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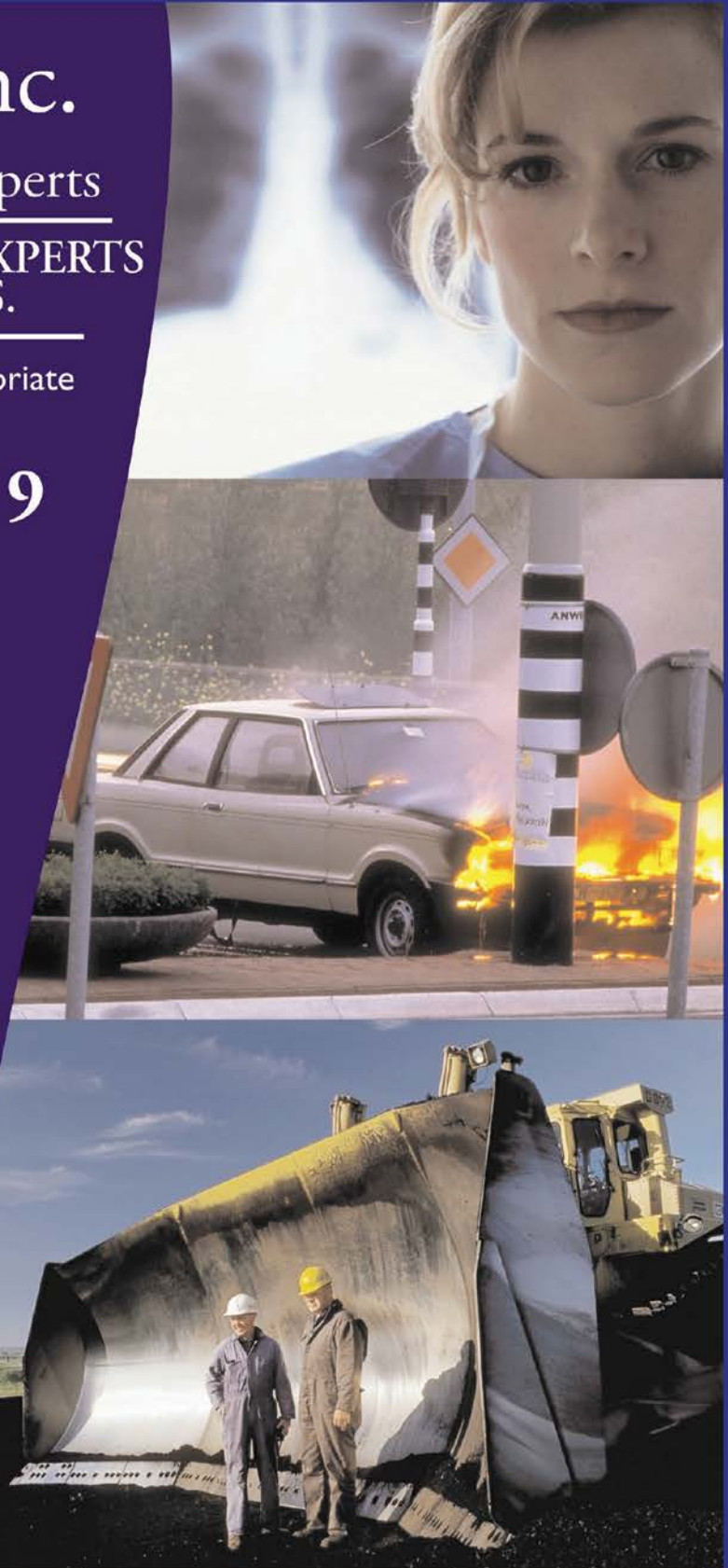
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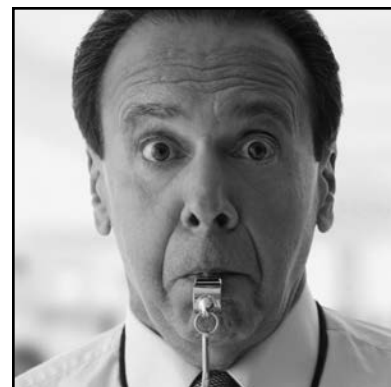
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Manners Maketh Man

I lead a pretty busy schedule. Up at 4 am seven days a week followed by two hours of work, a two hour hard core workout at the gym, and then comes a “full day” of work as a lawyer. Therefore I rarely have time to catch a movie, and when I do, it is usually a Netflix over the weekend. Accordingly, I am always two to three months behind everyone else when it comes to conversations on the latest film. With that in mind, I just recently watched *Kingsman: The Secret Service*. One of the movie's subtle themes is near and dear to my heart and directly applies to our work as officers of the court: “manners maketh man.”

The Kingsmen are a group of elite British agents who are lethal trained killers charged with the responsibility of protecting truth, justice and country. Yet they are extremely polite, respectful and well mannered, carrying out their responsibilities with style, class and grace. If we can just set aside the whole killing part for the time being, it is my belief that we lawyers should be acting in the same manner. Although we talk about civility and professionalism all of the time, I always believe there is room for improvement and that we should all strive to be “Kingsmen.”

When we discuss civility and professionalism we focus upon our relationships with opposing counsel: granting extensions, getting along, working together and generally trying not to engage in unnecessary disputes. However, politeness and manners go well beyond these issues. On a daily basis we are interacting with court reporters, bailiffs, parking attendants, court clerks, waitstaff during our business and trial lunches, as well as our jury and our Judges. Politeness and manners should be extended throughout all of our daily interactions no matter how attenuated the relationship.

This is a practice I have always followed. Over the years I have watched other attorneys walking on eggshells while addressing the court, but thereafter speaking harshly to a court staffer. I

have seen attorneys snapping at waiters and waitresses during lunch breaks from trial. I have even witnessed some counsel being rude to janitors as they are cleaning a restroom and apparently “in the way” during the exact moment that a trial is taking the morning or afternoon break. I am always astonished when I see such behavior, but the last thing I want to do is go and get in the face of someone acting in such a manner so I just let it go.

Recently I completed a rather lengthy trial and my opposing counsel was rude to the court staff, kept violating court orders right in front of the jury, never held the door for anyone, failed to stand when the jury arrived, never asked permission to move around the court or relocate the podium, and eventually started having open court disputes with the judge in front of the jury. When the trial was over I went to speak to the jury to find out what they felt was important in their deliberation process. This group of jurors spent 30 minutes discussing the rudeness of opposing counsel and how offended they were by his behavior, in contrast to how polite my associate and I were throughout the trial. After months of litigation, dozens of expert depositions, hundreds of hours in trial preparation, and hundreds of thousands of dollars spent trying the case, the jury's first comments were focused upon politeness and manners.

I prefer to be polite and well-mannered. After all of these years I have learned that there is another benefit as well. You can be a “trained killer” and at the same time handle your assignments with class, style, grace, politeness and manners. Therefore, in conclusion, I submit “Schonbuch's Rules Of Killing With Kindness”:

- 1) Be polite to everyone from the valet parking attendant right up to the Judge.
- 2) Always say “please” and “thank you” no matter what the circumstances.



Michael Schonbuch
ASCDC 2015 President

- 3) Always knock on the Judge's chamber door (and any door for that matter) before entering.
- 4) Always let opposing counsel get to side bar first.
- 5) Always stand when the jury enters and exits.
- 6) Always introduce yourself to all members of the court staff before trial begins and say hello each and every morning no matter how busy you are getting ready for the day.
- 7) Always ask for permission to move the podium or walk around the courtroom.
- 8) Even if you are running late, be kind to the officers working at the security line.
- 9) Never be late-anywhere.
- 10) Always shake opposing counsel's hand-win, lose or draw.
- 11) Always hold the door entering and exiting no matter who is approaching, especially if it is the opposing party or witness.
- 12) Always remember: It is not your courtroom. It is theirs. They work there every day and you are just visiting. Clean up after yourself, push your chairs in when leaving, say good night every day and maybe, just maybe, you will be welcomed back the next time.
- 13) Remember: Manners Maketh Man. 🍷

A handwritten signature in black ink, appearing to be 'MS', with a long horizontal line extending to the right.

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Big Issues in Civil

Lawyers accustomed to the gradual development of case law often are surprised by how quickly significant changes in the law can be made by the legislature. Frequently the entire process requires months, not years, and bills introduced in January can be enacted by August, signed in September and effective on January 1 of the following year. As Sacramento approaches the end of the 2015 legislative year, important issues of civil procedure are being debated, and the California Defense Counsel is front and center in the discussions.

Demurrers, expedited jury trials, summary judgment and partial summary adjudication are all “at issue” in the California Assembly and Senate. Stakeholders involved in the discussions include such diverse organizations as the Consumer Attorneys of California, California Judges Association, Judicial Council of California, California Chamber of Commerce, Civil Justice Association of California, and many insurer organizations. Aligning the interests and views of these groups, which are often opposed, is the secret of successful legislation.

Demurrers are the subject of SB 383 (Wieckowski). Responding to concerns of the judiciary that demurrers are consuming large percentages of the law and motion calendar in some counties, but mindful of the defense view that demurrers represent a critical tool in refining causes of action, SB 383 proposes a meet and confer obligation prior to demurrer. But the “meat” of the “meet and confer” is in the details, which are so important. When and how is the meet and confer to be conducted? What happens if lawyers are not able to talk, or if a lawyer is not conferring in good faith? Are there specific cases where meet and confer is not appropriate? Should there be a limit on the number of times a complaint should

be amended absent some showing of good cause?

In addition to conditioning demurrers on meet and confer, SB 383 requires plaintiffs to amend complaints by the date that the opposition to the demurrer would otherwise be due, to eliminate the circumstance where complaints are amended just prior to demurrer hearings, mooting out the preparations of judges and court staff. As this column is written, the Chamber of Commerce and the Civil Justice Association are opposed to SB 383, believing that the meet and confer will cause unproductive delay, but discussions with these groups are continuing.

Expedited jury trials are addressed in AB 555 (Alejo). The law creating the current voluntary “EJT” process will sunset at the end of this year, and the discussion has been how to more effectively incentivize the use of the expedited process in appropriate cases. After much discussion, AB 555 has been amended to make the EJT process mandatory, for the first time, for limited jurisdiction cases. The bill gives lawyers the ability to unilaterally “opt-out” of EJT for cases with certain characteristics, however, including a possibility of punitive damages, an allegation of intentional conduct, an insurer reservation of rights, and more. A catch-all exemption is also provided where the judge determines that EJT is not appropriate. While the current voluntary program will continue where lawyers agree, the mandatory limited jurisdiction program will provide for a slightly longer amount of time to present cases, and a right of appeal to the appellate division of the superior court.

