., Inc., No. 37-2011-00091257-CU-BC-CTL

Raymond L. Blessey
Taylor Blessey LLP
Seeman v. McGuire

Benjamin F. Coats
Engle Carobini & Coats LLP
Benson v. Luckenbacher

Patricia Egan Daehnke
Bonne, Bridges, Mueller, O'Keefe & Nichols
Jeanine Del Carlo v. Linda Li, M.D.

Chrostpher E. Faenza
Yoka & Smith
Gutzwiller v. Rosales

Peter W. Felchlin
Yoka & Smith
Gutzwiller v. Rosales

Robert J. Gokoo
Law Offices of Robert J. Gokoo
Todd Neikirk v. City of Monrovia, The People of the State of California, The State of California, Caltrans, Does 1-10, Inclusive and Doe Corporations 1-10, Inclusive, No. GC047294

Yuk K. Law
Law, Brandmeyer + Packer, LLP
Leticia Garibaldi and Raul Garibaldi v. Beverly Hospital, et al.

Thomas F. McAndrews
Reback, McAndrews, Kjar, Warford, Stockalper & Moore, LLP
Takaria Hosea by and through her Conservator and Natural Mother, *Sharon Hosea vs. Long Beach Memorial Medical Center;* Gail Carruthers, M.D.; Does 2 through 20; Arrowhead Regional Medical Center; Chander Malhotra, M.D. and Roes 1 through 20

Daniel R. Sullivan
Sullivan, Ballog & Williams, LLP
Doolin v. The Roman Catholic Bishop of Orange

John J. Tasker
Early, Maslach & O'Shea
Christopher Redd v. Jambry Scott, No. PC048088

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

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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 cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

2012 Year in Review

Published cases where ASCDC submitted briefs on the merits:

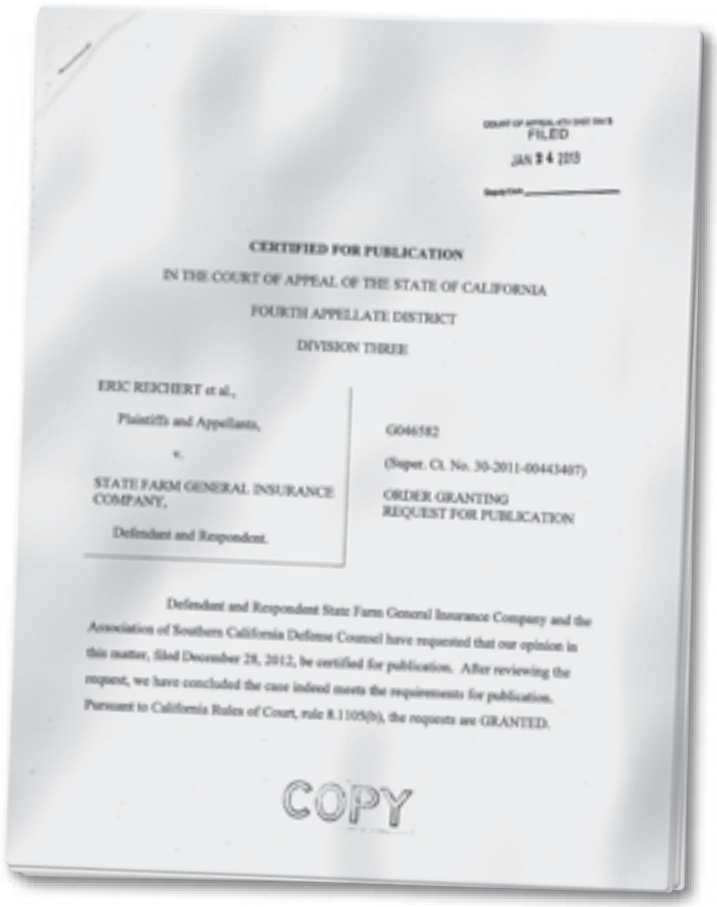
During the last year, ASCDC has submitted amicus briefs on the merits in four cases raising issues of interest to the defense bar:

A. *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148: Court adopted position advocated by ASCDC and held that the doctrine of primary assumption of risk barred claim by plaintiff injured on bumper car ride at amusement park. ASCDC submitted a joint amicus brief with the Association of Defense Counsel of Northern California and Nevada drafted by Don Willenburg, Gordon & Rees, and Josh Traver, Cole Pedroza.

