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# president's message

**Robert A. Olson**
**ASCDC 2014 President**

## Help Us Help You

I am honored and excited to be ASCDC's new President.

I need your help. If you are reading this, you already know how great ASCDC is. You know that its members – you – are the most interesting, dedicated, involved lawyers around, lawyers who care about being the best and lawyers who really care about achieving the right and just result – for their clients, for the profession, for the judicial system and for the public at large. Share the wealth. Let your colleagues know. Get them to join too. Years ago a defense lawyer colleague gave me a gift by inviting me to join; give your colleagues a gift by inviting them.

And I need your help in letting us know how we can improve for you. We are trying some new things to add value for our members, including a listserv (after a hectic first day, it is operating smoothly; for those of you who opted out, it is safe to come back in the water) – to allow our members to network and to obtain information the way that others already have. We are going to continue the tradition of mixers for younger lawyers (and for other lawyers seeking to masquerade as younger lawyers). And, at virtually all of our educational presentations there is also an opportunity to socialize. Indeed, perhaps the greatest benefit we offer is the opportunity to meet, network with and share ideas with peers who are among the best civil defense lawyers in Southern California.

I know that times and budgets – firm and personal – are tight, and the days when law firms paid bar association dues willy nilly are gone, but the investment made in the ASCDC will return itself many times over. It's the cost of a suit. You buy a nice professional wardrobe so that you look good to clients, to judges, to colleagues. Likewise, your ASCDC investment makes you look good, by helping you learn practice tips from colleagues, alerting you to cutting edge legal decisions and legislative developments, and identifying you as part of a group that actively works to shape the legal landscape for defense lawyers. Ask around, I think you will find that happens not just once, but many times a year. When you are ahead of the curve on an issue because you learned about it through ASCDC, your investment pays off. When ASCDC has a hand in crafting a helpful rule or statutory change, or in preventing one that would undermine how you practice law, your investment pays off. When ASCDC lends its voice to those working with the legislature and the governor to keep the filing window open and to secure a courtroom with a judge, your ASCDC investment pays off.

It pays off in personal and professional growth, through *Verdict* magazine with timely articles and case updates – this edition is yet another great example. There are also all of the educational seminars. Our recent Annual Seminar was a great success with topics ranging from defending against the plaintiff's reptilian brain theory to the psychology of negotiations. We have continued our educational efforts this year with an update on recoverable damages after the *Howell* and *Corenbaum* decisions, and we will host a September general liability seminar at Torrey Pines, along with seminars on other hot topics. We are going to continue as a channel of information about the ongoing changes that our local courts are going through in coping with difficult budgetary times.

Our relationship with the courts is a two-way street. The fact of the matter is that this organization, along with our sister organization in the North, is *the* voice of the defense bar with courts when it comes to rule changes, jury instructions, budgetary issues and court restructurings. As amicus curiae, ASCDC is the voice of the defense bar in the appellate courts. If you don't think that it makes a difference, look at ASCDC's involvement in cases like *Howell* and *Oliveros*. Through the California Defense Counsel and our legislative advocate, Mike Belote, we are the voice and the ears of the defense bar when it comes to legislative proposals. We have worked tirelessly along with others to keep the budget wolf at the courthouse door somewhat at bay.

I'm looking forward to a great year, and, I'm looking forward to seeing each and every one of you at an upcoming event; please come up and introduce yourself to me at one.

# CDC Bill Moves Idea Forward

**Michael D. Belote**
**Legislative Advocate**
**California Defense Counsel**

People unfamiliar with California's legislative process often ask where all the bill ideas come from. While some are the brainchildren of legislators themselves, in many cases the answer really is, from us. Groups exactly like the California Defense Counsel frequently suggest changes in statutes, and act, in California legislative nomenclature, as the "sponsor" of the bill.

So it is with AB 1659 (Chau), co-sponsored by CDC and the Consumer Attorneys of California. Suggested by Bob Olson, currently serving as both ASCDC President and as a Board member of the California Defense Counsel, the bill is designed to reduce confusion and align procedural deadlines for motions for new trial, motions to vacate judgment, and for judgment notwithstanding the verdict.

AB 1659 is part of an ongoing effort with the plaintiff's bar to jointly work on issues of civil procedure where consensus can be achieved. Other notable examples have included procedures for expedited jury trials and the ability to bring motions for summary adjudication of issues which do not completely dispose of causes of action, where both sides agree that trial economy could be achieved.

In order to conform the various deadlines, AB 1659 amends Code of Civil Procedure Sections 629,650a, and 663a. Time periods applicable to JNOV and motions to vacate will be made consistent with motions for new trial. The bill recently was approved by the Assembly Judiciary Committee and will next be considered by the full Assembly.

As the bill moves forward, CDC will continue discussions with CAOC about other areas of potential consensus. We plan to discuss demurrer procedures and various discovery deadlines. Possible additions may be made to the bill before it is considered in the state Senate in June.

Beyond issues of civil procedure, the other area where consensus has certainly been achieved with the Consumer Attorneys is that of court funding. The two organizations are the only groups in Sacramento exclusively representing civil practitioners which are advocating for judicial branch funding. And the issue is far from easy: with tax revenues finally increasing and the budget heading back into positive territory, every major interest group is pushing its particular budget priorities. Meanwhile, Governor Brown repeatedly has expressed a determination to build up reserves and not over-commit the new revenues.

The Governor's January budget proposal included $105 million in increased funding for courts. While that sounds substantial, the Judicial Council indicates that approximately $300 million is necessary just to maintain the status quo, given various cost increases. Both the Assembly and Senate are conducting budget hearings now, in anticipation of a final budget by mid-June. In the final analysis, budget decisions are often worked out among the "Big 3" (Governor, Speaker of the Assembly, Senate President pro Tem), so ultimate decisions rest on the priorities of the leaders.

Beyond the CDC-sponsored change to the CCP and the budget, approximately 2000 bills are winding their way through the Sacramento hearing process. Every bill, and every amendment to a bill, is read for possible impact on ADC members. In all, over 100 bills are being monitored. Literally, every major area of defense practice is implicated by some bill, whether it is products, construction, IP, public entity, med-mal, employment or other. Lawyers more accustomed to keeping up with changes in case law often are surprised with both the suddenness and significance of statutory changes coming out of Sacramento. The ASCDC website links to the electronic folder containing every bill of interest to CDC, along with a wealth of analytical information.

Finally, CDC Board members work very hard in precious off hours to review pending legislation in Sacramento. Keeping up with and influencing legislative issues is another clear example of the value of ASCDC membership.

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# Some Thoughts On Firing Up Creativity

**Patrick A. Long**

"A woman is only a woman, but a good cigar is a smoke." Baloney, that is beyond misogynistic, and incorrect as well. Cigar smokers hear that quote from time to time (but not from my lips except for purposes of this column). The culprit who uttered that bushwa was Mr. Rudyard Kipling, and it's one of the last few lines of his poem, "The Betrothed." What we can deduce from those words is that cigars can be a very important part of a person's life, and you'll notice I used the *person* locution rather than *man*. As will be noted further on, women can and do enjoy the occasional cigar.

Let me lay my personal cards on the table. I've never smoked cigarettes, but at a pretty early age began smoking pipes, and over the years started smoking cigars as well. Today I smoke both. Through attendance at ASCDC events over the years I've learned that quite a large number of our membership enjoy a periodic smoke. As cigar smokers will affirm, smoking benefits our profession. Here's how. Modernly in California it takes great *creativity* to find a place to legally sit, relax, light up a cigar and let tensions exit the body. This need for *creativity* carries over into our practice, e.g. new theories of defense, new kinds of experts, a kind of gentle cross-examination which completely eviscerates the plaintiff's case, etc. Yep, the *creativity* we must develop in finding a space to light up also helps us in our professional lives . That's my story and I'm sticking to it.

A recent example of this *creativity* occurred at the ASCDC Annual Seminar at the Biltmore Hotel (oh, excuse me, the Millennium Biltmore). Some of our smokers explored many properties surrounding Pershing Square and discovered an alley on the south side of the hotel where construction work was under way. This alley became the place to light up for a day or two. Of course we shared it with the cigarette folks.

Why do a goodly number of our members smoke cigars aside from improving their *creativity?* I actually spoke with six such smokers, all six of whom are currently or were recently in leadership positions in ASCDC. Their responses to my questions were quite interesting. Here are some of their reasons. It's not just lighting up, it's the circumstances surrounding the experience, the relaxation, the almost meditative atmosphere, the dissipation of tension, the opportunity to relax and listen to others and learn things one didn't previously know. Cigar folks don't inhale so they're not as concerned about health issues as cigarette folks. Cigars somehow draw out a desire to converse, discuss, ponder, theorize and sometimes agree with other smokers, so our ASCDC cigar types will often set aside a little time to visit a tobacconist who maintains a lounge where smokers can gather, sit, relax, perhaps sip an espresso, and talk, not about law but about anything else. Regardless of what you may have seen in an old Edward G. Robinson movie, it's difficult to yell, scream and be mean with a stogie in your mouth. These moments of collegial interaction can be a highpoint of their day.

There is no question that most cigar smokers are men, but there are in fact some women who enjoy the occasional, or even regular, cigar. Several are customers at my tobacconist, and my ASCDC colleagues also mentioned that they regularly encounter women draining stress by way of a cigar.

I'm a pretty miserable golfer, but I'd be even worse if I played a round with a stogie clamped between my teeth. Still, that's how many of my ASCDC friends play, and it sure doesn't seem to hurt their game. I have to save my smoke for relaxing outside the clubhouse afterwards.

So golly, let's hang loose about that sizable percentage of our membership that seek solace with the occasional cigar, and realize that there are much more destructive ways to spend one's leisure. I don't care how good the scotch is, a little goes a long way. And Kipling had it backwards, a cigar is only a cigar, but a good woman a prize above all others (and my wife didn't make me write that).

Here's to the next Macanudo. Can I borrow a match?

Patrick A. Long
*palong@ldlawyers.com*

# 53rd Seminar Luncheon Highlights – *by Carol Sherman*

The historic Millennium Biltmore Hotel in downtown Los Angeles was once again the setting for ASCDC's Annual Seminar. This year's event marked its 53rd year and was hailed as one of the best, with an outstanding line up of expert speakers who addressed a wide range of timely and relevant educational topics. In keeping with tradition, seminar attendees filled the Biltmore Bowl ballroom for the Friday luncheon to welcome incoming President Robert A. Olson, show their appreciation to outgoing President N. Denise Taylor for her efforts on behalf of members over the past year, and hear from featured keynote speaker Dana Perino, former Press Secretary to George W. Bush.

For the second consecutive year, the luncheon opened with the National Anthem, beautifully sung by Kaitlin Olson. Kaitlin is the daughter of our ASCDC president, who welcomed members and guests, and acknowledged the Board of Directors and Committee Chairs, along with Past Presidents, members of the judiciary and Defense Counsel of Northern California and Nevada who were in attendance. He also introduced special guests Patricia Egan Daehnke, President of Los Angeles County Bar Association; Stan Bissey, Executive Director of California Judges Association; Linda Miller Savitt, CDC President; and Mike Belote, ASCDC's legislative advocate.

Moving on, Olson invited to the podium, Pat Long, Past President of ASCDC and Defense Research Institute (DRI), to present outgoing President Taylor with DRI's President's Award for outstanding service for supporting and improving the interests of the defense bar.

Hon. J. Stephen Czuleger, Mike Belote, Stan Bissey, Hon. Mary Ann Murphy

Following the DRI award, Olson honored Taylor with the presentation of the ASCDC's president's plaque for her dedicated service. "She sets very high standards and she leads by example," said Olson.

Taylor took a few moments to acknowledge those who helped contribute to the success of ASCDC over the past year, including the seminar committees, Amicus Committee, officers and members of the Board of Directors, and ASCDC Executive Director Jennifer Blevins and members of the CAMS staff. On a personal note, she thanked her husband Doug and her law firm partner Ray Blessey for their support.

"It's been such a privilege to be your president," she said, going on to note the highpoints of the year, including an early concern over measures to consolidate cases in response to the state budget crisis. "The first six months of the year were devoted to educating our members about the changes, the tweaks, and the 'new normal' in the courts. Last year, I asked, 'How is this all going to work out?' It really hasn't been quite as bad as we thought. The courts still are in a budget crisis, but we're

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## Quarter In Review – continued from page 10

getting motions heard, we're getting trials out." She also reminded everyone of several of the ASCDC's many events over the past year noting, "This has been a really fun year for me."