Various amendments to AB 555 have been taken to respond to concerns of insurers, and again, discussions over the details of the bill are ongoing.



Michael D. Belote
Legislative Advocate
California Defense Counsel

For summary judgment, SB 470 (Jackson) clarifies that judges need not rule on nonmaterial objections to evidence. CDC (and particularly ASCDC’s own Bob Olson) has been quite involved with the language, to insure that objections not ruled upon are preserved on appeal. This bill currently faces no opposition, and it will soon be sent to the Governor for signature.

Finally, AB 1141 (Chau) reinstates the ability of parties to stipulate to summary adjudication of issues, if judges determine that ruling on the issue will increase the chances of settlement or shorten the resulting trial. The bill also amends Code of Civil Procedure Section 998, to provide both plaintiffs and defense with a parallel ability to obtain post-offer costs.

Governor Brown will act by mid-October on all bills sent to him this year. 2015 may well go down as one of the most significant in many years in terms of the number and significance of bills relating to civil procedure. ♣

A handwritten signature in black ink, appearing to read "Michael D. Belote". The signature is fluid and cursive, with a large, stylized initial "M".

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Some among our membership apparently love the concept of marketing their firm's services. Others, while conceding the importance of marketing, would rather spend their time preparing opposition to motions for sanctions for failing to appropriately respond to discovery requests.

Certainly there are many, many different methods of marketing legal services, and these methods change and adapt to the times, conditions, technology, recipients, and the nature of the services being offered. I'd like to briefly touch on a specific marketing methodology which fortunately no longer exists. At least I don't think it does.

A week ago I ran into an old friend. I use the term "old" in the strictest sense. This fellow has an even lower bar number than I do, and had been practicing for several years before I began taking my first uncertain steps as a baby lawyer. Folks, we're talking more than forty years ago. My friend brought up a topic that I hadn't much thought about for many years, a marketing technique used those many years ago which, fortunately, dropped by the wayside a long way back. The older members of our association will probably recall the many different marketing efforts our firms used in those long ago days.

In those days we were known as "insurance defense" lawyers, and of course we were. We still are today, at least to a certain extent, but with the passage of time much of our practice has transitioned to some percentage of our work involving insurance defense, but also a great deal of work for many ASCDC firms now includes non-insurance related matters such as business litigation, intellectual property, ADA issues, employment matters, and transactional tasks. Forty years ago almost all our membership worked exclusively in insurance defense.

My friend laughingly recalled a specific old-time marketing technique that we might describe as the "extended lunch." Well yes, I do recall taking my first lawyerly baby steps and being invited by senior partners to some Friday lunches with local claims folks. These lunches would often extend far into the afternoon, and involved far more cocktails than was appropriate. My friend recalled that each insurance defense firm seemed to have a favorite lunch joint where these extended lunches would take place. I myself remembered a firm where I had a couple of friends, and that firm had an account at a well-known hangout where such lunches took place. I was grateful to this firm because they wouldn't let me purchase a drink in "their" hangout; it was always on their tab. For a baby lawyer on a starting salary with young kids at home this was a Godsend for which I was grateful.

Those of us who were there forty or so years ago can certainly be happy that the extended lunches eventually fell out of favor. Certainly we all lunch with clients occasionally, but I suspect that continuing to drink into the afternoon and sometimes never even returning to work essentially never takes places modernly. Not only is it a bad practice in and of itself, but over the years many, if not most, claim departments are primarily female, and many defense firms now have a large female contingent, and obviously our sisters practice much better judgment than many of us did "in the old days." During those olden days I fortunately never heard that any of our membership became involved in an accident or other untoward encounter, but still, I am grateful that such marketing techniques faded away long ago.


Perhaps one of you might consider an article for Verdict on the evolution of marketing techniques over the years since ASCDC was



Patrick A. Long

founded in 1960 until today. Technology has obviously played a large part in marketing during the last twenty years, but I've heard it said that being face to face with a prospective client serves as the bedrock of the best marketing effort. Fortunately there are numerous ways to achieve personal interaction, including CLE programs, bar organization activities, office visits, and yes, the occasional lunch, when permitted by the carrier. And as I reflect on whether or not you might be interested in doing a Verdict article, those with successful marketing techniques might not be inclined to share that success with the world.

Let's have lunch sometime soon,

Patrick A. Long
palong@ldlawyers.com 

A handwritten signature in black ink that reads "Patrick A. Long". The signature is stylized and cursive.





ASBESTOS LITIGATION: New Order on Disclosure of Bankruptcy Filings Creates New Transparency

by Stephen J. Kelley

For over 40 years, courts nationwide have addressed claims for compensation by individuals and families alleging exposure and damages resulting from asbestos. In the 1970s to mid-1980s, the prime targets for this litigation were companies involved with the mining and processing of asbestos, and manufacturers of insulation products that predominantly contained amphibole forms of asbestos. The volume of cases led to bankruptcy filings for the majority of these companies. Trust money was set aside by the bankruptcy courts. While plaintiffs' lawyers continued to pursue recovery from the trusts, they also broadened their

scope of defendants to include product manufacturers that were still solvent, but that made products containing only minimal amounts of less harmful forms of asbestos, as well as premises owners where asbestos-containing products may have been used, and employers whose workers used such products. Such claims are frequently asserted by plaintiffs who never used the defendant manufacturers' products but were only bystanders to use by others, or who never set foot on the defendants' premises but claim secondary exposure, through fibers brought home on the clothing of family members.

For many years, plaintiffs pursued recovery on parallel tracks, obtaining substantial sums from the trusts based on their own more significant direct exposures, while also seeking jury verdicts from solvent defendants for the same injuries. This was

in part possible because claims against the trusts were held confidential, allowing plaintiffs not only to conceal the funds they received, but also to conceal contentions tailored to trigger trust payments while making flatly contradictory exposure source allegations in civil suits. However, recent challenges by defendants have resulted in court decisions that have added transparency to the bankruptcy claim process, to the benefit of companies that are currently defendants in asbestos litigation. For matters pending in Southern California, defendants received such a favorable ruling on April 7, 2015, when Judge Emilie H. Elias of the Los Angeles County Superior Court issued an order directing disclosure of bankruptcy trust claims information for plaintiffs in Los Angeles, Orange and San Diego counties.

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This article traces the history of asbestos litigation and places into context the significance of the order issued by Judge Elias and jurists in other venues requiring transparency for bankruptcy trust claims.

On September 10, 1973, the United States Court of Appeals for the Fifth Circuit in New Orleans issued its landmark decision in *Borel v. Fibreboard Paper Products* (5th Cir. 1973) 493 F.2d 1076, affirming a judgment based on a verdict of strict liability against asbestos manufacturers. It has been said that the Borel decision triggered the greatest avalanche of toxic-tort litigation in the history of American jurisprudence. It is estimated that over 50,000 asbestos cases are filed each year.

On August 26, 1982, the Manville Corporation (formerly Johns-Manville Corporation), filed a petition for relief under Chapter 11 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1101 et seq. (1982). At the time, Manville was one of the healthiest companies in America and was listed in the Fortune 500. Arising out of that bankruptcy was the creation of the first asbestos personal

injury trust for the payment of asbestos claimants who allege injuries from exposure to Manville products. The trust was funded by a majority of Manville's stock and, after confirmation by the Court, the trust became the only recourse for asbestos claimants for claims against Manville. For many years, the Manville bankruptcy and trust creation became the model other asbestos product manufacturers followed when they were forced to seek Chapter 11 relief due to asbestos claims.

In 1994, Congress enacted section 524(g) of the United States Bankruptcy Code authorizing the establishment and funding of a trust to pay present and future asbestos exposure claims. (11 U.S.C. section 524(g).) Pursuant to section 524(g), upon emerging from bankruptcy, all liabilities for asbestos exposure against the bankrupt entity are assigned to the newly created trust and all asbestos-related liability is discharged. Currently there are over 60 such trusts. These trusts pay billions of dollars to asbestos claimants each year. Many of those claimants also sue solvent defendants in the tort system.

A 2011 Rand Corporation study examined, in part, the information link between the tort and trust systems related to filing, disclosure and timing of trust claims for six states, including California. (Dixon, Lloyd and Geoffrey McGovern (2011) *Asbestos Bankruptcy Trusts and Tort Compensation*, Santa Monica, CA: RAND Corporation, www.rand.org/pubs/monographs/MG1104.) The study found that many courts had begun requiring plaintiffs who had filed trust claims to disclose at the least the amount of any payments to defendants whom those plaintiffs were suing. Accordingly, defense attorneys interviewed for the study reported their understanding that plaintiffs often waited to file trust claims until after settlement or entry of judgment in the tort case, opening the possibility for compensation above the amount found by the jury to have been suffered. The study also reported that, in the view of most defense attorneys, plaintiff's attorneys controlled the testimony provided by the plaintiffs and coached plaintiffs not to mention the products of bankrupt firms. This impeded

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Asbestos – continued from page 10

the defendant's ability to assign fault to bankrupt firms in the tort system.

In the same Rand study, some plaintiffs' attorneys said they routinely filed trust claims early in a case for reason of immediate availability of money, concern that trust payment percentages would drop over time, or statute of limitations requirements. Others, however, confirmed that they frequently delayed filing until after the tort case was resolved. Some indicated a belief that it was their ethical obligation to delay filing if the information would assist defendants in assigning liability to bankrupt firms. Although the Rand study was not intended to definitively prove these practices, this potential for abuse was identified.

On January 10, 2014, in the matter of *In Re Garlock Sealing Technologies, LLC*, et al., United States Bankruptcy Judge George R Hodges issued his "Order Estimating Aggregate Liability" in which the Court determined that the amount sufficient to satisfy Garlock sealing technologies, LLC's

liability for present and future mesothelioma claims, for purposes of funding its asbestos personal injury trust, was \$125 million. In reaching that conclusion, the court considered evidence presented over seventeen trial days, including 29 witnesses and hundreds of exhibits. The court determined that the best evidence of Garlock's aggregate responsibility was the projection of its legal liability, taking into consideration causation, limited exposure and the contribution of exposures to other products. The Court found that estimates of Garlock's aggregate liability based on its historic settlement values were not reliable because those values were "infected with the impropriety of some law firms and inflated by the costs of defense." In an unprecedented move, to determine Garlock's true liability, the Court allowed Garlock full discovery in 15 settled cases. For each of the 15 cases, through that discovery, Garlock demonstrated a pattern by plaintiffs and their counsel, represented by five major firms, of withholding exposure evidence and other abuses as follows:

- a. One of the leading plaintiffs' law firms with a national practice published a 23-page set of directions for instructing their clients on how their testimony about certain exposures could be tailored to maximize recovery based on different entities' solvency status;
- b. It was a regular practice by many plaintiffs' firms to delay filing trust claims for their clients so the remaining tort system defendants would not have that information. One plaintiff's lawyer justified this practice as based on an ethical duty to conceal the truth about such claims: "My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies."
- c. In the 15 settled cases, Garlock demonstrated that exposure evidence was withheld in each and every one of them. These were cases that Garlock had settled for large sums. Garlock's discovery showed what had been withheld in the tort cases – on average plaintiffs disclosed only about 2 exposures to bankrupt companies' products, but after settling with Garlock, they made claims against about 19 such companies' Trusts.