B. *Coito v. Superior Court* (2012) 54 Cal.4th 480: Court adopted position advocated by ASCDC and held that work product doctrine applies to written witness statement. ASCDC brief submitted by Paul Salvaty, Glaser Weil.

C. *Aryeh v. Cannon Business Solutions* (2013) 55 Cal.4th 1185: Rene Konigsberg Diaz at Bowman and Brooke submitted amicus brief on the merits on behalf of ASCDC. The Supreme Court held that the statute of limitations for a UCL (Bus. & Prof. Code, § 17200 et seq.) claim may be tolled under the discovery rule.

D. *Colony Bancorp. of Malibu, Inc. v. Patel* (2012) 204 Cal. App.4th 410: Court ruled against position advocated by ASCDC and held that a trial court has discretion to proceed with bench trial without defense counsel being present where there was no prior warning, admonition, etc. Edith R. Matthai and Natalie Kouyoumdjian, Robie & Matthai, submitted amicus brief on behalf of ASCDC.



FILED
JAN 24 2013

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIC REICHERT et al.,

Plaintiffs and Appellants,

v.

STATE FARM GENERAL INSURANCE COMPANY,

Defendant and Respondent.

G046582

(Super. Ct. No. 30-2011-00443407)

ORDER GRANTING REQUEST FOR PUBLICATION

Defendant and Respondent State Farm General Insurance Company and the Association of Southern California Defense Counsel have requested that our opinion in this matter, filed December 28, 2012, be certified for publication. After reviewing the request, we have concluded the case indeed meets the requirements for publication. Pursuant to California Rules of Court, rule 8.1105(b), the requests are GRANTED.

COPY

Have you read any good nonpubs lately?

During the last year, ASCDC has been successful in having seven nonpublished opinions ordered published, all of which are favorable to the defense:

A. *Hodjat v. State Farm* (2012) 211 Cal. App.4th 1: The Court of Appeal affirmed the trial court's ruling denying plaintiff a continuance on a hearing for a motion for summary judgment in order to correct procedural defects in their evidentiary objections. Steven Fleischman and Jeremy Rosen of Horvitz & Levy submitted the successful publication request.

B. *Batarse v. SEIU Local 1000* (2012) 209 Cal.App.4th 820: The defendant moved for summary judgment. The plaintiff's opposing separate statement was procedurally defective. The trial court granted summary judgment on that basis and denied plaintiff's request for a continuance in order to fix their defective separate statement. The Court of Appeal affirmed. Harry Chamberlain and Don Willenburg submitted a joint request for publication on behalf of ASCDC and the Association of Defense Counsel of Northern California and Nevada.

C. *Caron v. Mercedes Benz Financial* (2012) 208 Cal.App.4th 7, review granted: The court reversed the trial court's denial of a motion to compel arbitration in an unpublished opinion. The opinion has some favorable language about the scope of the United States Supreme Court's decision in *Concepcion* as well as about how there's nothing wrong with requiring a plaintiff to individually arbitrate his claims without being able to resort to a class action. Steven Fleischman and John Quiero of Horvitz & Levy submitted a publication request which was granted on July 30, 2012. The Supreme Court subsequently issued a "grant and hold" order.

continued on page 37

D. *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65: This is a pro-defense ruling on an anti-SLAPP motion in a medical peer review setting that gives a very broad reading of *Kibler v. Northern Inyo County Local Hosp. Dist*. (2006) 39 Cal.4th 192. *Kibler* established that peer review constitutes an official proceeding under the anti-SLAPP statute. Jeremy Rosen and Steven Fleischman, Horvitz & Levy, wrote the successful request for publication.

E. *Thayer v. Kabateck Brown & Kellner* (2012) 207 Cal.App.4th 141: The Court of Appeal reversed the trial court's denial of the defendant's anti-SLAPP motion. The Court of Appeal held that a non-client's claim against class counsel for matters arising from litigation (disbursement of settlement proceeds) was protected by the anti-SLAPP statute. The case weighs in on the continuing controversy of whether claims against lawyers based on litigation conduct are subject to the anti-SLAPP statute. Steven Fleischman and Jeremy Rosen of Horvitz & Levy wrote the successful publication request.