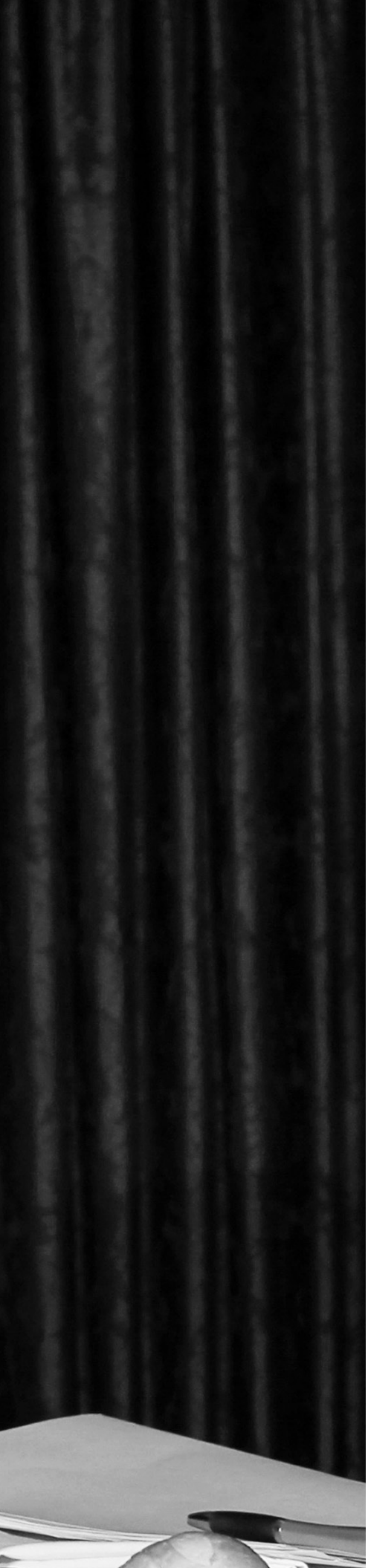
Taylor then introduced incoming President Olson, describing him as a gifted and highly effective appellate attorney.

Olson focused his remarks on the importance of ASCDC to all civil defense lawyers, and described what the organization has meant to him since joining shortly after being invited some 19 years ago, to co-present "A Year in Review" at the Annual Seminar with Chip Farrell.

"This organization has interesting and dedicated lawyers. I've learned from this organization that real trial lawyers are interesting people. They have to be; it's a job requirement," he quipped. In all seriousness, he referred to the work that members do as important and honorable. He spoke about the reasons why he has stayed a member over the years. "For me, it's been the opportunity to network with people and learn from peers." Describing ASCDC as the "voice of the defense bar," he mentioned one of the important messages that ASCDC has broadcast concerning judicial branch funding: "We've worked tirelessly to keep the wolf at the courthouse budgetary doors at bay."

He also spoke about the opportunities for personal and professional development through ASCDC, and the many benefits of membership. "At its heart, this organization is about its members. It's about advancing and protecting the interests of the civil defense bar in Southern California and doing what needs to be done to keep the courts open and keep you informed."

Olson acknowledged two ASCDC Presidents for their positive influence: Linda Miller Savitt who invited him to join the Board of Directors, and Denise Taylor, "whose shoes will be immensely hard to fill."



# Pulling Back the Curtain

## Former Press Secretary Dana Perino Shares Lessons Learned from Working at the White House

*by Carol Sherman*

Dana Perino may make light of the fact that she's just slightly over five-feet tall "on a good day," but she stands out when sharing lessons on leadership drawn from serving as Press Secretary to President George W. Bush.

Perino, co-host of Fox News Channel's *The Five*, delivered the keynote address to the 53rd Annual Seminar of the Association of Southern California Defense Counsel (ASCDC) on Friday, February 28, 2014, at the Millennium Biltmore Hotel in Los Angeles. When learning that close friend and former White House colleague Karl Rove delivered the keynote address the previous year, she admitted to having "very big shoes and a disheveled look to fill." Her opening remark drew appreciative laughter from luncheon attendees, who had many more opportunities to smile at the often amusing but also deeply thoughtful presentation by the energetic Ms. Perino.

Reflecting on her early background, Perino credited her father for instilling in her an interest in journalism and an appreciation for the First Amendment. "I remember my dad started when I was in the third grade, requiring me to read the *Rocky Mountain News* and the *Denver Post* before he got home everyday. I had to choose two articles to discuss with him before dinner."

Before joining the White House staff in 2001 as deputy to Press Secretary Tony Snow, Perino spent a brief time in the Justice Department. "You know what

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you learn as a spokesperson in the Justice Department?" she asked, pausing. "I had to learn to say 'no comment' in a 101 different ways."

Of course, Perino was called upon to offer far more substantive communications during her government service, and she graciously compared White House challenges in that regard with challenges faced by ASCDC members. She joked, "In truth, President Bush had to deal with a lot of adversaries, of course there's the famous Vladmir Putin and a rising China. There was the Taliban. You guys have the plaintiff's bar." The important work being done by ASCDC was not lost on Perino, who told members, "What you do – ensuring the integrity of the court system – is very important."

Fiercely loyal to President Bush, to whom she referred as "W," Perino recounted stories, both humorous and deeply emotional, drawn from times when the news cameras were not present to capture her interactions with the President as his spokesperson. She recollected lessons learned about leadership from a "follower's perspective," and spoke of the humility, strength, forgiveness and civility that she observed firsthand as traits imbued in Bush's leadership.

Perino began with humility, recalling the first time she filled in for then Press Secretary Snow (who was also a past ASCDC Annual Seminar keynote speaker). "You can get a big head working at the White House. Everybody you call returns your phone call within 10 seconds. It can be a heady experience." It can also be intense, and Perino's stories demonstrated that she had to be ready for anything. One one occasion in 2008, when she had been on the job as deputy press secretary for only eight weeks, Perino had to brief the press while Snow was undergoing treatment for cancer. Since Snow was more than a foot taller than Perino, a White House worker offered to construct a new podium for her. "I said, "Oh goodness no, that's such a waste of taxpayer dollars. I'll just stand on one of those apple boxes and it'll be fine." For a full week, Perino delivered press briefing from atop a box at Snow's podium,

but the White House worker returned, insisting more strongly that she have her own podium built. She vividly recalled him telling her, *"NBC News* showed us the shot from the back of the room from their position. And when you're standing on that box at Tony Snow's podium, the seal above your head does not say "The White House,' it says 'The White Ho.'" Over the audience laughter, she was quick to add, "So y'all bought me a new podium. Just when you think you're hot stuff, God has a way of reminding you that you're only the White House."

A heartfelt moment came during a visit to Bethesda Naval Hospital where veterans with traumatic brain injuries were treated. While Bush presented the Purple Heart to a critically injured veteran, with the soldier's family looking on, the veteran regained consciousness. Perino recalled the President holding the soldier's head in his hands as the aide read the commendation. "The rest of us will never really know what that is like to make a decision to send a young person to war, and then to be there to witness a traumatic brain injury." Before leaving she saw the President touch his forehead to the soldier's and say, "Thank you.'"

In January 2009, four days before Barrack Obama was sworn in as President, Perino accompanied the President to Norfolk, Virginia, for a speech and "photo op" with Navy Seals. She remembered her lighthearted conversation with two Navy Seals waiting for a picture with the President. "I tried to make conversation so I asked the first Navy Seal, 'What made you want to become a Seal? Was it family tradition or patriotism or sense of adventure?' The first Seal said to me, 'No ma'am, chicks dig it.'" She asked the second Navy Seal, "When you're about to go wherever it is you might be going, do you have to take a lot of language courses?" He said, "Oh no ma'am, we're really not there to talk."

Perino offered another anecdote about a lesson of forgiveness that she learned from the President. When former Press Secretary Scott McClellan, who hired Perino, later wrote a book highly critical of the President, Perino took it personally. "I was devastated," she said. "I broke up with my boyfriend in college, and that put me in bed for three days. But that was nothing like the betrayal that I felt from

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## Dana Perino – continued from page 15


Scott McClellan." When Bush got wind of her reaction, he called her into the Oval Office and told her it was best to forgive McClellan, suggesting that she view it as he did, shrugging it off because, in a few weeks, no one would remember the book. Perino took that perspective to heart, but also learned from the wisdom and kindness that the President showed to her. "I always think of this from a management perspective. When you manage younger people and they are working their way up, try to understand what will help them do a better job. It's like children, everyone deals with criticism or discipline differently."

She also talked about civility as a component of leadership, recalling a reporter asking Bush during one of his final interviews as President, how often he saw Bill Clinton. According to Perino, Bush and Clinton met frequently, often for lunch at the White House, but the meetings were not for show, to be broadcast to the media. "They had a good relationship in spite of their political differences."

Perino had insights about other national leaders as well. She met President Obama in 2005 when he was a Senator, and both were seated at the same table at a gridiron dinner. "He had been in town for only five weeks. He and I laughed for hours. I had so much fun getting to know him, that I went home and remember telling my husband that I think I just met someone who could be President in 25 years." Several years later in September of 2008 during the presidential campaign, she ran into Obama at a meeting at the White House. "Everybody else had filed in and President Obama, then Senator, was shaking everybody's hand. I put out my hand to introduce myself, he said, 'Ah, Dana Perino.' I thought wow, he knows who I am, that's amazing." Before she could remind then-candidate Obama of where they had previously met, he interrupted her. "How could I not remember?, that was my favorite evening in all of Washington." Shortly after, she told the Deputy Chief of Staff, "I just might vote for him."

Turning to a broader theme, Perino blamed political extremists for much of today's divisiveness in government. She predicted that little will be accomplished in Washington before the 2016 election. "You wonder if civility can survive. In the words of a future president, I think it can but it will 'take a village.' You notice I said 'future president.'"

She cited recent polls that reflect the majority of Americans do not believe the country is on the right track. Perino believes the Republicans would keep the majority in the House of Representatives in elections later this year. However Republicans need six seats to gain a majority in the Senate. "If you know any young people looking to get campaign experience this summer, go to any of these big campaigns – Arkansas, West Virginia, Montana, Louisiana, North Carolina – those campaigns are going to be wild and a lot of fun to watch." She predicted that the outcomes of these races will determine what will happen in 2016.

"This will be one of the first times ever that a Democratic nominee will not have a primary challenger. You hear some people suggest that Hilary Clinton is not running for President. You could literally knock me over with a feather if that happens," although Perino added Clinton's campaign in 2008 could have used some work. On the Republican side in 2016, she said, "Get ready for another clown show" if, as seems possible, there are some 18 candidates all vying to be the party's candidate.

Lastly, she said to expect the unexpected. "Everything I just said here today could be inoperable at the next moment." She brought up the evening of September 10, 2001, when she and colleagues were discussing the Vice President's energy task force. "After September 11, we never talked about that task force again." She also noted that, in June of last year, "Edward Snowdon revealed all of America's secrets. That is an event that will have consequences for the rest of our lives." She added, "One thing for sure, something will happen that no one expected."

Wanting to sound optimistic despite the prevalence of negative stories that abound, Perino said, "I work at cable news. No one covers a story that several planes landed safely at an airport. The only story they cover is the one that didn't. I do think that there is some reason to be optimistic because of traditions of the rule of law, the peaceful transfer of power, American ingenuity, and our ability to act on a crisis. We are reaching crisis proportions on the fight of what kind of a country are we going to be and how much are we going to pay for it."

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**Dana Perino** – **continued from page 15**

Concluding her remarks, she reminded everyone of January 2009 when President Bush invited the living past Presidents and Senator Obama to the White House for a luncheon before the inauguration. "I was there with Robert Gibbs, Obama's first Press Secretary. Robert and I stood by the grandfather clock in the back of the room and there were all of the Presidents standing together." She added, "I was thinking about that lesson on forgiveness at that moment because it's remarkable how dirty and nasty politics can be, but you have all of these men who were Presidents or who was going to be a President that are willing to be there together."

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# LIFE CARE PLANNING

# *Howell* Two Years Later: Strategies for Responding to Attempts to Circumvent a Landmark Decision

*by Steven S. Fleischman & Robert H. Wright*

It has been more than two years since the California Supreme Court's seminal decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), which held that personal injury plaintiffs are limited to recovering the amounts actually paid for medical costs, not the inflated amount supposedly "billed" by their medical providers. In the two years since, the appellate courts have confirmed that *Howell* turned on general principles of universal application and should be applied broadly. Indeed, earlier this year, the Court of Appeal in *Dodd v. Cruz* (2014) 223 Cal.App.4th 933 recognized the defendant had a right to discovery regarding the machinations of plaintiff's counsel in seeking to circumvent *Howell* through the sale of medical liens. The purpose of this article is to update readers as to the status of *Howell*, and to discuss strategies for responding to attempts by the plaintiffs' bar to evade or limit *Howell* to its specific facts.

## *Howell* – a recap.

In *Howell*, the Supreme Court held a plaintiff "may recover as economic damages *no more than the amounts paid* by the plaintiff or his or her insurer for the medical services received...." (*Howell, supra*, 52 Cal.4th at p. 566, emphasis added.) The court explained that, "[t]o be recoverable, a medical expense *must be both incurred and reasonable*." (*Id.* at p. 555, emphasis added.) "[I]f the plaintiff negotiates a discount and thereby receives services for less than might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount." (*Ibid.*; see Civ. Code, §§ 3281 [damages are awarded to compensate for detriment suffered], 3282 [detriment is a loss or harm to person or property], 3283 [future damages also require detriment].)

Accordingly, when a health care provider has accepted as full payment an amount less than stated in that provider's bill, the plaintiff cannot recover for "the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person ... for the simple reason that the injured plaintiff did not suffer any economic loss in that amount." (*Howell, supra*, 52 Cal.4th at p. 548.)

In reaching its holding, the Supreme Court explained that pricing for medical services is controlled by a highly complex market – one in which prices vary to a significant extent depending on the categories of payees and payors. (*Howell, supra*, 52 Cal.4th at pp. 561-562.) Some payors, such as private health insurers, are "well equipped to conduct sophisticated arm's-length price negotiations." (*Id.* at p. 562.) Other payors are guaranteed discounted rates by state law. (*Id.* at p. 561.) As a result, most patients, including those who are insured, uninsured, and recipients under government health care programs, pay steeply discounted rates. (*Id.* at pp. 561-562 & fn. 9.) As the court summarized: "Because so many patients, insured, uninsured, and recipients under government health care programs, pay discounted rates, hospital bills have been called 'insincere, in the sense that they would yield truly enormous profits if those prices were actually paid.' " (*Id.* at p. 561.)