The Court cited specific egregious examples of cases where exposure evidence was withheld:

- In a California case, a plaintiff, who was a former Navy Machinist aboard a nuclear submarine, denied exposure to Pittsburgh Corning's Unibestos insulation, fought to keep Pittsburgh Corning off the verdict form, and affirmatively represented to the jury there was no Unibestos insulation on the ship. However, after a \$9 million verdict, plaintiff's lawyers filed 14 Trust claims, including in the Pittsburgh Corning bankruptcy, certifying "under penalty of perjury" that the plaintiff had been exposed to Unibestos



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insulation. Plaintiff's lawyers failed to disclose exposure to 22 other asbestos products;

- In a Philadelphia case, the plaintiff did not identify exposure to any bankrupt companies' asbestos products, stating in answers to written interrogatories that plaintiff had "no personal knowledge" of such exposure. The defendant settled for \$250,000. Six weeks earlier, however, plaintiff's lawyers had filed a statement in the Owens Corning bankruptcy case, sworn to by plaintiff, that he "frequently, regularly and proximately breathed asbestos dust emitted from Owens Corning Fiberglas's Kaylo asbestos-containing pipe covering." Plaintiff's lawyers in total failed to disclose exposure to 20 other asbestos products for which Trust claims were made, 14 of which were supported by sworn statements contradicting denials in tort discovery;
- A New York case settled for \$250,000 during trial in which plaintiff denied exposure to insulation products. After settlement, plaintiffs' lawyers filed 23 Trust claims – 8 of which were filed within 24 hours after the settlement;
- In another California case, Garlock settled for \$450,000 with a Navy technician. Plaintiff denied ever seeing anyone installing or removing pipe insulation on ship. After settlement, plaintiff's lawyers filed 11 Trust claims – 7 based on declarations that plaintiff personally removed and replaced insulation and identified, by name, the insulation products to which he was exposed;
- In a Texas case, plaintiff received a \$1.35 million verdict upon claims that his only asbestos exposure was to Garlock crocidolite gasket material. In discovery responses, plaintiff disclosed no other product to which exposure was alleged, specifically denied knowledge of the name "Babcock & Wilcox," and attorneys represented to the jury there was no evidence injury was caused by exposure to Owens Corning insulation. The day before plaintiff denied

knowledge of Babcock & Wilcox, plaintiff's lawyers filed a Trust claim against that entity on his behalf. After verdict, plaintiff's lawyers also filed a claim with the Owens Corning Trust.

Garlock identified 205 additional cases where plaintiffs' discovery responses conflicted with at least one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel also identified 161 cases during the relevant period where Garlock paid recoveries of \$250,000 or more. Further, the limited discovery allowed by the court demonstrated that almost half of those cases involved misrepresentation of exposure evidence. The court in Garlock noted that, while the 15 settled cases for which discovery was allowed were not purported to be a random or representative sample, the fact that each and every one of them contained demonstrable misrepresentation was surprising and persuasive. The court further commented that it appeared certain that more extensive discovery would show more extensive abuse.

The Garlock court contrasted those cases in which exposure evidence was withheld to several cases in which Garlock obtained evidence of trust claims and was able to use them in its defense at trial. In three of them, Garlock won defense verdicts and in a fourth it was assigned only a two percent liability share. The court in Garlock also considered persuasive, observations of Garlock's outside counsel who were involved in negotiating or trying cases, and of its general counsel involved in approving settlements. They observed that when the thermal insulation defendants were excluded from the tort system, evidence of exposure to their products disappeared. This was corroborated by the discovery allowed by the Garlock court.

In the wake of the Garlock order, many jurisdictions began pursuing in earnest greater transparency for asbestos personal injury settlement trusts to report on claims by legislation. (See, "Furthering Asbestos Claim Transparency (FACT) Act of 2015" (H.R. 526); West Virginia Senate Bill 411, also known as the Asbestos Bankruptcy Trust Claims Transparency Act and the

Asbestos and Silica Claims Priorities Act.) Other jurisdictions have looked to the courts for solutions.

Judge Emilie H. Elias, the Coordination Trial Judge for asbestos cases in Los Angeles, Orange and San Diego Counties, on April 7, 2015, issued an order that goes far to ensure transparency in asbestos trust claims. Judge Elias' Order specifically provides that facts relating to a plaintiff's or a decedent's alleged exposures to asbestos are not privileged and are discoverable. Plaintiffs must disclose all facts relating to all alleged exposures to asbestos regardless of whether attributable to named defendants, bankrupt or other entities, and whether the facts have been or ever will be included in a claim to a third-party to obtain compensation for asbestos-related injury.

Judge Elias' Order specifically requires plaintiffs' disclosure of documents and other asbestos bankruptcy trust filings. Plaintiffs must execute and provide a signed Asbestos Bankruptcy Trust Authorization which comprehensively encompasses any and all documents and information submitted or communicated to a trust by a claimant or claim holder. Plaintiffs must respond to six additional interrogatories (73 - 78) appended to the LAOSD Standard Interrogatories to Plaintiffs. The interrogatories identify, but are not limited to, 61 Asbestos Bankruptcy Trusts. The interrogatories, in part, key off a revised interrogatory number 68 and require plaintiffs to identify facts supporting any claim identified in response to interrogatory number 68 (73) and all persons who have knowledge of facts about each product a plaintiff or decedent was exposed, which support their claim (74). However, the additional interrogatories then delve deeper. For each of the 61 identified Asbestos Bankruptcy Trusts, Plaintiffs are required to identify all facts (75), witnesses (76) and documents (77) that relate to any claimed exposure. Plaintiffs must supplement and update the responses to defendant's additional interrogatories and interrogatories 68 to 72 of the LAOSD Standard Interrogatories to plaintiffs no later than 5 days before trial, if new witnesses or documents have been discovered.

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Plaintiffs in Southern California asbestos actions also must produce all documents sent to, received from, shown to, exchanged with, or otherwise disclosed to any established or pending asbestos trust for any purpose including, but not limited to, supporting a claim, providing notice of or reserving a place for, a future claim for compensation for asbestos-related injury. (In some situations, plaintiffs' counsel were known to file trust paperwork that stopped just short of actually asserting a completed claim, so that in discovery they could truthfully say they had not presented any claim.) In addition, plaintiffs must produce declarations and/or affidavits circulated to someone other than plaintiff and plaintiffs' counsel (or their law firm) and set forth facts regarding a plaintiff's and/or decedent's exposure to asbestos or asbestos-related injury. This production of bankruptcy trust related documents is required to be made at the same time that plaintiffs serve responses to Defendants' Standard Interrogatories. Further, plaintiffs are required to supplement the production no later than five days before trial. The Elias Order specifically provides plaintiffs may not object

or refuse to produce information related to exposure facts in response to appropriate discovery requests on the grounds that no claims have been or will be made based on such facts or because such facts may also appear in otherwise privileged documents such as signed affidavits or un-submitted bankruptcy trust claim forms.

The Elias' Order was issued retroactively to apply on or after February 1, 2015, for a six month trial period. Thereafter the order is to remain in effect, unless amended, vacated or otherwise superseded by further order of the Court.

Judge Elias' Order goes a long way towards promoting transparency in Southern California asbestos litigation. Disclosure of claims relating to bankruptcy trust filings helps level the playing field for current asbestos defendants. Exposure of such claims allows defendants to identify inconsistent claims and argue for a proper allocation of fault among all potentially liable parties. The Elias Order does not go so far as to bar plaintiffs from holding off on any trust claim communications until after

resolving claims against solvent defendants and does not provide a mechanism for offsetting a defendant's liability by trust payments received after trial (although a defendant could seek to introduce evidence of the reasonably likelihood of future payments for that purpose). And while the trusts have little interest in undertaking the administrative burden of cross-checking claims against contradictory allegations in civil actions (the trust forms do not require disclosure of such information from a claimant), nonetheless, this order is a most welcome change for defense counsel and defendants in the defense of asbestos lawsuits. ♣



Stephen J. Kelley, Bowman and Brooke.

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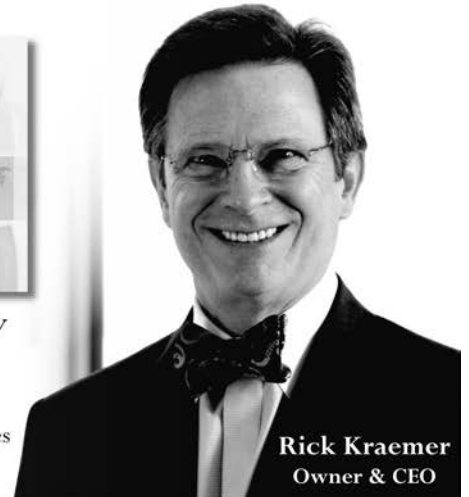
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Advising Clients On the Best Way to Navigate Whistleblower Issues

by *Laura Reathaford*

California provides extremely broad protections for employees who seek to disclose or refuse to participate in purportedly illegal activity in the course of their employment. These individuals are commonly referred to as “whistleblowers.”

Advising employers on how to properly navigate through whistleblower issues is not easy. Involving the Human Resources (HR) department can be useful, however, since most employers already direct employee complaints to the HR department and HR representatives are generally trained on how to receive and investigate personnel complaints. HR can also assist with policy development, management training and, when necessary, monitoring compliance with an employer’s anti-retaliation policies. While the thoughts below represent more of an idealized “wish list” of best advice practices and do not reflect the legal standard of care required of an employer, defense counsel should consider addressing these ideas with their employer clients to fend off future litigation.

Policy Development. When drafting whistleblowing policies, employers should start with the premise that ethical conduct and the reporting of illegal conduct are good things and should develop policies that *encourage* whistleblowing. This is particularly important since California law specifically prohibits discouraging whistleblowing.