F. *Comstock v. Aber* (2012) 212 Cal. App.4th 931: This opinion contains a comprehensive discussion of anti-SLAPP procedural issues favorable to the defense. The Court of Appeal affirmed the granting of an anti-SLAPP motion in an employment case. Josh Traver, Cole Pedroza, submitted the successful publication request.

G. *Reichert v. State Farm Gen'l Ins. Co.* (2012) 212 Cal.App.4th 1543: Mitch Tilner and Steven Fleischman of Horvitz & Levy submitted the publication request which was granted. The case involves a house ordered destroyed by a governmental entity for failure to comply with floodplain regulations. The Court of Appeal held that this was a clear example of the "law or ordinance exclusion" in the policy and affirmed the granting of summary judgment in favor of State Farm.

How about those unfortunate opinions that you wish would never make it to the bound volumes in the library?

The Amicus Committee was also successful in having the Supreme Court depublish two cases which were adverse to the defense bar:

A. *Shifren v. Spiro* (2012) 206 Cal.App.4th 481, *ordered depublished*: The Court of Appeal reversed the granting of summary judgment in favor of defendant law firm based on the statute of limitations (Code Civ. Proc., § 340.6). Edith Matthai and Natalie Kouyoumdjian of Robie & Matthai wrote a request for depublication which was granted on September 12, 2012.

B. *Moody v. Bedford* (2012) 202 Cal. App.4th 745, *ordered depublished*: Heir of deceased contacted insurance company and represented she was the sole surviving heir. Insurance company paid policy limits. Plaintiff then sues claiming she was the other surviving heir. The trial court granted summary judgment in favor of the defendant under the so-called "one action" rule for wrongful death cases (Code Civ. Proc., § 377.60.) The Court of Appeal reversed, holding that the one-action rule is not triggered unless and until a wrongful death action is filed. Accordingly, the rule is not triggered when a wrongful death claim is settled without litigation. Thus, to obtain the protection of the one-action rule for its insured, the insurer must insist that the wrongful death claimant file an action against its insured before the insurer settles the claim. Mitch Tilner of Horvitz & Levy wrote a successful depublication request.

continued on page 38

Pending Cases At The California Supreme Court and Court of Appeal

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

1. *Sanchez v. Valencia*, No. S199119: This case includes the following issue: Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. __, 131 S.Ct. 1740, preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable? J. Alan Warfield, McKenna Long & Aldridge, submitted an amicus brief on behalf of ASCDC.

2. *Corenbaum v. Lampkin*: This issue is pending at the Court of Appeal. The court has requested amicus briefs on the issue of the admissibility of billed, but unpaid medical bills post-*Howell* for purposes other than to prove past medical damages. Robert Olson, Greines, Martin, Stein & Richland, and J. Alan Warfield, McKenna Long & Aldridge, have submitted amicus brief on behalf of ASCDC arguing that such evidence is inadmissible for all purposes, but if admitted, must be admitted with proper limiting instructions.

3. *Kesner v. Superior Court* (Pnumo Abex, LLC). This case involves the issue of whether a plaintiff can maintain a "take home" asbestos claim, i.e., claiming that the plaintiff was exposed to asbestos through a family member bringing home asbestos fibers on clothing. The Court of Appeal held no in *Campbell v. Ford Motor Co*. (2012) 206 Cal.App.4th 15. The trial court in this case followed *Campbell* and dismissed the plaintiff's claims. The issue is now pending before a different district of the Court of Appeal in a writ proceeding; the court has issued an alternative writ indicating that it may disagree with *Campbell*. ASCDC joined the amicus brief submitted by Don Willenburg, Gordon & Rees, on behalf of the Association of Defense Counsel of Northern California and Nevada.

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:

Jeremy Rosen,
Horvitz & Levy

Harry Chamberlain,
Manatt, Phelps & Phillips

Josh Traver,
Cole Pedroza

Renee Koninsberg,
Bowman & Brooke

Michael Colton,
Michael A. Colton, Lawyer & Counselor at Law

David Pruett,
Carroll, Kelly, Trotter, Franzen & McKenna

John Manier,
Nassiri & Jung LLP

Sheila Wirkus,
Greines, Martin, Stein & Richland

Christian Nagy,
Collins Collins Muir & Stewart

Paul Salvaty,
Glaser Weil

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

You're Invited

By N. Denise Taylor, ASCDC President

What do we have planned for this year?