Given these facts, the Supreme Court held the amount nominally "*billed*" for medical expenses does not reflect the value of the services provided: "it is not possible to say generally that providers' full bills represent the real value of their services, nor that the discounted payments they accept from private insurers are mere arbitrary reductions." (*Howell, supra*, 52 Cal.4th at p. 562.) Drawing any generalizations about the relationship between the cost of medical care and the amounts listed as the price for

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that care – "other than that the relationship is not always a close one – would be perilous." (*Ibid*.)

The Supreme Court thus held that "evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra*, 52 Cal.4th at p. 567.) By contrast, evidence of the amount actually *paid* for medical expenses *is* relevant and not barred by the collateral source rule. "[W]hen a medical care provider has ... accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial." (*Ibid*.)

### *Corenbaum*

In *Howell,* the Supreme Court did not address whether evidence of the "billed" amount for medical damages might be relevant on other issues, "such as noneconomic damages or future medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567.) Those issues were decided by Division Three of the Second Appellate District in *Corenbaum v. Lampkin* (2013) 215 Cal. App.4th 1308 (*Corenbaum*).

*Corenbaum* dealt squarely with the issue of "admissibility in evidence of the full amount of an injured plaintiff's medical billings not only with respect to damages for past medical expenses, but also with respect to future medical expenses and noneconomic damages." (*Corenbaum*, *supra*, 215 Cal.App.4th at p. 1319.) *Corenbaum* held that because "the full amount billed is not an accurate measure of the value of medical services," the "full amount billed for past medical services is *not relevant* to a determination of the reasonable value of future medical services." (*Id*. at pp. 1330-1331, emphasis added.) For the same reasons, *Corenbaum* precluded expert witnesses from relying on the inflated "billed amounts" to support opinions regarding future medical expenses. Evidence of billed amounts "*cannot support an expert opinion on the reasonable value of future medical services*." (*Id*. at p. 1331, emphasis added.)

*Corenbaum* further concluded that the amount "billed" is also inadmissible to prove a plaintiff's noneconomic damages:

> [E]vidence of the full amount billed is not admissible for the purpose of providing plaintiff's counsel an argumentative construct to assist a jury in its difficult task of determining the amount of noneconomic damages and is inadmissible for the purpose of proving noneconomic damages.

(*Corenbaum, supra,* 215 Cal.App.4th at p. 1333.)

*Corenbaum* concluded in no uncertain terms: "evidence of the full amounts billed for [the plaintiffs'] medical care was not relevant to the amount of [the plaintiffs'] damages for *past medical expenses, future medical expenses or noneconomic damages*" (*Corenbaum, supra,* 215 Cal.App.4th at p. 1333, emphasis added.) Thus, under *Howell* and *Corenbaum,* a plaintiff's recovery of damages for future medical care is limited to the amount likely to be *paid* or incurred for that care, not the inflated amount listed on a hospital "bill" that no one is expected to actually pay, and a plaintiff cannot circumvent this rule by arguing that the billed amount is relevant to issues such as noneconomic loss.

### Strategies for responding to attempts to circumvent *Howell* and *Corenbaum*

In light of *Howell* and *Corenbaum*, the amount "billed" by a medical provider is inadmissible to prove past or future medical damages, is inadmissible to support a claim for noneconomic damages, and cannot support an expert's opinion. It is simply inadmissible for any purpose. Nonetheless, plaintiffs' counsel have come up with novel arguments in an attempt to circumvent these clear rules. Following is a list of some of these arguments and possible responses.

**The uninsured plaintiff:** Plaintiffs frequently contend that *Howell* and *Corenbaum* turn on the existence of private insurance and that plaintiffs without insurance should, unlike insured plaintiffs, be able to rely upon the inflated amounts "billed" by medical providers. Not so. Whether or not insured, a plaintiff can recover only the amount *actually paid or incurred*. The contrary argument by plaintiffs should fail for three reasons.

First, the appellate courts have not limited *Howell* to its facts involving private insurance. Instead, the holding in *Howell* has been applied to plaintiffs with coverage under Medicare (*Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal.App.4th 196, 198) and the workers' compensation system (*Sanchez v. Brooke* (2012) 204 Cal. App.4th 126, 131). As the *Luttrell* Court of Appeal explained, any attempt to limit *Howell* to its facts "does not account for the fact that, whatever the *source* of the payments ... the end result is the same: [the plaintiff] has no liability for past medical services in excess of those payments, so he is not entitled to recover anything more than the payment amount." (*Luttrell*, at p. 206)

The most recent decision on this point is *Romine v. Johnson Controls, Inc.* (March 17, 2014, Case No. B239761) __ Cal.App.4th __ [2014 WL 1012960, at p. *__].) Although primarily addressing the issue of prejudice from the erroneous admission of evidence in a pre-*Howell* trial, the *Romine* Court of Appeal summarized the broad legal principles from *Howell* and *Corenbaum*: "[E]vidence of the full amount billed for a plaintiff's medical care is not relevant to damages for future medical care or noneconomic damages and its admission is error." (*Id*. at p. *__.) As correctly reflected in the *Romine* decision, the legal principle in these cases does not hinge on the existence of private insurance.

Instead, *Howell* and *Corenbaum* turn on the issues of detriment and reasonable value. As those courts recognized, damages require *actual detriment*. (Civ. Code, §§ 3281, 3282, 3283.) In the context of payments for medical expenses – past or future – this means the amounts *actually paid or incurred*, not the inflated amounts supposedly "billed" by medical providers. (*Howell, supra,* 52 Cal.4th at pp. 548, 567; *Corenbaum, supra,* 215 Cal.App.4th at pp. 1330-1332.)

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# green sheets

## NOTES ON RECENT DECISIONS

Lisa Perrochet

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

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

## ARBITRATION

### Arbitration agreement clauses that eliminate all federal court review of arbitration awards are unenforceable.

*In re Wal-Mart Wage and Hour Employment Practices Litigation* (9th Cir. 2013) 737 F.3d 1262.

This case arose out of a dispute over how to allocate $28 million in attorney fees awarded as part of a wage-and-hour class action settlement with Wal-Mart. The plaintiffs' attorneys submitted the allocation dispute to "binding, non-appealable arbitration" as required by the settlement. The district court confirmed the arbitrator's allocation, finding no grounds to vacate the award under section 10 of the Federal Arbitration Act. The attorneys appealed, and one of the attorneys who received a large allocation challenged the Ninth Circuit's jurisdiction over the appeal in light of the non-appealability clause.

The Ninth Circuit rejected the jurisdictional challenge, declining to construe the non-appealability clause as precluding the district court or it from reviewing the arbitration award because such a construction would render the agreement unenforceable. The court reasoned that parties may not contractually evade or waive FAA section 10, which sets out the legal grounds for vacating an arbitration award and reflects Congress' intent to ensure a minimum level of due process for parties to arbitration.

## CIVIL PROCEDURE

### Federal courts may not exercise general jurisdiction over a foreign parent company in a suit brought by foreign plaintiffs for events occurring outside the United States simply because the parent company's subsidiary does business in the forum.

*Daimler AG v. Bauman* (2014) 571 U.S. __ (No. 11-965)

A group of Argentinan residents filed suit against a German company, Daimler, in California federal court, claiming that Daimler's Argentinian subsidiary collaborated with Argentinian security forces in causing human rights violations. The plaintiffs claimed they could sue Daimler in California federal court on causes of action arising anywhere in the world because Diamler had an indirect subsidiary in Delaware that imported and sold Daimler vehicles throughout the United States, including California. Daimler moved to dismiss for lack of personal jurisdiction, and the district court granted the motion. The Ninth Circuit reversed, holding that California federal courts could exercise jurisdiction over Daimler because its American subsidiary's activities in California were "important" to Diamler.

The United States Supreme Court held that due process prevents the exercise of jurisdiction by a California federal court over a foreign corporation being sued by foreign plaintiffs for events occurring wholly outside the United States. In *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. ___ (2011), the Supreme Court held that a court may assert general personal jurisdiction over a foreign corporation when that corporation's affiliations with the forum state are so constant and

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pervasive that the corporation may be said to be "at home" in the forum state. Daimler could not be considered "at home" in California because, regardless of its American subsidiary's systematic and continuous contacts with California, Daimler, as a multinational corporation with worldwide sales that manufactures vehicles and has its headquarters in Germany.

**Compare** *Conseco Marketing, LLC v. IFA and Insurance Services, Inc.* (2013) __ Cal.App.4th __ (B244444) [holding that a judgment creditor that is a foreign limited liability company does not have to qualify to do business in California to enforce a sister state judgment under the Sister State and Foreign Money Judgments Act].

## Contractual forum-selection clauses are enforceable by a motion under 28 U.S.C. § 1404(a), and the court should usually consider the parties' choice of forum as the controlling factor when ruling on such a motion.

*Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas* (2013) 134 S. Ct. 568

A party to a contract dispute filed suit in federal court in Texas. The defendant moved to have the case dismissed or transferred under 28 U.S.C. section 1406(a) and Federal Rule of Civil Procedure 12(b)(3), or, in the alternative, 28 U.S.C. section 1404(a), on the basis of a forum selection clause in the parties' contract that pointed to Virginia federal or state court. The district court held that section 1406(a) and Rule 12(b)(3) did not support dismissal or transfer because those rules provide for transfer only where venue would be "wrong" under the standards set forth in 28 U.S.C. section 1391, and venue was not "wrong" by that standard in this case. Accordingly, the district court considered section 1404(a), which governs transfer only within the federal court system and permits transfer for convenience, as the exclusive available ground for the motion to transfer. In applying the forum non-conveniens factors under that statute, the district court determined that the forum selection clause was one factor favoring transfer, but that transfer was unwarranted because another factor – the convenience of witnesses – outweighed the others. Thus, the district court denied transfer.

The United States Supreme Court reversed. The Supreme Court agreed that section 1406(a) and Rule 12(b)(3)do not authorize transfer based on a forum selection clause where the suit has not been filed in a statutorily "wrong" venue. The Supreme Court further agreed that the proper mechanism for enforcing a forum selection clause (at least where there is a federal forum selected) is section 1404(a). The Court ruled, however, that in evaluating the forum non-conveniens factors in a case involving a forum selection clause, the parties' contractual choice of forum should be given controlling weight in the absence of extraordinary circumstances unrelated to the parties' convenience. The Court therefore directed the case to be transferred to Virginia federal court.

## Declaration saying earlier factually-devoid discovery responses were a "mistake" can defeat summary judgment motion.

*Ahn v. Kumho Tires* (2014) 223 Cal.App.4th 133
(Petition for review filed 3/4/2014)

In this breach of contract action, the defendant propounded interrogatories asking the plaintiff to state all facts supporting the complaint's allegations. The plaintiff responded saying "responding party does not know whether any facts responsive to this request exist. Discovery is continuing." The defendant moved for summary judgment, arguing that in light of the factually-devoid interrogatory responses, the claims were without any factual basis. The plaintiff opposed the summary judgment motion with a declaration attesting to the facts alleged in the complaint. Plaintiff's counsel also submitted a declaration explaining that the interrogatory responses contained inadvertent omissions and were mistaken, and that amended responses were being served. The trial court, relying on *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, disregarded the declarations as inconsistent with the interrogatory responses and granted summary judgment for the defendant.

The Court of Appeal (Fourth Dist., Div. Two) reversed. The court determined that the factually-devoid discovery responses saying that the plaintiff did not know whether facts or documents supported the claims were not clear and unequivocal admissions of fact that could not be contradicted by other evidence like the plaintiff's declaration. The court explained, "evasive answers to written discovery is not a legally sufficient ground for granting a motion for summary judgment, particularly when other evidence adduced on the motion shows there are triable issues of material fact. This is because summary judgment is proper only if *all the papers* submitted on the motion show there are no genuine issues of material fact requiring a trial." Here, considering all of the papers, there were triable issues regarding whether the original discovery responses were a mistake and whether plaintiff had credible evidence in support of his claims. There were also triable issues on the merits of plaintiff's claims. Accordingly, the summary judgment motion should have been denied.

*Ahn* is one of several cases that are in disagreement over the practical application of *D'Amico.* ASCDC filed an amicus letter in support of the unsuccessful petition for review, and defense counsel preserve a challenge to *Ahn* in appropriate cases.

## A defective special verdict form is subject to harmless error analysis.

*Taylor v. Nabors Drilling USA, LP*
(2014) 222 Cal.App.4th 1228

The jury found for the plaintiff in this suit alleging sexual harassment. Specifically, on the special verdict form, the jury answered "yes," to questions about whether the plaintiff had been subjected to unwanted harassing conduct based on his perceived sexual orientation, that such harassment was severe or pervasive, and that a reasonable person in plaintiff's position would have considered the work environment to be hostile. Because of a typographical error in the verdict form, however, the jury was directed to skip questions asking whether plaintiff personally considered the environment hostile and whether the hostile environment was a substantial factor that caused harm to the plaintiff. Rather, the jury skipped straight to damages, and awarded plaintiff a significant sum. Although the jury's failure to answer the additional questions was obvious when the jury was polled, the defendant did not object.