Employers who encourage ethical behavior and take complaints about misconduct seriously arguably demonstrate a desire to follow the law. This, in turn, increases employee loyalty and productivity which, in turn, benefits the company in ways beyond avoiding tort liability. In March 2013, for instance, *Forbes* magazine reported on “The World’s Most Ethical Companies” as designated by The Ethisphere Institute recognizing that “companies... understand that a strong culture of ethics is also key to helping drive financial performance.” And that “...studies show that employees increasingly want to work for an organization that aligns with their own personal values. They are more loyal to such organizations.”

Accordingly, employers should explore ways to explain to employees that unethical and illegal conduct will not be tolerated. Employers should also (to the extent practicable) inform employees of the kind of conduct that it expects from its employees and that the employer will not tolerate any illegal conduct whatsoever. Importantly, employers should make clear that employees are not expected to engage in any illegal activity, should refuse to engage in any illegal activity, and should report any suspicions that illegal activity to HR.

Along these same lines, employers should examine their procedures for the

receipt, assessment and investigation of whistleblower complaints. While HR is typically best suited to handle the complaint, some larger employers appoint specialized personnel outside of HR and/or provide a 1-800 hotline to receive and record complaints. Ideally, any written policy will direct employees to specific personnel (or hotline information) who can receive the complaint, while assuring confidentiality to the extent practicable.

Once a complaint is received, employers should evaluate their procedures for handling and investigating the complaint. Using HR for this purpose is favorable in most cases because they already have knowledge of the company and its personnel, are familiar with the company’s policies, often have education and experience with the law surrounding discrimination and retaliation, and are less often the decision makers with respect to pay and promotion decisions.

Management Training. While most employees bring their complaints to HR, many others may complain to their direct supervisors or someone in operations with a supervisory role. Oftentimes when complaints are made, they are not always clearly communicated as complaints. Importantly, California’s “anticipatory retaliation” standard imputes liability to

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employers who retaliate against an employee if the employer believes an employee *may* report or disclose illegal information. This makes it all the more critical that managers not only learn how to recognize a complaint but also recognize when an employee may be expected to complain.

Even with the best policies in place, employers face liability claims that can be difficult to dispose of summarily because of the “he said, she said” nature of many disputes. However, liability prevention starts with education and training. HR is often well equipped to provide this training since most HR managers are trained in whistleblowing and retaliation laws and likely have participated in drafting the company’s policies.

Disseminating (or simply passing along) the law or policy information may not be enough to avoid liability. Going the extra mile by conducting focus groups with managers and employees about issues that may concern the workforce, along with role playing examples of how complaints are made (demonstrating how some complaints can be vague and unspecific), may prove useful to managers fully understanding the variety of different ways employees may complain or may be expected to complain.

Managers should also be trained not to pre-judge a complaint. All too often, whistleblowers allege that they brought a concern to a supervisor’s attention only to have the supervisor summarily dismiss the complaint based on the supervisor’s belief that the complaint lack merit. Managers can be most effective when they receive complaints in a positive way, without pre-judging the merit of the complaint, and even praising the complainant for coming forward. This approach may help the employee feel “heard,” and thus avoid a later claim altogether. And, if litigation does arise, indications that the manager listened with an open mind may go a long way to demonstrating to the jury that the employer was not attempting to squelch complaints. Thus, after a complaint is received by a manager, the manager may do well to reassure the informant that the complaint will be investigated. Importantly, managers should be taught where to forward

complaints and if necessary, whether and how to communicate the outcome of the investigation back to the informant.

Ensuring Compliance with Anti-Retaliation Policies. Even if an employee makes a complaint that is ultimately found by the employer to lack merit, the employer could still be liable under the whistleblower statute for retaliation if an adverse employment action is taken against a whistleblower because they engaged in whistleblowing activity.



Assuming employers have a policy against retaliation, HR can be instrumental in ensuring compliance with this policy.

For instance, after a complaint is made, it may be helpful to have someone from HR appointed as a liaison to the informant. The liaison can check-in periodically with the employee to ensure that he or she does not feel that the work environment has changed because a complaint was made. This appointee can also monitor the workplace periodically and make notes of any observed workplace behavior (either positive or negative), and can be assigned to monitor performance reviews or employee counselling documents to ensure neutrality has been maintained and respected.

Appointing such a liaison, with a clearly defined role as outlined above, helps the

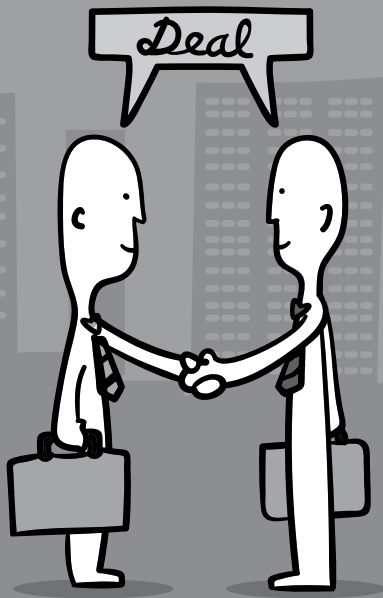
employer demonstrate transparency in the process. While a de facto liaison may often be involved when disputes arise, the formal appointment of such a person shows that person’s efforts to be a constructive part of the process, minimizing the chance that he or she may later be characterized as someone who is just trying to paper over an issue.

Closing remarks. California protections for whistleblowers are broad, but not every person who complains about something at the workplace has a valid grievance, and airing complaints should not insulate the complainer from meeting the employer’s legitimate job performance requirements. Too often, underperforming employees, or those whose duties are revised for perfectly proper business reasons, argue that adverse employment actions against them are the result of workplace grousing, repackaged as “whistleblowing.” Employers are advised to get in front of whistleblower issues before litigation ensues. By using corporate HR departments to develop policies that encourage whistleblowing, to train managers about how to receive and respond to complaints, and to monitor potential retaliation, employers should be better positioned to defend against whistleblower retaliation claims. And, while it may be impossible to predict every instance when an employee might be expected to complain, conducting focus groups and asking employees about their workplace concerns in advance may assist employers keep whistleblower issues in-house and out of court. ▼



Laura Reathaford

Laura Reathaford is a partner in the Los Angeles office of Venable LLP, specializing in the defense of employment matters, including wage and hour class actions and PAGA claims.



Reap the Benefits of the Joint Defense Agreement – With the Right Counsel in the Right Case

by Wendy Wilcox and Glenn Barger

One of the most frustrating issues for defense counsel and their clients and principals is how much they spend in valuable resources responding to other defendants' attacks that ultimately benefit only the plaintiff. One tried and true approach to combat this issue is to utilize a Joint Defense Agreement (JDA).

JDA's have been around for many years; however, defense counsel far too often do not take advantage of the many benefits JDA's can provide. JDA's can help lead to an efficient and effective defense, reduce costs, and most importantly, streamline the defendants' efforts so that they are unified in attacking the plaintiff's claims instead of each other. However, JDA's must be used strategically with a well thought-out plan and a coordination of efforts with the right counsel in the right case to be the most effective.

A JDA is a detailed written agreement created by defense counsel, with the consent of their clients and used by parties with common interests to coordinate strategies, pool resources and reduce costs. A comprehensive written JDA can be the best protection for defendants against the undesirable risks such as the waiver of privileged information, finger-pointing, generating exorbitant costs and expenditure of excessive time and resources. The primary purpose of the JDA is to preserve the common interest and joint defense privileges without creating any attorney-

client relationships that may not otherwise exist and provide protections if the JDA ultimately unravels. JDA's have been permitted pursuant to the "Joint Defense Doctrine" and "Common Interest Doctrine" as recognized at least in part by *Hunydee v. United States* (9th Cir. 1965) 355 F. 2d 183 and *Continental Oil Company v. United States* (9th Cir. 1964) 330 F. 2d 347.

The right case for a JDA is one where the defense can be aligned either on liability or damages or both. An added bonus of "the right case" is where the plaintiff has galvanized the defense parties. For example, if the plaintiff's strategy in proving the case is to attack all defendants and not differentiate between them regarding which is liable or caused plaintiff's damages, it's easy for the defendants to align themselves and work together to attack back with a unified front. No one defendant has anything to lose by working with all defendants under the JDA because the plaintiff is treating them as if they are all liable and caused the plaintiff's damages.

The right defense counsel include those who are experienced, take advantage of each JDA members' skillsets, and take leadership in dividing up the labor. Importantly, JDA members should check their egos at the door and be prepared to allow others to take the lead when the situation dictates. A JDA usually does not work to the benefit of everyone when counsel is inexperienced, lacks leadership or when the defense cannot

align themselves or coordinate efforts to effectively divide the labor.

The basic JDA should include at least the following six general terms:

- (1) clear identification of the JDA members – parties, counsel, experts, consultants, insurers (and anyone working with the defense parties);
- (2) a provision that any privilege as to any communication among the JDA members or work product of defense counsel cannot be waived;
- (3) a provision that the JDA members cannot share information with anyone outside the members of the JDA;
- (4) a provision that any claims by and between JDA members relating to the case are specifically reserved as necessary (until after the case is over);
- (5) a provision that the JDA members will not offer any opinions, conclusions and/or testimony adverse or otherwise critical of any other member, and will refrain from asking any questions or soliciting any opinions, conclusions or testimony adverse or critical of any other member; and
- (6) a provision that any withdrawal of a JDA member must be made in writing to all members.

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Joint Defense Agreement – continued from page 17

With respect to number two above, the following two cases are instructive regarding the privileged communication protections provided by a JDA: (*U.S. v. Henke* (9th Cir. 2000) 222 F.3d 633, 637 [entering into a joint defense agreement establishes an implied attorney-client relationship between all defendants and attorneys who are parties to the agreement]; see also *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 Cal. App.4th 969).

If the JDA includes a provision to reserve rights as set forth in number four above, the defense side of the case through litigation and trial can be cut down significantly because the defense parties have agreed to reserve their rights on their cross-claims until after the case or trial is over. Quite simply, this also provides peace of mind that you may still pursue your claims and defenses against other parties at a later time while not assisting the plaintiff to prove his or her case. It can also be helpful to include a provision these cross-claims will be mediated rather than litigated (to further save time and costs).

If the JDA includes a provision to not offer opinions, conclusions and arguments adverse to other participants as set forth in number five above, everyone benefits because the defense experts and witnesses refrain from finger-pointing (which only leads to arguments, meet and confer discussions, motions, further depositions and other issues our typical adversarial system brings with it). With this anti-defense pointing provision along with the reservation of rights provision in your JDA, time and money is also saved at trial because if the defense parties are not pointing proverbial fingers at each other, fewer lay and expert witnesses are typically needed to present the defendants' case and disagreements typically can be resolved later through alternative dispute measures. The defense can then focus their valuable trial time on attacking and defeating the plaintiff's claims.