On **June 20, 2013** we will once again have our Hall of Fame dinner at the Biltmore Hotel. This it always a fun event, when we meet to honor a member who has made significant contributions to our organization; a plaintiff's attorney who is undisputed as both a worthy and civil adversary; and a member of the judiciary who is known for both high integrity and fairness. This year we will salute our 1989 President Bob Baker, Tom Girardi, and the Honorable Bill MacLaughlin. Rick Kraemer of Executive Presentations will again be working with us to prepare short and entertaining introductions of the honorees, and we expect a full house so it's not too early to buy a table.

On **July 18, 2013** Judge Dan Buckley, and others involved in the PI Courts downtown Los Angeles, will present a seminar to let us know how it's all going so far. Mark the date on your calendar, and look for ASCDC e-mails for further details regarding this informational seminar as well as other new developments in the Los Angeles Superior Court in the coming months.

We are revitalizing our substantive law committees, and at the Annual Seminar we had a great start with mini-sessions on medical malpractice, products liability, and insurance law. We are starting an Intellectual Property substantive law committee that we hope will attract our members who practice in this specialized area, and will also help us convince IP attorneys who are not currently ASCDC members to join. Our Employment Committee is planning a seminar to discuss the impact of the *Harris v. City of Santa Monica* case and the future of the mixed-motive defense in California this summer.

Our Young Lawyer Committee is energetic, enthusiastic, and committed not only to be great defense lawyers but to meet each other and have some fun. They are planning several get-togethers throughout the year, not only in downtown Los Angeles but on the Westside of town and wherever else they can get sponsors to supply appetizers and cocktails. What's great is that all young at heart members are welcome to participate. Let us know if you want to be included on the Young Lawyers of ASCDC e-mail list, or if you have young lawyers in your firm who would enjoy the camaraderie of fellow defense attorneys.

Our Medical Malpractice Committee already has a six-hour MCLE program planned for **September 20 and 21, 2013** in Santa Barbara. We brought back the Santa Barbara "med mal" seminar last year and it was a huge success. We expect this year to be even better, and the seminar, over Friday afternoon and Saturday morning, will include sessions that are informative to the general defense practice as well as to those of us who practice med mal defense, so that all of our members can benefit from attendance. The ever-popular optional wine tour on Saturday afternoon will also undoubtedly be a highlight of the weekend.

Our Construction Defect Committee has scheduled its annual Construction Defect seminar for **December 5, 2013** in Orange County which will be followed by a judicial reception honoring the Orange County bench. Our Secretary/Treasurer Glenn Barger will once again take the lead on this seminar which is substantively excellent and always one of our best attended events of the year.

Our annual Los Angeles Judicial and New Member reception will end the calendar year on **December 17, 2013** at the Jonathan Club. This is a festive time of year at the Jonathan Club with holiday decorations and spirit to match. It is a great opportunity for our members to thank the judges for the hard work they do, and for our new members to meet the judges that they usually only see in their robes on the bench. And best of all, new members attend for free.

As you all know, our Annual Seminar was a major success. Karl Rove proved to be not only an intelligent and entertaining luncheon speaker, but he was most gracious and showed a genuine interest in our members. ASCDC has a rich history in presenting iconic speakers of all political stripes, from Ronald Reagan to Bill Clinton. We were as pleased with Mr. Rove as we were with James Carville last year. I cannot wait to see who we will draw as a speaker in 2014 as he or she will undoubtedly be the best reason to once again attend the Annual Seminar.

We will keep our members updated regarding all programs throughout the year through e-mail and our website. If you have a suggestion for a "hot topic" seminar, or would like further information, please contact me or our Executive Director, Jennifer Blevins, at *ascdc@camgmt.com,* or visit our website at *www.ascdc.org.* We look forward to seeing you!

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June 20, 2013
Hall of Fame Dinner
Millennium Biltmore Hotel, Los Angeles

July 18, 2013
Los Angeles Courts Update with Judge Dan Buckley
Los Angeles Superior Court

September 20-21, 2013
Santa Barbara Seminar
Santa Barbara

December 5, 2013
Construction Defect Seminar w/CD Claims Managers Association
Orange County

December 5, 2013
Orange County Judicial Reception
Orange County

December 17, 2013
Judicial and New Member Reception
Jonathan Club, Los Angeles

February 27-28, 2014
ASCDC 53rd Annual Seminar
Millennium Biltmore Hotel, Los Angeles