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The Court of Appeal (Second Dist., Div. Six) held not only that the defendant forfeited the defect in the verdict by failing to object before the jury was discharged, but also that the error in the verdict form was harmless. Given the overwhelming evidence of aggressive harassment and the jury's answers to the questions it did answer, the court had no doubt the jury would have answered yes to the unanswered questions but for the typographical error that directed the jury to skip those questions. Thus, the court concluded a retrial would be a waste of judicial resources. The court emphasized that it would have to reverse if it had any concerns about prejudice, but that it had no such concerns here, where the parties clearly had a full and fair trial.

### Plaintiff's inability to collect judgment because of debtor's insolvency constitutes an inequitable result as a matter of law justifying adding alter egos as judgment debtors.

*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811

Plaintiffs obtained a judgment against Airborne Turbine Limited Partnership. Plaintiffs were unable to collect the judgment against Airborne, however, because its principals transferred out all of its assets, leaving it insolvent. Plaintiffs therefore sought to add Airborne's two limited partners, and another company they owned, as judgment debtors. The trial court denied plaintiffs' motion to add the judgment debtors because, although the plaintiffs established that the limited partners were Airborne's alter egos, the plaintiffs failed to show how treating Airborne as a separate entity would lead to "an inequitable result."

The Court of Appeal (Second Dist., Div. Two) reversed. The court explained that there is no requirement that the plaintiffs show the limited partners acted with bad intent when they removed the assets from Airborne to show that the resulting insolvency created an inequitable result. The court held that plaintiffs' inability to collect the judgment because of Airborne's insolvency was, under the circumstances, an inequitable result as a matter of law. Accordingly, the Court of Appeal modified the judgment to include the limited partners as judgment debtors. In the course of its ruling, the Court of Appeal also noted that there was no requirement that plaintiffs attempt to litigate the alter ego issue as part of the liability action. Imposing such a requirement would not be prudent, as it would force plaintiffs to engage in pretrial discovery on alter ego issues that are better left to be resolved once there is a judgment and it goes unpaid.

**See also** *Cardinale v. Miller* (2014) 222 Cal.App.4th 1020 [Parties who conspired to help a judgment debtor evade plaintiff's efforts to enforce a judgment are liable under Code of Civil Procedure Sec. 685.040 for attorney fees incurred in enforcing the judgment even though they were not parties to the contract on which the original judgment was based or parties to the original action leading to the judgment].

### Trial courts have discretion to allow for more than 14 hours of deposition time.

*Certainteed Corporation v. Superior Court (Hart)* (2014) 222 Cal.App.4th 1053

The plaintiff sued numerous defendants for his asbestos-related injuries. There was "substantial medical doubt" that the plaintiff would survive six months. Under Code of Civil Procedure section 2025.290, subdivision (b), a deposition of such a person is limited to 14 hours. The defendants sought leave of court to depose the plaintiff in excess of 14 hours, and the trial court denied the request. The trial court found that limiting the deposition to only 14 hours raised significant due process concerns, but it feared it lacked authority to grant more time. Specifically, the court was concerned that the part of section 2025.290, subdivision (a) that permits a trial court to grant additional deposition time where needed to "fairly examine the deponent" did not apply to subdivision (b). The trial court recommended, and the defendants sought, writ relief.

The Court of Appeal (Second Dist., Div. Three) held that the 14-hour time limit imposed by subdivision (b) is merely presumptive, and that trial courts are not only authorized but *required* to allow for additional deposition time, unless the court in its discretion determines that the deposition should be limited. The court emphasized that section 2025.290, subdivision (c) makes clear that nothing in the statute is intended to affect the trial court's discretion to make whatever orders regarding limitation of depositions that are required in the interests of justice.

### Personal service may be effected at a UPS store address designated by a party who is unrepresented and lacks a permanent residence.

*Sweeting v. Murat* (2013) 221 Cal.App.4th 507

The defendants in a conversion suit moved for summary judgment and to compel discovery responses from the plaintiff. They served the motion papers on the plaintiff at an address plaintiff had listed on a notice of change of address form. That address turned out to be a unit at a UPS store. The plaintiff did not timely respond to the motions, and at the hearing on the motions, the trial court exercised its discretion not to consider plaintiff's untimely responses. The trial court granted summary judgment in favor of the defendants, and granted defendants' discovery motions and request for sanctions against plaintiff. Relying on Code of Civil Procedure § 415.20(a) for the proposition that personal service cannot be effected at a post office box, the plaintiff asked the trial court to reconsider its rulings because the papers were improperly served. The trial court nonetheless entered judgment for the defendants.

The Court of Appeal (Second Dist., Div. Four) held that when a party has filed a notice of change of address that lists an address for a UPS store at which he rents a mailbox and states that "[a]ll notices and documents regarding the action should be sent to [that] address," personal service is effectuated by personal delivery of a notice of motion to the UPS store. The court explained that service at a United States Postal Service postal box is improper under the Code, but service at a private or commercial post office box is allowed.

### **A fax-filed 170.6 challenge must include** instructions for directing the challenge to appropriate judge.

*Fry v. Superior Court* (2013) 222 Cal.App.4th 475

Plaintiffs faxed Los Angeles Superior Court Form LACIV 015 to the clerk's office in order to exercise a Code of Civil Procedure § 170.6 challenge. The fax transmittal did not include any instructions to the clerk regarding whether to direct the challenge to the assigned judge or to the presiding judge. Accordingly, the clerk's office took no further action. Over a month later, plaintiffs inquired about the status of the challenge and was informed it was lost. When the plaintiffs finally brought the issue to the trial judge's attention, she declined to deem the challenge timely filed. The plaintiffs sought a writ of mandate.

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The Court of Appeal (Second. Dist., Div. One) held that Form LACIV 015 is sufficient to constitute a section 170.6 motion, and that fax filing is permissible, but that the faxed document must be accompanied by processing instructions that specify where the challenge should be directed. Because plaintiffs did not include such processing instructions in this case, the trial court did not abuse its discretion in treating the challenge as untimely.

## CLASS ACTIONS

### **Commonality for class certification exists where** there is a pattern or practice of employees working off-the-clock to complete daily tasks.

*Williams v. Superior Court (Allstate Insurance Company)* (2013) 221 Cal.App.4th 1353

Plaintiff filed an action for unpaid overtime wages on behalf of himself and other, similarly-situated Allstate auto insurance adjustors who are allegedly required to work "off the clock" at the beginning of each work day. The trial court originally certified the class, but then permitted Allstate to brief the issue of whether the court should de-certify the class in light of the United States Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541 (a class action cannot be maintained where the plaintiffs' claims are based on countless individual employment decisions and not a general policy of discrimination that could serve as the "glue" holding the class together for the purposes of Federal Rule of Civil Procedure 23's "commonality" requirement). The trial court then decided to de-certify the class in light of the individualized nature of Allstate's affirmative defense that not all adjusters worked "off the clock" and that any "off the clock" time was de minimis and without Allstate's knowledge.

The Court of Appeal (Second Dist., Div. Eight) held that the trial court erred in de-certifying the class. The court explained that *Dukes* did not apply because it involved a federal class action seeking injunctive relief, whereas this case involved a California class action seeking monetary relief. Further, unlike in *Dukes*, the plaintiff's claim here involved a companywide policy of not paying overtime for work performed before the official start of the work day, not the subjective employment decisions of countless individual company managers. Here, the "glue" binding together the class is the question of whether Allstate had a policy of not paying for "off the clock" work – a question amenable to class treatment. Allstate's defenses about the amount of time any adjustors worked "off the clock" related to damages, and differences in damages are ordinarily not sufficient to defeat class certification.

**See also** *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986 [reversing denial of class certification because trial court improperly focused on individual issues concerning the right to recover damages rather than evaluating whether the theory of recovery was amenable to class treatment; plaintiff's theory of recovery based on the existence of a uniform policy denying compensation for preshift work presented predominantly common issues of fact and law appropriate for class treatment].

**See also** *Martinez v. Joe's Crab Shack Holdings* (2013) 221 Cal. App.4th 1148 (Review Granted and Held – February 19, 2014) pending *Duran v. U.S. Bank National Assn.* (S200923)) [reversing trial court denial of certification of class of salaried managerial employees who claimed that they had been misclassified as exempt and were entitled to overtime pay; if defendant's policies as implemented across California resulted in managerial employees being undercompensated for performing exempt work, class relief is appropriate even if there were individual disputed issues of fact relating to the amount of time spent by individual class members on particular tasks].

### Whether "local controversy" exception to Class Action Fairness Act jurisdiction applies must be based on evidence or a clear inference from the **class definition, not guesswork.**

*Mondragon v. Capital One Auto Finance* (9th Cir. 2013) __ F.3d. __

The plaintiff brought suit on behalf of a class of persons who purchased or registered vehicles in California in the four years before the suit was filed. The defendants removed the case to federal court under the Class Action Fairness Act of 2005, and the plaintiff moved to remand on the basis of the "local controversy" exception, which provides for remand if at least two-thirds of the class members are citizens of the forum state. The district court granted the motion to remand.

The Ninth Circuit reversed, holding that the plaintiff failed to meet his burden to show the "local controversy" exception applied. The court rejected the plaintiff's argument that the court could infer that at least two-thirds of the class members were Californians from the definition of the class. The court held that a pure inference regarding the citizenship of prospective class members may be sufficient to establish the "local controversy" exception if the class is defined as limited to citizens of the state in question, but there was no such class definition here – there could be many reasons people who purchased or registered vehicles in California over the relevant period were not Californians at the time or have since moved. Thus, plaintiff had to meet its burden if burden of proof by presenting some evidence of the class members' citizenship in order to prevail on its remand motion. The court remanded the case for further proceedings on the jurisdictional issue.

## EVIDENCE

### If the record established in the district court is **sufficient, an appellate court has authority to** make *Daubert* **findings.**

*Estate of Barabin v. AstenJohnson, Inc.* (9th Cir. 2014) __ F.3d __

A jury awarded the plaintiff some $10 million in damages for his personal injury claims arising his alleged exposure to asbestos from dryer felts provided by defendants. The plaintiff's case rested on the testimony of two experts who opined that "every exposure" to asbestos could cause mesothelioma. The district court allowed plaintiff's experts to testify over defendants' objections. The district court recognized the divide among courts and scientists over whether the "every exposure" theory was relevant, but decided that the theory could go to the jury "in the interest of allowing each party to try its case." The defendants appealed, arguing that the trial court's failure to make findings about the relevance and reliability of the expert testimony under Federal Rule of Evidence 702 and *Daubert* was an abuse of discretion.

The en banc panel of the Ninth Circuit agreed with the defendants that the district court erred by abdicating its role as "gatekeeper" and allowing the testimony to go to the jury without having made threshold findings of relevance and reliability. The en banc court held that the improper admission of plaintiff's experts' testimony was prejudicial because the "every exposure" theory was critical to the plaintiff's case. In reversing, the Ninth Circuit considered the defendants' argument that

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the reviewing court should have authority to make *Daubert* findings itself. Overruling *Mukhtar v. California State University*, 299 F.3d 1053, 1066 n.12 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003), the Ninth Circuit agreed that a reviewing court has the authority to make *Daubert* findings itself if it "decides the record is sufficient to determine whether expert testimony is relevant and reliable." The record in this case was not sufficiently, clear, however, so the court remanded for a new trial.

## LABOR AND EMPLOYMENT

### Location of new job is a factor the jury may consider in determining whether new job is inferior for mitigation of damages purposes.

*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425

In this wrongful termination suit, the plaintiff was unemployed for eight months after losing his job with the defendant, at which point he took another job. The new job had slightly better pay, but was located so far from the plaintiff's home that he had to rent an apartment and not see him family during the week. The jury found for the plaintiff and awarded $198,000 in damages for lost salary. The defendant argued in a motion for judgment notwithstanding the verdict that the damages award was unsupported by the evidence because plaintiff's lost salary for the eight months he was unemployed was only $44,000. The plaintiff argued that he was not limited to seeking damages for the time he was unemployed because his new job was not comparable to his old job in light of the distance of between his new job and his home and family. The trial court denied JNOV.

The Court of Appeal (Fourth Dist., Div. Two) affirmed the jury verdict. The court recited the rule that wages from a new but inferior job cannot be used to mitigate damages, and noted that the location of a new job is one of the factors to consider in determining whether a new job is inferior. The plaintiff's evidence that taking the new job required him to assume the burdens of renting a second residence and not seeing his family during the week was sufficient to support the jury's finding that the new job was inferior.

### Allegation that employer's failure to pay for employee's work-related auto expenses rendered salary below minimum wage could state a claim for wrongful discharge.

*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2014) 222 Cal.App.4th 819

An employee working as an apartment maintenance technician brought suit against his employer for violation of Labor Code § 2802, alleging that the employer required the employee to do significant driving for work in his personal vehicle without getting reimbursed for mileage and gasoline. The employee alleged that he was forced to resign because he could not afford the fuel and maintenance costs on his $10.00 per hour salary and still afford his basic living expenses. The employee asserted claims for constructive discharge and intentional infliction of emotional distress. The employer demurred on the grounds that the failure to reimburse for fuel and mileage was not sufficiently intolerable and outrageous to support constructive discharge and IIED claims. The trial court sustained the demurrers with leave to amend the constructive discharge claim. The employee amended his complaint to include calculations showing that his salary after vehicle expenses was less than the minimum wage, but he did not specifically allege that the effect of the no-reimbursement policy was that he received less than minimum wage. The employer demurred again, and the trial court sustained the demurrer without leave to amend, finding that the failure to reimburse mileage and pay for gas was not so intolerable that it forced the employee to resign.