It is helpful to keep several issues in mind while navigating through the case with a JDA. Timing is always an issue regarding when to execute the JDA. Typically, the JDA should be executed early on so there is enough time to coordinate efforts, divide

the labor and start sharing costs. Also, the sooner the JDA is executed the sooner JDA members can take advantage of safely sharing privileged information.

A JDA can be narrow and among a couple of defendants or broad and among all defendants. It does not need to include all defendants to reap its benefits. For example, the tenants of a commercial property could execute a JDA among themselves without including the property owner in a premises liability action. It depends on the issues in the case and the strategies of the defendants and their counsel. The key is that any time parties cooperate and work with each other, everyone can benefit.

Defense counsel need to work together towards the ultimate goal in the case, i.e., work together to defeat plaintiff's case regarding liability or damages or both. In particular, defense counsel should focus on the ultimate goal at the macro level and respect each other, not focus solely on their or their client's individual needs and wants at the micro level. Counsel can and should aggressively defend the client at the micro level while at the same time work with the JDA members at the macro level to coordinate efforts and share costs to show the plaintiff cannot prove any liability or his or her damages. It defeats the purpose of the JDA for defense counsel to focus solely on their client's individual position in the case and the JDA will not work to the advantage of the parties.

Defense counsel should also divide up the labor by designating particular counsel to take the lead in deposing plaintiff's lay and expert witnesses. For example, in a construction defect case defense counsel

for the roofer should be designated to take the depositions of the plaintiff's witnesses regarding the roof claims. This same approach should be considered at trial. Coordinating efforts in this way helps to prevent the "jack of all trades, master of none" approach too often seen from counsel who does not take advantage of the skillset of their aligned colleagues. Further, defense counsel should divide up the labor among counsel regarding pre-trial motions. Rather than having all defense counsel prepare motions in limine, counsel should divide up the labor so that certain counsel take lead and the remaining counsel file joinders.

If there is a coordinated effort by the defense from the outset of the case, through discovery, through pre-trial motions and trial under a JDA, everyone can and will reap its benefits because undoubtedly this will result in a better defense to the detriment of the plaintiff all while saving time and money for the client. ♡



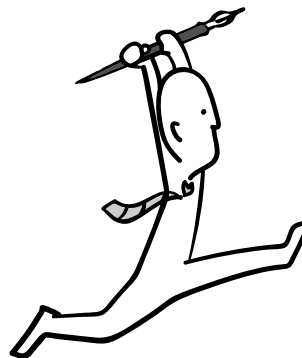
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NOTES ON RECENT DECISIONS

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. ♣



Lisa Perrochet

ANTI-SLAPP

An order granting a special motion to strike a "SLAPPback" cause of action is reviewable by discretionary writ, not interlocutory appeal as a matter of right.

West v. Arent Fox LLP (2015) 237 Cal.App.4th 1065

On behalf of its client residential facility, Arent Fox LLP filed a defamation complaint against Val West (West). After the trial court granted West's anti-SLAPP motion as to the defamation claim, West sued Arent Fox for malicious prosecution. Arent Fox moved to strike West's malicious prosecution claim, which was a "SLAPPback" cause of action. The trial court granted Arent Fox's motion, and West appealed.

The Court of Appeal (Second Dist., Div. Five) dismissed West's appeal. While rulings on anti-SLAPP motions are subject to interlocutory appeal under Code of Civil Procedure sections 425.16 and 904.1(a)(13), rulings on "SLAPPback" motions are not. Rather, "SLAPPback" motions are specifically governed by section 425.18, which provides that section 904.1(a)(13)'s interlocutory appeal authorization does *not* apply to such motions. Orders striking "SLAPPback" causes of action are reviewable only by writ within 20 days of the order, per section 425.18(g). ♣

Malicious prosecution claim is unlikely to succeed for purposes of anti-SLAPP statute where the malicious prosecution plaintiff is still litigating his own cross-claims in the underlying action.

Pasternack v. McCullough (2015) 235 Cal.App.4th 1347

After being sued for breach of a home purchase contract, homebuyer filed a malicious prosecution suit against the seller's attorneys. The

attorneys filed an anti-SLAPP motion. The trial court granted the motion on the ground that the homebuyer could not show a likelihood of prevailing on his malicious prosecution claim (prong two) because his cross-claims against the seller were still pending, so no judgment in his favor had yet been entered in the underlying action. The homebuyer appealed, arguing that he had prevailed on the seller's claims and the pendency of his own affirmative claims for relief was irrelevant.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. The court held that the homebuyer could not establish the favorable-termination element of his malicious prosecution cause of action while still pursuing a cross-complaint in the underlying action against some of the same defendants he claimed maliciously filed the complaint in the underlying action. Permitting the malicious prosecution action against the seller's attorneys to proceed while they were still representing the seller in the underlying action would create the appearance of a conflict of interest between the attorneys and their still-client.

See also *Parrish v. Latham & Watkins* (2015) 238 Cal.App.4th 81 [anti-SLAPP motion properly granted where malicious prosecution defendant defeated summary judgment motion in the underlying action; under the "interim adverse judgment rule," the defendant's successful defeat of the summary judgment motion precluded a malicious prosecution action even though the same trial judge who ruled on the summary judgment motion later found the defendant initiated the action in bad faith].

See also *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200 [anti-SLAPP motion properly granted because litigation privilege protected attorneys' receipt of allegedly stolen hard drive in the course of discovery in a case in which they were attorneys of record] ♣

ATTORNEY FEES AND COSTS

Civil Code section 3291 prejudgment interest may not be awarded on costs.

Bean v. Pacific Coast Elevator Corporation (2015) 234 Cal.App.4th 1423

In this personal injury case arising out of a vehicle accident, the jury awarded the plaintiff \$1.27 million in damages. That award exceeded the plaintiff's offer of judgment under Code of Civil Procedure section 998. The trial court then awarded the plaintiff \$34,830 in costs and ordered prejudgment interest under Civil Code section 3291 to run on the entire judgment (damages plus costs).

In the defendant's appeal from the judgment, the Court of Appeal (Fourth Dist., Div. 1) held that section 3291 prejudgment interest does not run on the costs portion of a judgment. The court reasoned that under *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, prejudgment interest runs only on damages for personal injury, which costs are not.

See also *Lee v. Silveira* (2015) 236 Cal.App.4th 1208 [when determining whether defendant failed to obtain a more favorable judgment than its settlement offer under Code of Civil Procedure section 998, trial court properly first reduced the jury verdict's for past medical expenses, which was based on full amounts billed, to the smaller amount actually paid by plaintiff's insurer]. ▼

Prevailing defendants in FEHA cases may recover costs and fees at the trial court's discretion, but not as a matter of right, and only if plaintiff's case was objectively groundless.

Williams v. Chino Valley Independent Fire District (2015) 61 Cal.4th 97

The plaintiff sued his employer, a local fire district, for employment discrimination under the California Fair Employment and Housing Act (FEHA). The fire district prevailed on summary judgment and the trial court awarded prevailing party costs pursuant to Code of Civil Procedure section 1032 (awarding costs as a matter of right). The plaintiff appealed, arguing that costs awards in FEHA actions are governed not by Code of Civil Procedure section 1032, but by FEHA, Government Code section 12965(b) (awarding costs in the trial court's discretion). Additionally, the plaintiff argued that the trial court's discretion in awarding costs is bounded by *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, which says that an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit.

The California Supreme Court agreed with the plaintiff. Government Code section 12965(b) takes precedence over the more general Code of Civil Procedure section 1032. The *Christiansburg* rule governs the trial court's discretion in awarding fees under section 12965(b), so fees and costs cannot be awarded against a losing plaintiff unless the trial court determines that the plaintiff's action was frivolous.

But see *Cypress Semiconductor Corporation v. Maxim Integrated Products, Inc.* (2015) 236 Cal.App.4th 243 [award of attorney fees to prevailing defendant pursuant to Civil Code section 3426.4 (authorizing such an award where a claim for misappropriation of trade secrets is found to have been made in bad faith) was proper where finding of bad faith was amply supported by the evidence and defendants were prevailing parties because the plaintiff dismissed the suit only to avoid an adverse determination on the merits]

And see *Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608 [where engagement letter provided for an award of attorney fees to prevailing party in fee litigation, law firm that prevailed in dispute with client could recover reasonable fees and costs as to the entire litigation, including tort and contract claims raised in the client's cross-complaint]. ▼

CIVIL PROCEDURE

A party is entitled to mandatory relief from a dismissal entered as a terminating sanction for discovery abuse if her attorney is at fault and she substantially complies with the discovery order before the hearing on her application for relief.

Rodriguez v. Brill (2015) 234 Cal.App.4th 715

The trial court entered a judgment of dismissal against the plaintiff as a sanction for failure to timely respond to discovery. The plaintiff sought relief under the mandatory relief provision of Code of Civil Procedure section 473(b), which states that the court “shall” grant relief when an application for relief is accompanied by an attorney’s sworn affidavit of fault, unless the court finds the attorney was not in fact at fault. The plaintiff served her discovery responses soon thereafter. The trial court denied relief without explanation and the plaintiff appealed.

The Court of Appeal (Fifth Dist.) reversed. (1) A dismissal entered as a terminating sanction for failure to respond to discovery is a “dismissal” within the reach of section 473(b)’s mandatory relief provision; (2) the trial court must make explicit findings that an attorney is not at fault when denying mandatory relief despite an attorney’s affidavit of fault; and (3) the application for relief is “in proper form” under section 473(b) when the moving party serves substantially compliant discovery responses before the hearing on the application. The plaintiff was entitled to relief from the dismissal because her attorney was at fault for the circumstances giving rise to the terminating sanction and she served substantially compliant discovery before the hearing on her application. 📌

“Judgment” entered prematurely after first phase of bifurcated trial is not a final judgment for purposes of appeal.

Baker v. Castaldi (2015) 235 Cal.App.4th 218

In the first phase of a bifurcated bench trial, the trial court found the defendants liable for compensatory damages and that they acted with malice, fraud, and oppression sufficient to entitle plaintiff to recover punitive damages. The court entered a “judgment” based on those findings, and the defendants filed notices of appeal. The trial court subsequently entered other orders, including enforcement orders.

The Court of Appeal (Fifth Dist.) dismissed the appeal on its own motion. The “judgment” reflecting the findings in the first phase of the trial was not a final, appealable, judgment, because the issue of the amount of punitive damages remained to be tried. The court noted that even if its result was “harsh” because it effectively prevented the appellants “from obtaining review of several unusual orders now and possibly ever,” a court is “not at liberty to modify the standards for appealability.” This case highlights one of the problems with trial courts entering judgment prematurely, before completing all judicial action bearing on the amount owed on a judgment (such as determining settlement offsets, resolving equitable claims, and so forth). 📌

The jurisdictional deadlines for noticing and ruling on a new trial motion are triggered by service of notice of entry of judgment on the moving party, not *by* the moving party.