The Court of Appeal (Second Dist., Div. Four) held that the employee should have been given leave to amend. The court concluded that "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." Allegations that the employee's work-related vehicle expenses were so high, in comparison with his wages, as to deprive him of the protection of the wage-and-hour laws and his ability to pay basic living expenses would have been sufficient to state a constructive discharge claim. The court affirmed dismissal of the IIED claim.

## TORTS

### Employer does not have preconception duty of care to child of employee who was exposed to chemicals.

*Elsheref v. Applied Materials, Inc.* (2014) 451 Cal.App.4th 223

A father, mother, and child sued the father's employer because the child was born with birth defects as a result of father's exposure to toxic chemicals at work. The trial court granted summary adjudication in favor of the employer on the ground that the employer did not owe a preconception duty of care.

The Court of Appeal (Sixth Dist.) held that the employer did not owe a preconception duty of care to prevent the child's injuries. The Court of Appeal explained that a preconception duty of care has previously been found to exist only with respect to medical professionals and product manufacturers. Applying the *Rowland* factors, the court held that the employer did not have a preconception duty of care under the facts of this case, as imposing such a duty would extend possible liability beyond reasonable bounds and impose significant burdens on the community.

The court also held, however, that the plaintiffs' claim for strict products liability was viable, on the court's assumption that "duty" is not a concept used to delineate the scope of a strict liability theory. (But see contrary California Supreme Court authorities, e.g. *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362 ["in strict liability as in negligence, 'foreseeability alone is not sufficient to create an independent tort duty'" (citing *Erlich v. Menezes* (1999) 21 Cal.4th 543,552)]; *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56,70 [discussing policy reasons for adopting sophisticated user defense premised on the lack of any *duty* to warn in negligence and strict liability claims]).

### A doctor can offer evidence that the plaintiff's death was caused by hospital equipment failure and not his conduct even though the hospital has been nonsuited.

*Leal v. Mansour* (2013) 221 Cal.App.4th 638

This was a wrongful death action against a doctor and a hospital whose patient died from post-surgical complications. Plaintiffs' theory was that the hospital was negligent in failing to ensure that the patient's ventilator was functioning, and that the doctor was negligent in providing post-surgical treatment. At the close of plaintiff's case, the hospital moved for a nonsuit in light of plaintiffs' failure to present evidence of negligence with respect to operation of the ventilator, and that motion was granted.

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During the defense case, the doctor's theory of the case was that he provided proper care but the ventilator malfunctioned. The case against the doctor went to the jury, and the jury returned a verdict in favor of the doctor on the ground that his negligence was not a substantial factor that led to the patient's death. The plaintiffs appealed, arguing the trial court violated Code of Civil Procedure section 581c, subdivision (d), which prohibits a defendant from making "comment" on the fault of an absent tortfeasor who has previously obtained an adjudication on the merits, by permitting the doctor to argue that the decedent's death was caused by a faulty ventilator and not his negligence. The doctor responded that he did not seek to attribute any fault to the hospital; rather, he only sought to explain what caused the patient's death and why that was not his fault.

The Court of Appeal (Second Dist., Div. Eight) found no error. The court held that section 581c, subdivision (d) does not preclude a defendant from arguing and presenting evidence that events and equipment that may have been under the control of an absent tortfeasor caused a plaintiff's injuries rather than the defendant's negligence. The court explained that section 581c, subdivision (d) "was intended to prevent the bad faith practice of relying on a dismissed defendant to confuse the jury and attempt to avoid liability for one's own wrongdoing, the so-called 'empty chair' defense," not "to prevent a defendant from presenting, in good faith, relevant evidence related to a causative factor for which there is no culpable party."

### Absent a basis for a product manufacturer to have believed that the ultimate users would know of the risks, the manufacturer may not rely on a sophisticated intermediary user defense.

*Pfeifer v. John Crane, Inc.* (2013) 221 Cal.App.4th 1270

In this asbestos case, the plaintiff claimed to have been exposed to the defendant's asbestos-containing products while working for the Navy in the 1960s and 1970s. The defendant sought a jury instruction that it could not be liable for failure to warn the plaintiff of the dangers of asbestos-containing products it supplied to the Navy because the Navy was a sophisticated user that knew of the risks of asbestos. The trial court declined to give this "sophisticated intermediary user" instruction, and the jury returned a verdict for the plaintiff.

The Court of Appeal (Second Dist., Div. Four) affirmed the trial court's refusal to give the defendant's requested instruction. The court held that the sophistication of an intermediary (the Navy in this case) does not, as a matter of law, operate to preclude the supplier's liability for failure to warn the ultimate end users of the product about the product's dangers. To avoid liability based on a sophisticated intermediary user defense, the supplier must have some basis for believing that the intermediary would protect the ultimate user, and the user's status as an employee of the intermediary is not alone a sufficient basis for such a belief.

The question of the scope of the sophisticated user/purchaser/intermediary doctrine is now pending before the California Supreme Court (*Webb v Special Electric*, case no. S209927), so this case would have been a strong candidate for a "grant-and-hold" order vacating the opinion as citable precedent, but the defendant in *Pfeiffer* chose not to seek review. Defense counsel at trial should preserve all arguments that this opinion was wrongly decided.

**See also** *Buckner v. Milwaukee Electric Tool Corporation* (2013) 222 Cal.App.4th 522 [upholding trial court decision to grant a new trial based on insufficiency of evidence to support a defense verdict on sophisticated user defense; there was no evidence that plaintiff – a handyman, not a licensed contractor – knew that use of defendant's very powerful drill without a side handle was dangerous.]

### Parent company may be liable for tortious interference with its subsidiary's contracts.

*Asahi Kasei Pharma Corporation v. Actelion Ltd, et al.* (2014) 222 Cal.App.4th 945

Asahi Kasei Pharma Corporation entered into a licensing agreement with Co-Therix, Inc. in order to develop and commercialize medical products to treat cardiovascular disease. Actelion, Ltd., a competitor pharmaceutical company and dominant market force, subsequently acquired the stock of Co-Therix and caused it to terminate development of Ashahi's products. Asahi sued Actelion and several of its managers for intentional interference with contract. Actelion sought summary adjudication that it and its high level managers were immune from suit for intentional interference because Actelion had an ownership interest in Co-Therix, and therefore could not be charged with interfering with Co-Therix's contract. The trial court denied summary adjudication. Actelion made similar arguments with respect to how the jury should be instructed on the interference claim, and renewed its arguments again in post-trial motions. The trial court rejected Actelion's position that it was immune from the interference claim as a matter of law at each juncture.

The Court of Appeal (First Dist., Div. Five) affirmed the trial court's rulings that Actelion was not immune from the tortious interference claim as a matter of law. Actelion had taken the position that no contract existed between it and Asahi and that it did not assume Co-Therix's contract. Rather, Actelion relied only on its economic interest in the contract resulting from its ownership interest in Co-Therix. The court rejected Actelion's argument for extending immunity to those who have merely an economic interest in the contract without being party to the contract. Accordingly, Actelion could be held liable for interfering with the contract.

## PROFESSIONAL RESPONSIBILITY

### An attorney who represents both an employee and the employer may be liable to the employee for malpractice and breach of **fiduciary duty for failing to protect employee from getting fired.**

*Yanez v. Plummer* (2013) 221 Cal.App.4th 180

Michael Yanez, the plaintiff in this case, was a witness to an on-the-job injury suffered by Boby Garcia, Yanez's co-employee at Union Pacific Railroad Company. After the accident, Yanez gave a statement saying that he "saw Boby slip & fall down." Garcia sued Union Pacific. Brian Plummer represented both Union Pacific and Yanez in connection with Yanez's deposition in Garcia's suit. While preparing for Yanez's deposition, Yanez expressed concern about being deposed because he feared that his testimony would be unfavorable to Union Pacific and that he might therefore lose his job. Plummer confirmed that as long as Yanez told the truth, his job would be unaffected. Plummer confirmed that Yanez did not actually see Garcia fall. Plummer did not prepare Yanez on the topic of why his earlier statement was different. During the deposition, Yanez testified that he did not see Garica fall. In a cursory part of the examination, Yanez said that his earlier statement

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was worded wrong. A Union Pacific director attended the deposition and noticed the inconsistency between Yanez's deposition testimony and the earlier statement. The inconsistency led to disciplinary proceedings against Yanez, concluding in his termination. Yanez sued Plummer for malpractice and breach of fiduciary duty. The trial court granted summary judgment for Plummer on the ground that Yanez could not establish causation, and Yanez appealed.

The Court of Appeal (Third Dist.) reversed. The court explained that Yanez and Union Pacific had adverse interests because Yanez's testimony was potentially harmful to Union Pacific, but that Plummer undertook to represent both in the deposition without informed consent. Plummer also failed to protect Yanez by giving him the opportunity to explain any discrepancy between his earlier statement and his deposition testimony regarding whether he actually saw Garcia fall. Under these facts, there was a triable issue as to whether Plummer's malpractice and breach of fiduciary duty was a substantial factor resulting in Yanez's termination.

The *Yanez* court focused on the attorney defendant's breach of ethical duties, but did not focs on causation, i.e., how the plaintiff will be able to prove that, but for the attorney's advice, the plaintiff could have told the truth when testifying and obtained a better result (not being fired).

## ATTORNEY FEES AND COSTS

### A non-party is entitled to recover its costs of complying with a subpoena if those costs are **"significant."**

*Legal Voice v. Stormans, Inc.* (9th Cir. 2013) __ F.3d __

Plaintiffs challenging certain regulations related to drug prescriptions served a subpoena deuces tecum to obtain, among other things, communications between an advocacy group and the government about the regulations. The district court denied the advocacy's groups request to have the costs of compliance shifted to the plaintiffs because it determined that the cost of compliance would not be "overly burdensome."

The Ninth Circuit held that the district court erred in applying the "overly burdensome standard." Rather, Federal Rule of Civil Procedure 45(d)(2)(B)(ii) requires a district court to shift a non-party's costs of compliance with a subpoena to the propounding party if those costs are "significant." In this case, the advocacy groups cost of compliance were $20,000, which was significant and entitled the advocacy group to have the costs allocated to the plaintiffs. As a threshold determination, the Ninth Circuit also held that a non-party is not limited to appealing the interlocutory order within 30 days of its entry; it may appeal an interlocutory order within 30 days after entry of final judgment to the same extent that a party may appeal such an order. Thus, the advocacy group's appeal of the denial of costs taken after entry of judgment was timely.

### When a plaintiff dismisses his suit in response to an anti-SLAPP motion, defendants are not entitled to attorney fees unless they would have prevailed on the merits of the motion.

*Tourgeman v. Nelson & Kennard*
(2014) 222 Cal.App.4th 1447

The plaintiff filed a class action under the Unfair Competition Law seeking to enjoin defendants from engaging in alleged violations of the Fair Debt Collections Practices Act. The defendants filed an anti-SLAPP motion, and the plaintiff dismissed his suit in response. The defendants then sought an award of attorney fees incurred in connection with the anti-SLAPP motion. The trial court awarded attorney fees against the plaintiff.

The plaintiff appealed the fee award, and the Court of Appeal (Fourth Dist., Div. One) reversed. The court held that the plaintiff's lawsuit, which sought only injunctive relief to benefit the public and no greater relief for the plaintiff himself, would have qualified for the public interest exception to the anti-SLAPP statute. Accordingly, the court held that the trial court erred in awarding attorney fees to defendants because they would not have prevailed on their anti-SLAPP motion.

## CASES PENDING IN THE CALIFORNIA SUPREME COURT

### Addressing whether a trial court may award attorney fees to a prevailing defendant under the anti-SLAPP statute where the trial court lacks jurisdiction over plaintiff's case.

*Barry v. State Bar of California,* Case No. S14058, formerly published at (2013) 218 Cal.App.4th 1435.

An attorney filed suit against the State Bar seeking to set aside a stipulation that had resolved disciplinary charges against her. The State Bar moved to strike the plaintiff's complaint, arguing that the attorney disciplinary proceedings were protected activities. The trial court found that it lacked subject matter jurisdiction to adjudicate plaintiff's claims arising out of State Bar disciplinary proceedings, and awarded the State Bar attorney fees under the anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (c). The Court of Appeal (Second Dist., Div. Two) reversed the fee award, holding that the trial court lacked subject matter jurisdiction over the entire case and therefore did not even have power to award attorney fees under the anti-SLAPP statute.

The Supreme Court granted review on November 26, 2013, to address this question: "If the trial court grants a special motion to strike under Code of Civil Procedure section 425.16 on the ground that the plaintiff has no probability of prevailing on the merits because the court lacks subject matter jurisdiction over the underlying dispute, does the court have the authority to award the prevailing party the attorney fees mandated by section 425.16, subdivision (c)?"

### Addressing whether *Brandt* fees awarded by the trial court should be considered as part of compensatory damages for purposes of calculating a punitive damages ratio.

*Nickerson v. Stonebridge Life Insurance Company,* Case No. S213873, formerly published as (2013) 219 Cal. App.4th 188

The plaintiff, a paraplegic who had fallen from his wheelchair and suffered a broken leg followed by various complications, was hospitalized for 109 days. He had insurance coverage for such hospital stays, and filed a claim, which the insurer refused to pay on the grounds that the need for such an extended stay was unsubstantiated. The plaintiff sued, and the jury returned a verdict finding that the insurer breached the contract and acted in bad faith. The jury awarded $35,000 for breach of the implied covenant and $19 million in punitive damages. In addition, the trial court awarded $31,500 in unpaid benefits, and, after the verdict,

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another $12,500 in attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813. The trial court conditionally granted the insurer's motion for a new trial unless the plaintiff consented to have the punitive damages award remitted to $350,000—ten times the compensatory damages award. The Court of Appeal (Second Dist., Div. Three) affirmed the trial court's conditional new trial order.

The Supreme Court granted review to determine whether, "when calculating the ratio between punitive and compensatory damages, an award of attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, is properly included in the compensatory damages calculation where the fees are part of a jury award, but excluded from the compensatory damages calculation when the fees are awarded by the trial court after the verdict."

## Addressing setoffs for noneconomic damages in medical malpractice actions.

*Rashidi v. Moser,* Case No. S214430, formerly published as (2013) 219 Cal.App.4th 1170.

The plaintiff settled his medical malpractice claim against two of the three healthcare defendants, and the trial court approved the settlements as being in good faith. The case went to trial as to the third defendant, and the jury awarded $125,000 for future medical care, and non-economic damages in an amount the trial court reduced to $250,000 pursuant to MICRA. The nonsettling healthcare defendant argued he should receive offsets for the economic and noneconomic damages based on the pretrial settlements. The trial court disagreed because there was no basis to allocate the pretrial settlement amounts between economic and noneconomic damages. The Court of Appeal (Second Dist., Div. Four) reversed, holding that the plaintiff's jury award for non-economic damages against the nonsettling defendant should be setoff based on the non-economic damages amount of the pretrial settlements. The court explained that whenever a more specific statute is inconsistent with a general statute, the specific statute should be interpreted as an exception to the more general one. Civil Code section 3333.2 sets a total maximum amount of $250,000 on a plaintiff's non-economic recovery against all healthcare provider defendants in a single action. Although the general statutory rule is that each defendant is only severally liable for non-economic damages, section 3333.2 is more specific in prohibiting a plaintiff from recovering more than a specified maximum for non-economic losses from all healthcare providers in the same action.

The Supreme Court granted review on January 15, 2014, on this question: "If a jury awards the plaintiff in a medical malpractice action noneconomic damages against a healthcare provider defendant, does Civil Code section 3333.2 entitle the defendant to a setoff based on the amount of non-economic damages in a pretrial settlement entered into by another healthcare provider, or does the general statutory rule that liability for non-economic damages is several only (not joint and several) bar this type of setoff?"

## Addressing the California Highway Patrol's vicarious liability for tow truck drivers in the Freeway Service Patrol program.

*Department of California Highway Patrol v. Superior Court* (Alvarado), Case No. S214221, formerly published as (2013) 220 Cal.App.4th 612.

The plaintiffs were injured in a collision with a tow truck operating under contract with the California Highway Patrol pursuant to the Freeway Service Patrol program. Plaintiffs sued CHP, and CHP moved for summary judgment on the ground that it was not the tow truck driver's special employer and could not be liable for the tow truck driver's negligence. The trial court granted summary judgment for CHP. The Court of Appeal (Fourth Dist., Div. Three) affirmed, holding that CHP was not vicariously liable for the collision caused by a tow truck driver in the FSP program. The court reasoned that the relevant statutes in the Streets and Highways Code and the Vehicle Code suggest that Legislature intended to distinguish between the people and companies employing tow truck drivers in the FSP program, on the one hand, and the CHP on the other. There was, therefore, no legislative intent to impose vicarious liability on the CHP as a special employer of FSP tow truck drivers.

The Supreme Court granted review on January 21, 2014, on the following question: "Can the California Highway Patrol be considered the special employer of a tow truck driver participating in the Freeway Service Program?"

## Addressing Ninth Circuit's questions regarding employers' obligation to provide seats during work hours.

*Kilby v. CVS Pharmacy,* Case No. S215614, formerly published as (9th Cir. 2013) 739 F.3d 1192.

The Supreme Court granted the Ninth Circuit's request under California Rule of Court 8.548 to answer a certified question of California law. In a single opinion concerning two cases – *Kilby v. CVS Pharmacy, Inc.*, which involves store cashiers, and *Henderson v. JPMorgan Chase Bank NA*, which invovles bank tellers – the federal court asked for help interpreting two California Wage Orders, which "require that an employer provide 'suitable seats' to employees 'when the nature of the work reasonably permits the use of seats.' "

The questions presented are: "For purposes of IWC Wage Order 4-2001 § 14(A) and IWC Wage Order 7-2001 § 14(A), (1) Does the phrase 'nature of the work' refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe 'nature of the work' holistically and evaluate the entire range of an employee's duties? (a) If the courts should construe 'nature of the work' holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat? (2) When determining whether the nature of the work 'reasonably permits' the use of a seat, should courts consider any or all of the following: the employer's business judgment as to whether the employee should stand, the physical layout of the workplace, or the physical characteristics of the employee? (3) If an employer has not provided any seat, does a plaintiff need to prove what would constitute 'suitable seats' to show the employer has violated Section 14(A)?"

Due to the quirk of an odd industry practice, medical care billing is unlike that in other commercial contexts, where the word "bill" is generally understood to be a synonym for the word "invoice," and is taken as a demand for payment in the amount stated. Virtually no patient, whether insured or uninsured, actually incurs the full amount "billed" by a medical provider. (See *Howell, supra*, 52 Cal.4th at pp. 560-565; see *id*. at p. 561 ["Nor do the chargemaster rates ... necessarily represent the amount an uninsured patient will pay"]; see *Vencor Inc. v. National States Ins. Co.* (9th Cir. 2002) 303 F.3d 1024, 1029, fn. 9 [only a "small minority of patients" pay the full listed rate]; Nation, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured* (2005) 94 Ky. L.J. 101, 104 [labeling hospital charges as " 'regular,' 'full,' or 'list,' [is] misleading, because in fact they are actually paid by less than five percent of patients nationally"]; Ireland, *The Concept of Reasonable Value in Recovery of Medical Expenses in Personal Injury Torts* (2008) 14 J. Legal Econ. 87, 88 ["only a small fraction of persons receiving medical services actually pay original amounts billed for those services"]; see, e.g., *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal.App.4th 196, 199 [$690,548 billed, but $138,082 accepted as full payment – a discount of 80 percent].)

Further, putting aside the question of how much is actually paid, a plaintiff may recover as damages "no more than the *reasonable value* of medical services received." (*Howell*, *supra*, 52 Cal.4th at p. 555.) Yet the "bills" issued by medical service providers (e.g., based on "chargemaster" schedules) do not reflect "reasonable value" because they grossly exceed what providers actually accept as full payment from insurers. (*Howell*, 52 Cal.4th at pp. 560-562]; *Corenbaum*, *supra*, 215 Cal.App.4th at p. 1326 ["the full amount billed by medical providers is not an accurate measure of the *value* of medical services"].)

Because the amount that medical providers include in their so-called bills is not incurred – even by noninsured patients – and does not reflect the value of the medical care, it should not be admissible and does not support a damages award.

***Future* medical expenses if the plaintiff is uninsured or *might* become uninsured:** Another variation of the argument to limit *Howell* and *Corenbaum* is that the plaintiff may not be insured in the future. All of the above arguments apply to defeat that claim.

Another argument based on federal law supports the defense argument as well. The Patient Protection and Affordable Care Act of 2010 (PPACA), also known as ObamaCare, now mandates that everyone obtain and maintain health insurance. (26 U.S.C. § 5000A(a) ["An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month"].) The PPACA requires that health insurance policies be offered on a guaranteed issue and guaranteed renewal basis. (42 U.S.C. §§ 300gg-1(a), 300gg-2(a).) The PPACA also prohibits health insurers from discriminating against prospective insureds on the basis of health status, including any preexisting condition. (42 U.S.C. § 300gg-3(a) [providing generally that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage"]; see generally *Nat. Fedn. of Indep. Business v. Sebelius* (2012) 567 U.S. __ [132 S.Ct. 2566, 2580, 183 L.Ed.2d 450] [describing the PPACA's provisions].)

Some might argue that patients could forgo their duty to buy health insurance, notwithstanding PPACA. But, by extension of the basic duty of mitigation (*Placer County Water Agency v. Hofman* (1985) 165 Cal.App.3d 890, 897; *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568), the plaintiff has an obligation to purchase medical insurance to obtain future medical treatment at negotiated rates. Because a plaintiff has the right and obligation to obtain such insurance under PPACA, the plaintiff cannot recover medical damages premised on a failure to obtain the insurance mandated by federal law. (For a full discussion of the implications of the PPACA on a plaintiff's right to recover economic damages, see H. Thomas Watson, Ripe For Litigation: Using the New Federal Healthcare Act to Limit Future Damages (Verdict Magazine 1st Quarter 2010) 39.)

**The undocumented worker plaintiff:** "A ha," says plaintiff's counsel, "my client is not only uninsured, but is also an undocumented worker and, thus, is not eligible under the PPACA for guaranteed-issue insurance coverage." Not so fast. Evidence of amounts that an expert claims will be "billed" in the future is no more relevant to showing the reasonable amount that would actually be paid for such a plaintiff' than it is to proving other patients' damages. The question is, what do providers actually accept as payment from such patients, and what will they accept in the future?

Moreover, if the plaintiff is subject to deportation, the future medical damages arguably should be calculated based on what the plaintiff would actually incur in the home country. Any recovery of future damages based on continued presence in this country would be preempted by federal immigration law. (See, e.g., *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* (2002) 535 U.S. 137, 150-151 [claim for back pay foreclosed by federal immigration policy]; *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1149 [an undocumented alien may only recover lost United States future earnings when he can "demonstrate to the court's satisfaction that he has taken steps that will correct his deportable condition"]; *Veliz v. Rental Service Corp. USA, Inc.* (M.D. Fla. 2003) 313 F.Supp.2d 1317, 1337 ["In sum, permitting an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents runs 'contrary to both the letter and spirit of the IRCA, whose salutory purpose it would simultaneously undermine'"]; *Hernandez-Cortez v. Hernandez* (D.Kan., Nov. 4, 2003, Civ.A. 01-1241-JTM) 2003 WL 22519678, at *6-7 [nonpub. opn.] [holding that federal immigration law preempts undocumented alien's state tort law claim for future earnings based on continued U.S. residence]; *Tarango v. State Indus. Ins. System* (Nev. 2001) 25 P.3d 175, 178-179 [holding that workers' compensation laws were preempted

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by federal immigration law to extent that state law afforded vocational rehabilitation benefits to undocumented alien].)

**The medical lien scam:** Another ploy to sidestep *Howell* and *Corenbaum* is to claim that the bill for medical services was sold to a third-party financing company (a factor) that is asserting a claim against the plaintiff for the full amount "billed." Fortunately, this tactic has been called into question by the recent Court of Appeal decision in *Dodd v. Cruz* (2014) 223 Cal.App.4th 933 (*Dodd*).

The facts in *Dodd* will bring a wry smile to any defense attorney's face. In *Dodd* the plaintiff was referred by his lawyer to a medical services provider. That provider, in turn, sold its account receivable to a factor, which coincidentally was owned in part by the plaintiff's attorney. The defendant subpoenaed documents to ascertain the amount the factor actually paid the medical provider for the lien. (*Id.* at p. 937.) The trial court granted the plaintiff's motion to quash the subpoena and sanctioned defense counsel $5,600. (*Id.* at p. 938.)

Defendant appealed and the Court of Appeal reversed the discovery ruling and the sanctions award. The Court of Appeal reaffirmed the rule that the amount "billed" by the medical provider (with no expectation of actual payment in that amount) is not the test: "The amount a health care provider bills a plaintiff for its medical services is not relevant to the amount of the plaintiff's economic damages for past medical services." (*Dodd*, *supra*, 223 Cal.App.4th at p. 941.) In contrast, the subpoena sought relevant information, i.e., what the medical provider actually accepted from the factor pursuant to their arrangement to discharge the medical provider's account receivable. (*Id.* at p. 942.) As the court noted, the defense expert could rely upon that figure in calculating the amount of the plaintiff's past medical expenses. (*Ibid.*)

## Where we go from here

*Howell* and *Corenbaum* turn on general principles of universal application. In those cases, the billed amount was inadmissible because it was not incurred and did not reflect the reasonable value of the medical services. Despite attempts by the plaintiffs' bar to limit *Howell* and *Corenbaum* to their facts, the logic of those cases does not depend on the existence of insurance, the identity of the plaintiff, or the type of medical damages. Indeed, it would make no sense to apply the measure of damages inconsistently to some plaintiffs but not to others, or to apply a different measure for past medical damages than to future medical damages. Moreover, the PPACA dovetails with these cases by mandating health insurance and thus putting to rest any speculation that a plaintiff may lack insurance in the future. Using this logic and these authorities, attempts to circumvent *Howell* and *Corenbaum* should be cut off at the pass.

Rob Wright and Steve Fleischman are appellate attorneys at Horvitz & Levy LLP in Encino. Mr. Wright was counsel of record for the defendant in the *Corenbaum* and *Dodd* cases discussed in this article.