Maroney v. Iacobsohn (2015) 237 Cal.App.4th 473

Following entry of judgment in this personal injury case, the defendant sought costs based on the plaintiff’s failure to do better than the defendant’s offer to compromise under CCP 998. Plaintiff moved to tax costs, attaching a copy of the judgment to her motion. Twenty-two days later, plaintiff moved for a new trial, which was heard sixty days later. The defendant argued the motion was untimely because it was filed more than 15 days after the plaintiff served notice of entry of judgment, and similarly, that the trial court lacked jurisdiction to grant the motion because its time to do so had expired. The trial court believed a new trial was warranted, but was concerned about its jurisdiction to grant the plaintiff’s motion. The trial court therefore issued an order granting plaintiff’s motion conditioned on the appellate court determining it had jurisdiction to grant the motion.

The Court of Appeal (Second. Dist., Div. Three) held that the plaintiff’s motion was timely. The express language of CCP 659 and 660 provide that their deadlines are triggered by service *on* the moving party, so plaintiff’s purported service of the judgment with her motion to tax costs did not trigger the deadlines. However, the order “conditionally” granting the new trial was a nullity, because nothing in the statutory procedure governing new trial motions permits a trial court to grant a new trial conditioned on appellate review of the order. And, because the trial court did not issue a valid order within 60 days of the motion, the motion was denied by operation of law. While motions for new trial are reviewable on appeal from the judgment, the plaintiff provided no grounds for reversal of the judgment, so it had to be affirmed. 📌

In a multi-defendant case filed in the “wrong venue,” all defendants must answer before the court may consider retaining case for the parties’ convenience.

Cholakian & Associates v. Superior Court (McDonold) (2015) 236 Cal.App.4th 361

A trucking company sued its insurers and defense attorneys for alleged improper handling of a personal injury suit against it. The defense attorneys moved to transfer venue under Code of Civil Procedure section 396b(a), arguing the case was in the wrong venue because no individual defendant resided there, and no corporate defendant had its principal place of business there. The trial court found that venue was not proper, but denied the motion on the ground the convenience of witnesses favored retaining the case, as argued by the trucking company in its opposition to the transfer motion. The attorneys sought a writ of mandate.

The Court of Appeal (Third Dist.) granted writ relief. Under section 396b(a), an opposition to a motion to transfer venue to a proper court must be filed before the defendant answers, demurs, or moves to strike; if the motion is filed after that, the plaintiff may oppose the motion on the ground the convenience of witnesses and ends of justice would be served by the court retaining the case. Here, the insurer defendants had answered but the attorney defendants had not. It was improper for the court to consider the trucking company’s “ends of justice” opposition to its motion to transfer because under section 396b(a), *all* defendants must answer before the trial court may consider such an opposition. Until that point, the trial court cannot determine what issues are material, and properly evaluate which witnesses’ convenience would matter. Additionally, requiring all defendants to answer would best safeguard each defendant’s individual right to litigate in his county of residence. 📄

TORTS

A church has a duty to protect its congregant’s child from abuse by another congregant during church-sponsored activities.

Conti v. Watchtower Bible & Tract Society of New York, Inc. et al. (2015) 235 Cal.App.4th 1214

Plaintiff, a former Jehovah’s Witnesses member, sued her congregation, the Jehovah’s Witnesses’ headquarters, and Jonathan Kendrick (another member of the congregation) for Kendrick’s abusing plaintiff as a child during “field service,” a church-sponsored activity where members go door-to-door preaching in the community, and other activities. Before plaintiff was abused, elders and officials of the congregation and headquarters learned that Kendrick had molested another child. A jury found the congregation and headquarters liable for \$7 million in compensatory damages, and the headquarters liable for \$21 million in punitive damages (remitted to about \$8 million). The congregation and headquarters appealed.

The Court of Appeal (First Dist., Div. Three) held the appellants had no duty to warn the congregation’s members about Kendrick’s past child sexual abuse because there was no special relationship between the church and the congregation’s children. That required reversal of the punitive damages award, which was based solely on a theory of failure to warn. However, the appellants did have a special relationship with plaintiff with respect to the conduct of field service, and accordingly had a legal duty to exercise due care to prevent Kendrick from molesting plaintiff during that activity. The court found substantial evidence that appellants breached this duty by failing to supervise Kendrick during field service, and so affirmed the compensatory damages award.

See also *Doe v. Superior Court (First Baptist Church of San Jose)* (2015) 237 Cal.App.4th 239 [church that ran summer camp had a special relationship with its minor campers and its employees giving rise to a duty to disclose camp employee’s suspected molestation of camper to camper’s parents] [check status of petition for review] 📄

The Federal Tort Claims Act statute of limitations is subject to equitable tolling. *United States v. Wong* (2015) 135 S.Ct. 1625

The statute of limitations provision of the Federal Tort Claims Act, 28 U.S.C. § 2401(b), provides that a plaintiff must present her claim to the appropriate federal agency within two years after the claim accrues and, assuming the claim is denied, must file suit in federal district court within six months after the denial. The first plaintiff, Kwai Fun Wong, timely brought a false imprisonment claim against the Immigration and Naturalization Service within two years of the accrual of that claim and then, after INS denied the claim, sought to bring the claim in federal court by amending an earlier complaint she had filed. However, due to a delay in the district court's resolution of her motion to amend, she missed the six-month deadline to bring the claim. The second plaintiff, Marlene June, filed a claim with the Federal Highway Administration for wrongful death based on FHA's approval of a faulty highway median barrier that allegedly caused a fatal traffic accident. She filed this claim more than five years after the accident, but argued her claim was timely because she did not discover that FHA had approved the faulty median barrier until several years after the accident. The district court held both plaintiffs' claims were untimely, but the Ninth Circuit (sitting en banc to review an internal circuit split on the issue) reversed the dismissals, holding that the plaintiffs' claims were subject to equitable tolling.

The U.S. Supreme Court consolidated the two cases for review to address a circuit split on this issue. The Court then affirmed the Ninth Circuit's ruling, holding that the statutes of limitations set forth in § 2401(b) are not jurisdictional and are subject to equitable tolling if the district court finds the facts warrant application of that doctrine. 🗳️

Gym's release is insufficient to bar personal injury claims based on allegations of gross negligence.

Jimenez v. 24 Hour Fitness USA, Inc. (2015) 237 Cal. App.4th 546

The plaintiff was injured when she fell off a treadmill at a 24 Hour Fitness and hit her head on another piece of exercise equipment placed just over three feet away. She sued 24 Hour Fitness, which asserted that a release plaintiff signed when she joined the gym barred her claim. The trial court granted summary judgment for 24 Hour Fitness.

The Court of Appeal (Third Dist.) reversed. The plaintiff had presented sufficient evidence that 24 Hour Fitness set up treadmill too close to the other equipment in violation of the manufacturer's safety instructions, giving rise to a triable issue on gross negligence, which cannot be released. Further triable issues concerned whether the release was even enforceable because the plaintiff presented substantial evidence that, despite knowing that the plaintiff spoke only Spanish, 24 Hour Fitness's representative did not obtain a Spanish-speaking employee to explain the release and instead procured the release by misrepresenting the release's contents. 🗳️

A passenger who verbally encourages reckless driving may be liable for civil conspiracy and willfully interfering with the driver's control of the vehicle.

Navarrete v. Meyer (2015) 237 Cal.App.4th 1276

A passenger in a vehicle driven by her friend urged the driver to race at high speed down a residential street so they could "gain air" when the car hit dips on the street. The driver complied, but lost control of the vehicle and struck a parked car, killing the decedent, who had been attempting to put one of his children in a car seat in the back of the parked car. The decedent's survivors sued the passenger, raising claims for civil conspiracy and violation of Vehicle Code Section 21701, which provides that "[n]o person shall willfully interfere with the driver of a vehicle or with the mechanism thereof in such a manner as to affect the driver's control of the vehicle." The passenger moved for summary judgment, arguing she could not be liable for merely encouraging the driver to increase his speed. The trial court granted summary judgment.

The Court of Appeal (Fourth Dist., Div. One) reversed. A person who encourages or assists a tortfeasor may be liable for the consequences of the tortfeasor's acts if the encouragement or assistance is a substantial factor in causing the resulting tort. The court further held that direct physical interference with the driver is not strictly required to violate section 21701. 🗳️

HEALTHCARE

Patients may sue nursing facilities for violating regulations requiring complete and accurate health care records.

Lemaire v. Covenant Care California, LLC (2015) 234 Cal.App.4th 860

After her mother died in a skilled nursing facility, the plaintiff sued the facility for wrongful death, elder abuse, and violation of patient rights under Health & Safety Code section 1430(b) (providing that a skilled nursing facility patient may bring a civil action for violation of the Patients' Bill of Rights "or any other right provided for by federal or state law or regulation" to recover "up to" \$500 and costs and attorney fees). Plaintiff predicated the latter claim on the facility's failure to keep complete and accurate health records as required by certain regulations. The jury found for the facility on the wrongful death and elder abuse claims, but for the plaintiff on the section 1430(b) claim. The jury awarded \$270,000 in statutory damages, reflecting \$500 per violation for over 500 violations. The court then awarded over \$800,000 in attorney fees. The facility appealed.

The Court of Appeal (Second Dist., Div. Six) held that section 1430(b) broadly permits any regulation to be the subject of a private right of action. The court went on to hold, however, that section 1430(b)'s provision for damages "up to" \$500 limited the plaintiff to recovering \$500 total, not per violation. Given the substantial reduction in statutory damages, the court also reversed the attorney fee award and remanded for reconsideration of an appropriate award in light of the reduced degree of the plaintiff's "success" in the action. 🗳️

INSURANCE

Vandalism exclusion did not apply to bar **coverage for fire lit by vagrant that got out of control.**

Ong v. Fire Insurance Exchange (2015)
235 Cal.App.4th 901

The insured's property, which was vacant, suffered fire damage when a vagrant lit a fire on the kitchen floor, possibly to keep warm. The insurer denied coverage because the policy excluded property damage caused by vandalism at properties sitting vacant for more than 30 days. The term "vandalism" was undefined in the policy. The insured sued, arguing that coverage should be provided because the cause of damage was a negligently-tended fire, not willful and malicious conduct. The trial court granted summary adjudication for the insurer. The insured appealed.

The Court of Appeal (Second. Dist., Div. One) reversed. The court concluded that "vandalism" requires malice, and there was no evidence of malice in this case because the evidence raised a triable issue of fact that the vagrant made the fire only to keep warm, not to damage the house.

Exclusion for intellectual property rights applies to right of publicity claims.
Alterra Excess and Surplus Insurance Company v. Snyder (2015) 234 Cal.App.4th 1390

The estate of creative personality R. Buckminster ("Bucky") Fuller sued Maxfield & Overton Holdings for using the "Bucky" name to market products without authorization. The complaint alleged causes of action for unfair competition, trademark infringement, and unauthorized appropriation of name and likeness. Maxfield's insurer denied coverage for the lawsuit, and sought an adjudication in the trial court that the policy's exclusion for personal or advertising injury "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" precluded coverage. The trial court agreed with the insurer.

The Court of Appeal (First Dist., Div. Two) affirmed, holding that the exclusion's reference to "intellectual property rights" clearly applied to violations of the right of publicity, so the insured could have had no reasonable expectation of coverage for the estate's claims. ▼

LABOR & EMPLOYMENT

Employers are not liable failing to take reasonable steps necessary to prevent sexual harassment where any sexual harassment **that occurred was not sufficiently severe** or pervasive as to result in liability for harassment itself.

Dickson v. Burke Williams, Inc. (2015) 234 Cal.App.4th 1307

A massage therapist sued her employer under the California Fair Employment and Housing Act for failing to prevent two customers from sexually harassing her while she was massaging them. At trial, the employer argued the jury should be instructed not to reach the issue of whether the employer failed to take reasonable steps to prevent sexual harassment unless the jury first found the plaintiff was subjected to *actionable* harassment (i.e., harassment that is so severe and pervasive that it gives rise to a hostile work environment). The trial court denied the employer's requested instruction. The jury found against the plaintiff on her sexual harassment claim, concluding that while the plaintiff was subjected to harassing conduct on account of her sex, such harassment was not severe or pervasive. However, the jury found in favor of the plaintiff on her failure-to-prevent claim. The employer appealed.

The Court of Appeal, (Second. Dist, Div. Five) reversed with directions to enter judgment in favor of the employer. The trial court should have instructed the jury as requested by the employer, and judgment notwithstanding the verdict should have been granted because "there cannot be a valid claim for failure to take reasonable steps necessary to prevent sexual harassment if, as here, the jury finds that the sexual harassment that occurred was not sufficiently severe or pervasive as to result in liability" for harassment as a threshold matter. ▼

To prevail in a disparate-treatment claim under Title VII, a job applicant need show only that her need for an accommodation was a motivating factor in the employer's decision.
Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. (2015) 135 S.Ct. 2028

Samantha Elauf sought employment with Abercrombie & Fitch, but was not hired because she wore a headscarf that violated Abercrombie's "Look Policy." The Equal Employment Opportunity Commission brought suit against Abercrombie under Title VII for failing to accommodate Elauf's need for a religious accommodation – i.e., an exemption from the "Look Policy" for her headscarf. The district court found against Abercrombie, but the Tenth Circuit reversed, reasoning that the prospective employee must provide the prospective employer with "actual knowledge" of her need for a religious accommodation before the employer may be liable for disparate treatment under Title VII.

The United States Supreme Court reversed. An employment applicant need not show she provided the employer with "actual knowledge" of the need for a religious accommodation in order to prevail on a Title VII claim; she "need only show that her need for an accommodation was a motivating factor in the employer's decision." ▼

A co-employer with knowledge of the other **employer's misclassification of employees** may be liable to the Labor Commissioner for administrative penalties under Labor Code section 226.8, but that statute creates no private right of action.

Noe v. Superior Court (Levy Premium Foodservice Limited Partnership) (2015) 237 Cal.App.4th 316

AEG, the owner of some sports venues, contracted with Levy to provide food and beverage services at those venues. Levy, in turn, contracted with Canvas to sell concessions in the aisles during sporting events. Plaintiffs, who were employed by Canvas, sued AEG and Levy (defendants), alleging that defendants were co-employers with Canvas and therefore liable for Canvas's violation of various labor laws, including misclassifying plaintiffs as independent contractors in violation of Labor Code section 226.8. Defendants obtained summary adjudication that they could not be liable under section 226.8 because they were not the ones who "engage[d] in" "willful misclassification" of workers as the statute requires. The plaintiffs sought a writ of mandate.

The Court of Appeal (Dist. Two, Div. Seven) affirmed the summary adjudication, but for a reason different from that given by the trial court. The court held section 226.8 creates no private right of action, and rejected plaintiffs' argument that an employer may be held vicariously liable under section 226.8 based solely on the acts of a co-employer. The court did hold, however, that 226.8 is not limited to employers who actually make the misclassification decision and extends to joint employers when they have actual knowledge of and acquiesce in a co-employer's misclassification of its employees. ▼

Even with an ethical screen, a law firm may not handle a case in which a member of the firm has received the opponent's confidential information as a settlement officer in a court-sponsored program.

Castaneda v. Superior Court (Perrin Bernard Supowitz, Inc.) (2015) 237 Cal.App.4th 1434

In this employment dispute, an attorney served as a volunteer settlement officer through the Los Angeles Superior Court CRASH program. The case did not settle, and later, the employer substituted in another member of the attorney's firm to represent it. The employee moved to disqualify the firm on the ground that the attorney's conflict was imputed to her firm and could not be avoided with screening procedures. The trial court denied the motion and the employee sought a petition for writ of mandate.

The Court of Appeal (Second Dist., Div. Eight) issued the writ. The court clarified the rule of *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, which held that when a judicial officer receives confidential information from a party while presiding over a settlement conference but later joins a law firm, that firm may not represent an opposing party in the same action, screening procedures notwithstanding. The *Cho* rule applies equally to attorneys who volunteer to serve as settlement officers. So long as the attorney had ex parte communications during the settlement conference with the party the attorney's firm later seeks to oppose, the exchange of confidential information is conclusively presumed, giving rise to a conflict imputed to the attorney's entire firm. No screening procedures would be sufficient to ensure public trust in the legal system under these circumstances, and the importance of preserving public trust in the legal system outweighed the risk of chilling attorney participation in the CRASH program.

See also *Acacia Patent Acquisition, LLC v. Superior Court (Reddy)* (2015) 234 Cal.App.4th 1091 [where law firm's representation of an attorney in a fee dispute gave the law firm access to the attorney's client's privileged information, the law firm was disqualified from later opposing the attorney's client in another matter substantially related to the matter giving rise to the fee dispute]. ▼

CONTRACTS

Where an agreement makes contracting parties jointly and severally responsible, parties may be sued in separate actions. *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813

The lessor of a commercial property brought an action against three co-lessees for past due rents. The lessor dismissed without prejudice two of the parties and received a \$3 million judgment against the third party which remains unsatisfied. The lease specified all lessees were “jointly and severally responsible.” The lessor then brought the present action against the other two lessees for the unpaid rent. The trial court sustained the two lessees’ demurrers without leave to amend. The Court of Appeal (Fourth Dist., Division Two), affirmed. It held “the complaint does not and cannot state a cause of action against [the lessees] for monies due under the lease, because [the lessor’s] claims against [the lessees] in the present action are barred by the claim preclusion aspect of the res judicata doctrine.”

The California Supreme Court reversed. The Court of Appeal erred in relying on perhaps misleading statements in prior case law about preclusion principles. Here, neither claim preclusion nor issue preclusion could bar the claim against the lessees dismissed from the earlier action because they were not parties to that action or in privity with the parties. The court held that basic contract and civil procedural rules provide that “[p]arties who are jointly and severally liable on an obligation may be sued in separate actions.”

The breaching party bears the burden to show the nonbreaching party would have lost money had the contract been performed. *Agam v. Gavra* (2015) 236 Cal.App.4th 91

The parties in this case formed a partnership to develop real estate. When disagreements among the partners and trouble in the real estate market threatened the financial viability of the partnership, the defendant partners decided to take certain actions to protect their own financial interests at the expense of the partnership’s interests. The plaintiff partner sued the defendant partners for breaching the partnership agreement and sought to recover reliance damages. In a bench trial, the trial court found for the plaintiff. The plaintiffs appealed, arguing, among other things, that the partnership would have been a losing proposition for all involved and that trial court improperly placed the burden on them to show the amount the plaintiff would have lost had they performed.

The Court of Appeal (Sixth Dist.) affirmed. Once the plaintiff in a breach of contract action has shown expenditures undertaken in reliance on a contract, the burden shifts to the breaching defendant to show which of the plaintiff’s expenses in reliance on the contract were unnecessary and how much the plaintiff would have lost had the defendant performed.

INTELLECTUAL PROPERTY

Supreme Court reaffirms that patent holders may not collect royalties after the patent term expires. *Kimble et al. v. Marvel Enterprises Inc.* (2015) 135 S.Ct. 2401

In 1990, Stephen Kimble patented a toy that enabled users to shoot foam strings from the palms of their hands a la Spiderman. In 1997, Kimble sued Marvel Entertainment for patent infringement arising out of Marvel’s marketing of his toy without permission or payment. The parties settled, and their agreement provided that Marvel would pay Kimble three percent royalties on its sales of the product indefinitely. Subsequently, Marvel learned of the United States Supreme Court decision in *Brulotte v. Thys Co.*, 379 U. S. 29 (1964), in which the Court held that a patent holder cannot charge royalties for the use of his invention after the patent term (20 years) expires. Marvel sued in federal district court seeking a declaration that it would not have to pay Kimble any royalties after 2010. The district court entered judgment for Marvel.

The United States Supreme Court affirmed. Under the principle of stare decisis, the rule of *Brulotte* remains the law and any change to the rule must come from Congress.

See also *Teva Pharmaceuticals USA Inc. et al. v. Sandoz Inc.* (2015) 135 S.Ct. 831 [district court patent claim construction rulings involving factual findings dependent on extrinsic evidence should be reviewed for clear error, not de novo as the Federal Circuit had held]

See also *Hana Financial Inc. v. Hana Bank* (2015) 135 S.Ct. 906 [whether a trademark is sufficiently similar to an older version of the mark to warrant “tacking”—i.e., use of the first mark’s priority date—is a jury question]

See also *B&B Hardware Inc. v. Hargis Industries Inc. et al.* (2015) 135 S.Ct. 1293 [a Trademark Trial and Appeal Board finding concerning whether consumers are going to be confused by a similar mark can be binding on a federal district court later deciding the same question]

See also *Commil USA LLC v. Cisco Systems Inc.* (2015) 135 S.Ct. 1920 [a company’s good faith belief that a patent is invalid is not a defense to induced infringement]

Federal District Court Cancels Washington Redskins Trademarks as Disparaging to Native Americans

Pro-Football, Inc. v. Blackhorse, et al., Case No. 1:13-cv-01043-GBL-IDD (E.D. Va., July 8, 2015).