# No Free Lunch

## The Transformation of Mediation into Mandatory Settlement Conferences

*by David B. Madariaga & Michael Lloyd*


You are sitting on a hard bench in a crowded corridor of a distant courthouse. You have limited internet signal, no power supply, and no table for your laptop. You've been waiting all morning to see the settlement referee, and you realize you will likely spend all day in this wasteland, no coffee, no drinks, no candy, no fresh baked cookies, and no free lunch (many may argue that lunch at one of the many mediation providers is not free, but is built into the ever increasing mediation fees). You realize your comfortable mediation was usurped by a mandatory settlement conference, and you ask, "How did we get here?"

After *Jeld-Wen, Inc. v. Superior Court* (Cal. App. 4th Dist. 2007) 146 Cal.App.4th 536, which confirmed that courts could not order parties to attend and pay for private mediation, many construction defect insurers instructed their defense counsel to stop attending mediation. This may have been a response to their frustration with the perceived lack of progress at most construction defect mediations, or possibly an attempt to save costs. Initially, the result was several voluntary mediations, where parties could opt-out of attending and avoid paying mediation fees, followed by one final mandatory settlement conference that all non-settling parties were required to attend. However, the downturn in mediation participation among the subcontractors led to an increase in the request for, and use of, successive mandatory settlement conferences where parties, counsel, and insurance representatives are compelled to attend. *Cal. Rules of Court*, Rule 3.1380(b).

The authority for the recent trend of holding multiple mandatory settlement conferences is found in *California Rules of Court*, Rule 3.1380(a), which states that "[o]n the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences." *California Rules of Court*, Rule 3.1380(a) was amended in response to the *Jeld-Wen* decision, and became effective January 1, 2008. Former Rule 3.1380(a) provided that the court could set a mandatory settlement conference and order parties to attend. Courts are increasingly appointing settlement referees to preside over these settlement conferences and ordering the parties to compensate the referee. Authority for appointing a settlement referee to preside over a mandatory settlement conference is found in *Jeld-Wen*, which states that a trial court may appoint a referee to conduct a mandatory settlement conference in a complex case pursuant to *California Code of Civil Procedure* § 639 and *Rules of Court*, Rule 3.920. *Jeld-Wen, Inc. v. Superior Court* (Cal. App. 4th Dist. 2007) 146 Cal.App.4th 536, 542. The court in *Jeld-Wen* relied on the holding in *Lu v. Superior Court* that *Code of Civil Procedure* § 187 and the complex litigation standards of *California Rule Court*, Rule 3.400 et seq. provide authority for a court to appoint a referee to conduct settlement conferences in complex matters. *Lu v. Superior Court*, (Cal.App. 4th Dist. 1997) 55 Cal.App.4th 1264, 1271. *Jeld-*

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## No Free Lunch – continued from page 23

*Wen* and *Lu* go on to conclude that *Code of Civil Procedure* §§ 638 and 639 provide for compensation of a court appointed settlement referee by the parties. *Lu* at 1272, and *Jeld-Wen* at 542.

Interestingly, nothing in *Code of Civil Procedure* § 639 mentions appointing a referee to preside over a mandatory settlement conference, but the advisory comment to *California Rules of Court*, Rule 3.920 provides that Rule 3.920(b) is not intended to prohibit a court from appointing a referee to conduct a mandatory settlement conference in a complex case. For a thorough discussion of the authority, or lack thereof, of the Judicial Counsel to impose rules allowing courts to appoint settlement referees and require the litigants to compensate the referee, see Jeff G. Harmeyer, Esq., *Judicial Council Authority And The Proposed Amendment To California Rules Of Court, Rule 3.1280*, published in the 2008 course materials for West Coast Casualty's Construction Defect Seminar. Neither *Jeld-Wen* nor *Lu* have any subsequent appellate history, and remain good law.

The transformation of voluntary mediation into mandatory settlement conferences has serious negative consequences, such as the loss of the mediation privilege. *Evidence Code* §§ 1115-1128 and Advisory Committee Comment to *California Rules of Court*, Rule 3.1380(d). Neither the communications nor the documents and reports prepared for the mandatory settlement conference are confidential, including the mandatory settlement conference statement that each party is required to prepare, file, and serve. Pursuant to *California Rules of Court*, Rule 3.1380(c), a settlement conference statement must include a good faith settlement demand by each plaintiff and a good faith settlement offer by each defendant. *California Rules of Court*, Rule 3.1380(c). While the parties at mediation may submit mediation briefs, it is not required, and the parties were are not required to make and publish "good faith" offers. What constitutes a "good faith" offer will clearly be a matter of dispute, and failure to make a "good faith" offer may subject a party to court sanctions. However, one court has held that *California Rules of Court*, Rule 3.1380(c) does not require a party to increase its offer or to participate in meaningful settlement negotiations at a mandatory settlement conference, and therefore its failure to do so is not sanctionable conduct. *Vidrio v. Hernandez* (Cal.App. 2nd Dist. 2009) 172 Cal.App.4th 1443, 1460. Aside from the loss of confidentiality, the requirement to prepare mandatory settlement briefs, and for parties and insurance representative to personally attend settlement conferences, increases the costs of litigation. Increasing the costs of litigation may have been an impetus behind courts' expanded use of the mandatory settlement process, as mediators and settlement conference judges often emphasize anticipated litigation costs to encourage insurance companies to

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## No Free Lunch – continued from page 24

compromise claims of questionable liability. Some judges are also of the opinion that inconveniencing insurance representatives will increase settlement authority.

Regardless of the motivations, there seems to be no escape from the multiple settlement gatherings in construction defect litigation that so many participants and insurance companies bemoan. While the venue has changed, the game remains mostly the same. Where before litigants were required to attend and pay for multiple mediations pursuant to a case management order, they are now required to attend and pay for multiple mandatory settlement conferences. If reducing the number of settlement conferences or litigation costs was a motivation in opposing mediation, the experiment has failed. Now, in addition to paying the referee's hourly rate, parties are required to prepare mandatory settlement conference statements and incur travel costs for insurance representatives to attend.

Perhaps this situation will cyclically evolve like so much of construction defect law, and we will see a return to mediation as it become clearer that participating in serial settlement conferences is not reducing litigation costs or resolving cases. In the meantime, the parties have exchanged the comfort and informality of an alternative dispute facility, with free wi-fi and room to work, for the back rooms and hallways of courthouses, where there is no free lunch.

With court delays worsening due to budget cuts, mediation is more valuable than ever. That was a theme at City Hall at the dynamic kickoff of the

**"2014 City of Los Angeles Mediation Awareness Week."**

ASCDC members represent companies, small business, individuals and, yes, government entities, who have been sued. Although ASCDC members are prepared to take cases to trial and beyond when appropriate, they recognize that many disputes are amenable to being and should be resolved through compromise and mediation.

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# Long Beach Court House

*by William O. Woodland*

If you haven't been to Court in Long Beach in a while, you are in for a pleasant surprise The new Governor George Deukmejian Courthouse has opened for business. At over 500,000 square feet, the glass and steel structure is a glistening, authoritative site. It stands as a welcome contrast to its care-worn predecessor, where either the elevators or escalators worked, but never both at the same time. The construction of the new facility was made possible through a financial and management partnership with the Long Beach Judicial Partners LLC which continues to manage and maintain the facility.

The new facility is well appointed with nearly all of the newest technology built in to the courtrooms themselves, including wireless connections throughout, and audio visual ports within the trial courts themselves.

In terms of accommodations, the Court currently maintains a convenience store with a variety of snacks, drinks and other sundries. Construction is underway for a combination retail Coffee Bean and Subway shop to be opened in the near future.

Like its predecessor, the new Courthouse services the full spectrum of legal issues with over 30 operational courtrooms managing a variety of civil and criminal caseloads. The Deukmajian Courthouse is a jewel among the Los Angeles County Court facilities.

Woody Woodland (William "Woody" Woodland is a Partner with the Long Beach firm of Ford Walker Haggerty & Behar. His practice emphasizes defense of wrongful death, catastrophic injury, and governmental liability matters).

# Express Warranty Claims Based on Product Safety Ads:

## The Admissibility of Trade Usage and Comparative Product Performance Evidence


*by Mark V. Berry*
*& Joyce M. Peim*

The typical product liability case starts with a complaint that contains causes of action for strict product liability, negligence and breach of express and implied warranty. However, by the time experts are deposed the issues usually have been reduced to their one common denominator: was the product defectively designed? More often than not plaintiffs drop their claims for negligence and breach of warranty and proceed to trial solely on the strict products liability claim based on design defect. This practice has its roots in legal doctrine and the rules of evidence.

First, California adopted strict liability to relieve the injured plaintiff of the burdens associated with proving negligence. *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121,133. Therefore, under the merger doctrine, claims for strict liability, negligence and warranty merge into a single cause of action related to the allegedly defective design of the product. See *Balido v. Improved Mach., Inc.* (1972) 29 Cal.App.3d 633, 640; disapproved on other grounds in *Regents of University of California v. Hartford Acc. & Indemn. Co.* (1978) 21 Cal.3d 624, 641 ("Although separate counts for negligence, warranty, and strict liability have been pleaded, we view them as stating a single cause of action, in that the complaint seeks damages for personal injuries caused by deficiencies in the design of a manufactured product"); see also *Lambert v. General Motors* (1988) 67 Cal.App.4th 1179, 1185 ("Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge").

Second, although evidence of "custom and practice" is generally not admissible in a strict liability claim, evidence of steps taken by the manufacturer in an attempt to design a safe product *is* relevant to a negligence claim. *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, 803. Therefore, if plaintiff proceeds to trial on a negligence theory, the jury is permitted to focus on the reasonable conduct of the manufacturer, as well as others in the industry. This opens the door for the admission of comparative evidence which can include comparative statistical data about safety performance, such as the risks of fatality and injury from comparable products with similar and different designs. Such evidence usually demonstrates that the product under attack is, for good reason, comparable to virtually every other similar product on the market, or that the use of comparable products with a different design can result in the same type of injury, or worse. This generally is harmful to plaintiff's defect case so, to avoid the admission of comparative evidence, plaintiffs usually drop their negligence claim prior to trial.

For these reasons generally there was no benefit to plaintiffs to proceed to trial on any claim other than strict liability.

But potentially included under the products liability umbrella is a claim for breach of *express* warranty based on advertisements of safety. See CACI 1230. CACI 1230 uses "safety" as an example of the type of representation giving rise to an express warranty, and that is the representation that will be used here. However, other representations regarding a product are also potentially actionable.

In *Gherna v. Ford Motor Co.* (1966) 246 Cal. App.2d 639 ("*Gherna*") the court stated that, "when a manufacturer engages in advertising in order to bring his goods and their quality to the attention of the public and thus to create a consumer demand, the representations made constitute an express warranty running directly to a buyer who purchases in reliance thereon." *Gherna*, 246 Cal.App.2d at 652. This type of claim will hereafter be referred to as an "Ads Warranty" claim.

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An Ads Warranty claim gives rise to issues of law and evidence usually not confronted by the products liability defense attorney. This type of claim turns on what the manufacturer meant when it advertised its product as "safe," and not whether the product or one of its component parts was defectively designed. Establishing what "safe" means in the relevant industry calls for the admission of comparative evidence and evidence of trade usage that the product liability plaintiff generally wishes to keep out. It also invokes the Commercial Code.

### The Elements of an Ads Warranty Claim

The three elements of an Ads Warranty claim are:

1. The defendant made a statement of fact, or a promise, or gave a description to plaintiff, indicating that the product 'was safe,' and
2. The product did not perform as stated or promised, or did not meet the quality of the description provided, and
3. The failure of the product to be as represented was a substantial factor in causing the alleged harm.

See CACI 1230; see also California Commercial Code § 2313.

In other words, under an Ads Warranty claim the plaintiff must establish that the failure of a product to be as represented in an advertisement caused plaintiff harm. The first issue then is, what constitutes a statement of fact "indicating that the product 'was safe?' " CACI 1230 (1).

### Statements of Fact

A fundamental principle of the Ads Warranty claim is that the manufacturer made a statement or promise of safety, or otherwise described the product, as "safe." But manufacturers make many claims when advertising their product. These claims often pertain to product features and product performance, but they also can be expressions of how wonderful the manufacturer thinks its product is. The former *may* give rise to an Ads Warranty claim, but the latter cannot.

In *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, the court identified the "three fundamental issues" that must be considered to determine whether a statement made by a manufacturer constitutes an express warranty under Cal. Comm. Code § 2313:

- whether the seller's statement constitutes an affirmation of fact or promise, or description of the goods, (under Cal. Comm. Code § 2313, subdivision (1)(a) or (b)), or whether the seller's statement is merely the seller's opinion or commendation of the goods (under Cal. Comm. Code § 2313, subdivision (2)),
- whether the statement was part of the basis of the bargain, and
- whether the warranty was breached.

*Keith*, 173 Cal.App.3d at 20.

In *Hauter v. Zogarts* (1975) 14 Cal.3d 104 ("*Hauter*"), the court explained the distinction between actionable and inactionable representations. "If defendants' assertion of safety is merely a statement of opinion – mere 'puffing' – they cannot be held liable for its falsity." *Hauter*, 14 Cal.3d at 111. However, when a manufacturer advertises that its product is "completely safe" and that "the ball will not hit the player," the statements "[do] not indicate the seller's subjective opinion about the merits of his product but rather *factually describe[ ] an important characteristic of the product*." See *id*. at 112 and 115. (Emphasis added). Despite the manufacturer's specific representations of safety the plaintiff in *Hauter* was struck and injured by the ball. Therefore, an Ads Warranty claim could properly be asserted.

Thus, a plaintiff cannot expect to present his or her Ads Warranty claim to the jury merely based on evidence of an injury from using a product that was advertised as "safe." The manufacturer must have advertised a characteristic that rendered the product safe, or which would otherwise prevent injury during the use of the product.

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However, most cases may not present themselves as neatly as *Hauter*, where the use of the product manifested itself in an injury contrary to the specific representation. In those cloudier cases, to establish what its advertisement or representation meant, the manufacturer must be allowed to produce evidence of trade usage and comparative evidence. This calls for the California Commercial Code.

### The Commercial Code

Under the plain language of the Commercial Code, trade usage is used to interpret *all* agreements, including warranties. An "affirmation of fact ... which ... becomes part of the basis of the bargain" creates an express warranty. Cal. Comm. Code § 2313, subd. (1) (a). That "bargain" includes usage of trade. Cal. Comm. Code § 1201, subd. (a) (3) (defining "agreement" as "The bargain of the parties in fact, as found in their language or inferred from other circumstances, including ... usage of trade as provided in section 1303"). Further, subdivision (d) of section 1303 unequivocally allows trade usage to give meaning to the terms of the parties' agreement: "A ... usage of trade ... is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." Cal. Comm. Code § 1303, subd. (d). Still again, section 2202 clearly states that a written term "may be explained or supplemented (a) By ... usage of trade." Cal. Comm. Code § 2202, subd. (a).

The Commercial Code plainly declares that trade usage evidence is relevant to give meaning to the bargain, the agreement, and every term in it, including warranties. *Hauter* confirms that the provisions of the Commercial Code apply to express warranties, and that warranties are basically contractual in nature. *Hauter*, *supra*, 14 Cal.3d at 117, citing Cal. Comm. Code § 2313, comment 1. These provisions are also supplemented by principles of law and equity. See Cal. Comm. Code § 1103, subd. (b) ("Unless displaced by the particular provisions of this code, the principles of law and equity .... supplement its provisions").

Moreover, Code of Civil Procedure sections 1644 and 1646 also provide that "usage" must be followed in interpreting the words of a contract. See Code Civ. Proc. § 1644 ("The words of a contract are to be understood in their ordinary and popular sense ... unless a special meaning is given them by usage, in which case the latter must be followed"); see also Code Civ. Proc. § 1646 (contract is interpreted according to "law and usage"). Under the plain terms of sections 2313, 1303, and 2202, and Code Civ. Proc. §§ 1644 and 1646, all terms of the agreement, including warranties, affirmations of fact and descriptions, may be interpreted by usage of trade. Comment 5 to section 2313 reaffirms that descriptions of goods are governed by usage of trade, but it does not exclude other terms.

Further, if a representation that a product was "safe" was not interpreted according to usage of trade, a question would remain as to what "safe" meant with regard to that product. Under contract law "safe" must be interpreted as to how the reasonable promisor, here the manufacturer, would have believed that the reasonable promisee, here the consumer, understood it. Code Civ. Proc. § 1649; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176

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## Warranty Claims – continued from page 30

Cal.App.3d 886, 893. This contract principle applies fully to sales of goods governed by the Commercial Code. See Cal. Comm. Code §§ 1201, subd. (b) (12) and 1103, subd. (b). Consequently a representation that a product is "safe" must be construed in the sense in which the manufacturer believed that purchasers of that product were likely to understand that term. The manufacturer is therefore entitled to prove how it believed that purchasers would interpret "safe" in regard to the product in question. This means that evidence of trade usage, and comparison to other products and applicable government or other legal requirements, is admissible.

Thus, the Commercial Code unequivocally allows evidence of trade usage to interpret the terms of an express warranty and to enable the jury to determine what the manufacturer meant when it advertised its product as "safe." Indeed, courts have admitted trade usage evidence in cases involving breach of warranty claims. *Weinstat v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213, 1229 (instructions furnished with device formed part of express warranty as usage of trade); *Nye & Nisson v. Weed Lumber Co.* (1928) 92 Cal. App. 598, 607-08 (term in warranty "must be accepted in the light of the meaning of that term as it is known to the trade"); *Brandenstein v. Jackling* (1929) 99 Cal.App. 438, 445 (similar).

So, if a plaintiff seeks to pursue an express warranty claim based on a manufacturer's safety advertising, the manufacturer is entitled to prove what "safe" means in the relevant industry. In the automotive industry, for example, this includes evidence that the established practice is to evaluate safety by comparison with competitors' vehicles and objective criteria such as compliance with the Federal Motor Vehicle Safety Standards. The jury can then consider what "safe" means in the automotive industry in order to determine what the manufacturer meant when it represented its vehicle as safe.

In sum, a manufacturer confronted with defending an Ads Warranty claim as part of a product liability action should be fully prepared to argue for the admissibility of evidence of trade usage and comparative evidence as relevant and not precluded by case or statute.

# Around the Counties

## Kern County Report
### by Tom Feher

New rules and fees are being proposed, likely to be effective July 1. The proposals out for public comment include:

An online form (at *www.kern.courts.ca.gov)* to notify the court *by 8:20 a.m. on the morning of a hearing* if an attorney is to be late for an appearance.

New fees, per rule 1.8.1, for retrieving and copying records.

See also changes to Chapter III. Civil Rules and Civil Case Management: Rule 3.3.2 (re Order to Appear for Judgment Debtor Examination), and Rule 3.12.2(b) (re Time for Filing papers in a Rule 3.740 collection action).

## Los Angeles County Report
### by Julianne DeMarco

An additional (fourth) personal injury supervising courtroom has been added downtown at the Mosk Courthouse.

North District (Antelope Valley) has resumed handling unlimited jurisdiction personal injury cases.

Online reservation of a hearing date in the personal injury supervising courtrooms now requires paying a nonrefundable fee. Dates can be reserved without paying a fee by calling the courtroom between 3:00 pm and 4:00 pm in the afternoon.

L.A. Superior Court is using legacy reserve funds that it must spend anyway to acquire an electronic case management system. Over the coming months and couple of years, L.A. Superior Court will transition to electronic filing.

## Orange County Report
### by Lisa McMains

All civil filings are required to be by e-filing. In addition, effective April 1, 2014, transcripts in civil, probate, and mental health proceedings where there was a court reporter can be ordered online. Your request will be sent directly to the court reporter present at the proceeding. The reporter will provide a cost estimate and make arrangements for payment. More information can be found at the court's redesigned website,

A hot issue in Orange County is whether the courts will return to a master calendar, in light of budget issues. If you have input on that prospect, feel free to send it to the presiding justice, or to Lisa McMains, who will communicate concerns and ideas to the court.

Also, information is available on the court's website regarding proposed changes to Local Rules 601.12, 700, 701, 701.1, 701.5, 704 and 900.5. See *www.occourts.org/directory/local-rules.*

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## San Bernardino County Report
### by Jeff Walker

By mid-May, all civil cases in Rancho Cucamonga are being transferred to downtown San Bernardino. This means that all civil cases will be in downtown San Bernardino.

## San Diego County Report
### by Pete Doody

Ground has just been broken for the construction of the new San Diego Central Court House. The new San Diego downtown court house will be 22 stories high and will include 71 courtrooms. It will replace the old courthouse on Broadway, which was built in 1961 and lies over an earthquake fault zone. The new court house is anticipated to be completed before the end of 2016. The well-known stained glass state seals salvaged from the 1890 court house will be on display in the new court house.

## Santa Barbara County Report
### by Michael Colton

Electronic filing is coming this summer. The court anticipates that by January 2015, through adoption of a local rule of court, electronic filing will be mandatory for represented parties (subject to a hardship exception).

The court continues to supply court reporters for regular law and motion hearings; the moving party is assessed a $30 fee (in addition to regular motion filing fees) which is to be paid, together with any regular motion fees, at the time motion papers are filed.

Santa Barbara is welcoming several new jurists: The Honorable James K. Voysey, with nearly thirty years of distinguished service in the Santa Barbara County Public Defender's office, was sworn in as the newest Judge of the Santa Barbara Superior Court; it is anticipated he will eventually move to a criminal court assignment in North County (Santa Maria). Chief U.S. Bankruptcy Judge Peter Carroll and U.S. Bankruptcy Judge Deborah Saltzman will soon be taking the reins in the Northern Division of the Central District U.S. Bankruptcy Court in Santa Barbara, upon the retirement of the Honorable Robin Riblet after twenty years of exemplary service.

## Ventura County Report
### by Diana Lytel

Strict compliance with court rules is being required for Case Management Conferences, including CRC 3.724 and CMC statement 19(b). Parties are to submit statements of agreed upon/contested facts, similar to FCRP Rule 26(f) Case Management Statements. Contact Diana Lytel for more information about guidelines set by Civil Case Management Attorney Miles Lang. Trials are being set within one year of filing dates.

# defense successes **january – march**

Robert T. Bergsten
**Hosp, Gilbert & Bergsten**
*Johnson v. Hartunian*
*Redman v. McCarty*

David Brobeck, Jr.
**Brobeck, West, Borges, Rosa & Douville**
*Colford v. Nunez*
*Bermudez v. Ciolek, Heacox*

Louise M. Douville
**Kevin P. Hillyer**
*Patterson Lockwood Hillyer*
*Huck v. Bruce M. Ascough*

Raymond R. Moore
**Moore McLennan LLP**
*Gonzalez v. Kok*

Stephen M. Nichols
**McKenna Long & Aldridge LLP**
*Robbins v. Union Carbide Corporation*

Terry A. Rowland
**Demler, Armstrong & Rowland, LLP**
*Croteau v. Harbach Family Trust*

Matthew Trotter
**Borton Petrini, LLP**
*Escalante v. Gillman*

Wayne W. Watten
**Watten, Discoe, Bassett & McMains**
*Lee v. Kostikyan*

Brian L. Williams
**Sullivan, Ballog & Williams, LLP**
*Mandala v. Reverend Robert Fulton, et al.*

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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.**

## 2013 YEAR IN REVIEW

During 2013, the amicus committee was actively involved in dozens of matters on behalf of ASCDC's membership, including the following case:

### Amicus briefs on the merits

*Aryeh v. Cannon Business Solutions* (2013) 55 Cal.4th 1185 [statute of limitations in section 17200 claims]

*Corenbaum v. Lampkin* (2013) 215 Cal. App.4th 196 [extending *Howell* to future damages and noneconomic damages]

### Publication requests granted

*Reichert v. State Farm Gen'l Ins. Co.* (2012) 212 Cal.App.4th 1453 ["law or ordinance" exclusion in homeowners policy]

*Aber v. Comstock* (2012) 212 Cal.App.4th 931 [anti-SLAPP procedural issues]

*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 710 [denial of class certification]

*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466 [error in giving former CACI 2430, 2500, 2505 and 2507 in light of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203]

*Meddock v. Yolo County* (2013) 220 Cal. App.4th 170 [interpreted "natural condition" immunity under Government Code, § 831.2]

*Wise v. DLA Piper* (2013) 220 Cal.App.4th 1180 [legal malpractice case discussing requirements for expert witnesses post-*Sargon*]

*Sadeghi v. Sharp Memorial Medical Center* (2013) 221 Cal.App.4th 598 [procedural issues in hospital staff privileges case]

### Support for successful petitions for review

*Alamo v. Practice Management Info. Group* (2012) 210 Cal.App.4th 95: ["grant and hold" order issued pending outcome of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203]

*Flores v. Presbyterian Intercommunity Hospital* (2013) 213 Cal.App.4th 1386, review granted [statute of limitations in medical malpractice case]

*Winn v. Pioneer Medical Group* (2013) Cal. App.4th 875, review granted [statute of limitations in medical malpractice case]

### Successful depublication requests

*Schaefer v. Elder* (2013) 217 Cal.App.4th 1, ordered depublished [tripartite relationship created conflict of interest]

## PENDING CASES AT THE CALIFORNIA SUPREME COURT AND COURT OF APPEAL

ASCDC's Amicus Committee has also 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. *Kesner v. Superior Court (Pneumo 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 in *Campbell v. Ford Motor Co*. (2012) 206 Cal.App.4th 15 that no such claim can be asserted against a premises defendant, who owed no duty to family members of those visiting the premises. 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 in the *Kesner* case; 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.

**continued on page 37**

## Amicus Committee Report – continued from page 36

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

**Joshua Traver**
*Cole Pedroza*
626-431-2787

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

**Jeremy Rosen,**
*Horvitz & Levy*

**Harry Chamberlain,**
*Manatt, Phelps & Phillips*

**Ben Shatz,**
*Manatt, Phelps & Phillips*

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

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

**John Manier,**
*Nassiri & Jung LLP*

**Sheila Wirkus Pendergast,**
*Hennelly & Grossfeld,*

**Susan Brennecke,**
*Thompson & Colegate;*

**Ted Xanders,**
*Greines, Martin, Stein & Richland LLP*

**Richard Nakamura,**
*Morris Polich & Purdy*


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(Updated 2/27/14)

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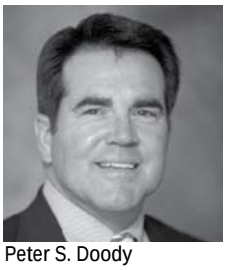
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