The US Patent and Trademark Office canceled the trademark registrations for Redskins on the ground that it disparaged Native American within the meaning of Section 2 (a) §1052 (a) of the Lanham Act, which prohibits registration of any matter “which may disparage” persons or “bring them into contempt, or disrepute.” The team appealed to Federal District Court, arguing there was inadequate evidence that the Redskins trademarks, used for over 80 years, disparaged a substantial composite of Native Americans at the time of the registrations between 1967-1990. The team also contended that the statute on which the Native Americans relied violated the team’s rights under the First and Fifth Amendments of the Constitution.

On summary judgment, the District Court upheld the finding of the Patent and Trademark Office, holding that there was no need for the Native Americans to prove intent to disparage Native Americans. The district court also rejected the constitutional challenges to the statute, and ordered cancellation of the Redskins trademark registrations. ▼

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing whether claims for public injunctive relief may be compelled to arbitration in light of *Concepcion*.

McGill v. Citibank, N.A. – S224086 – Review Granted – April 1, 2015

The defendant sought to compel arbitration of this consumer class action seeking damages and injunctive relief. Following California Supreme Court precedent that had held that California public policy prohibits arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act, and that the Federal Arbitration Act (FAA) does not preempt that state public policy, the trial court declined to compel arbitration of the claims for injunctive relief. The Court of Appeal (Fourth Dist., Div. Three) held that the California Supreme Court precedent the trial court relied on did not survive the U.S. Supreme Court’s *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011), decision, which held that the FAA preempts state laws (such as bans on class arbitration waivers) that prohibit outright the arbitration of a particular type of claim or that otherwise stand as an obstacle to the FAA’s objective of ensuring that arbitration agreements are enforced according to their terms. Accordingly, the court reversed the decision of the trial court and directed the trial court to order all of plaintiff’s claims to arbitration.

The Supreme Court granted review to address the following issue: Does the Federal Arbitration Act (9 U.S.C. § 1 et seq.), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 321, preempt the California rule (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303) that statutory claims for public injunctive relief are not subject to compulsory private arbitration?

See *Securitas Security Services USA, Inc. v. Superior Court (Edwards)* (2015) 234 Cal.App.4th 1109 [where PAGA waiver was unenforceable and not severable from the remainder of the arbitration agreement, the entire arbitration agreement was unenforceable] ▼

Addressing whether employees may remain “on call” during rest breaks.

Augustus v. ABM Security Services,
S224853 – Review Granted – April 29, 2015

The plaintiff and other former security guards alleged that defendant employer failed to provide legally required rest periods in that the security guards had to remain on-call during their rest breaks. In granting the plaintiff’s motions for class certification and summary adjudication, the trial court held that an employer must relieve its employees of all duties during rest breaks, including the obligation to remain on-call. The Court of Appeal (Second Dist., Div. One) reversed, holding that Labor Code section 226.7 does not require that an employee be relieved of all duties and instead requires only that the employee not be required to work. According to the Court of Appeal, remaining on-call did not itself constitute performing work.

The Supreme Court granted review to address the following issues: (1) Do Labor Code, § 226.7, and Industrial Welfare Commission wage order No. 4-2001 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833? 📄

Addressing the validity of an Industrial Wage Commission Order permitting meal period waivers.

Gerard v. Orange Coast Memorial Medical Center,
S225205 – Review Granted – May 20, 2015

Although Labor Code section 512 requires two meal periods for shifts longer than 12 hours, section 11(D) of Industrial Wage Commission (IWC) Order No. 5-2001 authorizes employees in the health care industry to waive one of those meal periods for shifts longer than eight hours. Plaintiff health care workers who signed second meal-period waivers, and occasionally worked shifts longer than twelve hours without being provided a second meal period, sued for Labor Code violations. The Court of Appeal (Fourth Dist., Div. Three) held that the IWC order was invalid to the extent it authorized waivers of second meal breaks on shifts exceeding twelve hours.

The Supreme Court granted review. The questions presented are: (1) whether the health care industry meal-period waiver provision in section 11(D) of IWC Order No. 5-2001 is invalid under Labor Code section 512, subdivision (a); and (2) whether the decision of the Court of Appeal partially invalidating the Wage Order should be applied retroactively? 📄

Addressing whether a trial court may excise allegations of protected activity when ruling on an anti-SLAPP motion.

Baral v. Schnitt, S225090 – Review Granted – May 13, 2015

In this business-related dispute, the plaintiff brought eighteen causes of action alleging the defendant engaged in fraud and multiple breaches of fiduciary duty. The defendant filed a special motion to strike under Code of Civil Procedure section 425.16 (the anti-SLAPP statute) because some of the allegations were based on protected activity within the purview of the anti-SLAPP statute. Applying existing authority, the trial court held that the anti-SLAPP statute does not authorize a court to grant such a motion after excising allegations concerning protected petitioning conduct from a “mixed” cause of action that also contains meritorious allegations not within the purview of the statute. The Court of Appeal (Second Dist., Div. One), affirmed, agreeing that the statute applies to causes of action or complaints, not individual allegations.

The Supreme Court granted review of the following issue: does the anti-SLAPP statute authorize a trial court to excise allegations of activity protected under the statute when the cause of action also includes meritorious allegations based on activity that is not protected under the statute? 📄

Addressing intentional interference with economic relations in the context of competitive bidding for public works contracts. *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, S225398 – Review Granted – June 10, 2015

American Asphalt South, Inc. (American) outbid two other contractors on 23 public works cases totaling \$14.6 million dollars. The contractors sued American for intentional interference with prospective economic advantage, claiming American was able to submit the lowest bid only because it paid its workers less than is required by Labor Code sections 1770 and 1771. American demurred, contending the plaintiff contractors did not have the required existing relationship and reasonable probability of being awarded the contracts that was required to show intentional interference with prospective economic advantage. The trial court sustained the demurrer, but the Court of Appeal (Second Dist., Div. Eight) reversed, holding that (1) a bidder on a government contract who submits a superior bid and loses out only because a competitor manipulated the bid selection process through illegal conduct has been the victim of actionable intentional interference; and (2) an actionable economic expectancy arises once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder.

The Supreme Court granted review. The case presents the following issues: (1) In the context of competitive bidding on a public works contract, may the second lowest bidder state a claim for intentional interference with prospective economic advantage against the winning bidder based on an allegation that the winning bidder did not fully comply with California’s prevailing wage law after the contract was awarded? (2) To state a cause of action for intentional interference with prospective economic advantage, must the plaintiff allege that it had a preexisting economic relationship with a third party with probable future benefit that preceded or existed separately from defendant’s interference, or is it sufficient for the plaintiff to allege that its economic expectancy arose at the time the public agency awarded the contract to the low bidder? ▼

Addressing scope of privilege for attorney billing records. *County of Los Angeles Board of Supervisors v. Superior Court*, S226645 – Review Granted – July 8, 2015

The ACLU filed a request under the California Public Records Act (CPRA) seeking invoices from outside attorneys hired by the Los Angeles County Board of Supervisors and the Los Angeles County Counsel (the County) to defend against lawsuits in which county jail inmates claimed they were subjected to excessive force. The ACLU wanted the records to investigate whether the County was spending excessive amounts defending against the lawsuits. The County withheld the billing records on the ground they were attorney-client privileged communications exempt from disclosure under the CPRA’s “catch-all” provision (which provides that the government may withhold documents if the public interest in confidentiality outweighs the interest in disclosure), so the ACLU sought a petition for writ of mandate from the superior court. The superior court granted the petition, but the Court of Appeal reversed. The Court of Appeal concluded that attorney invoices are protected by the attorney-client privilege and the interest in preserving attorney-client confidences outweighed in the interest in public disclosure of the invoices.

The Supreme Court granted review to address whether invoices for legal services sent to the County of Los Angeles by outside counsel are within the scope of the attorney-client privilege and exempt from disclosure under the CPRA, even with all references to attorney opinions, advice and similar information redacted. ▼

Addressing insurance commissioner's authority to promulgate regulations under the authority of the Unfair Insurance Practices Act. *Association of California Ins. Companies v. Jones*, S226529 – Review Granted – July 15, 2015

The Insurance Commissioner promulgated a regulation under the authority of the Unfair Insurance Practices Act (UIPA), Insurance Code sections 790-790.15, that controls the way property insurers communicate replacement cost information to homeowners. In an action brought by insurer trade associations, the trial court ruled that the Commissioner did not have authority to issue the regulation, and the Court of Appeal affirmed. (1) The UIPA, read as a whole, did not give the Commissioner authority to promulgate the regulation, (2) the Commissioner's reliance on section 790.10 did not sufficiently credit other portions of the UIPA and was not consistent with the structure of the UIPA, and (3) the legislative evolution of the UIPA as well as other sections in the Insurance Code supported the conclusion that the Commissioner was without authority to promulgate the regulation.

The Supreme Court granted review of the following issues: (1) Does the UIPA give the Insurance Commissioner authority to promulgate a regulation that sets forth requirements for communicating replacement value and states that noncompliance with the regulation constitutes a misleading statement, and therefore an unfair trade practice, for purposes of the act? (2) Does the Insurance Commissioner have the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate that omits one or more of the components in subdivisions (a)-(e) of section 2695.183 of title 10 of the California Code of Regulations is a "misleading" statement with respect to the business of insurance? ❶



Around the Counties

by Patrick J. Kearns

Kern County Report



Effective as of May, 2015, the CaseFax (e-fax) system for Civil case filings is no longer being used or maintained by the Superior Court of Kern County. The Court has a new system for Civil case filings – Odyssey File and Serve (e-filing) available for use. Information about the system is available on the court’s website.

A helpful tip: Registering with the Kern County website before using the Kern County case filings search makes searching much easier and offers more complete results. 📌

Los Angeles County Report



In July, the Superior Court expanded the required use of its on-line Court Reservation System (CRS) for several independent calendar departments. Parties with a case assigned to these courtrooms **must** reserve a date for law and motion hearings via CRS, on the Court’s website at www.lacourt.org under *LA Court Online, Court Reservation System* and must also use CRS to continue motions. Make sure to check the Court’s website to see if your department requires use of the CRS, and continue to check as additional Departments continue to be added to the list. ***Note:** Fees are due at the time the reservation is made and once the hearing date is reserved, the fees are non-refundable.

The Los Angeles Superior Court system is taking steps to encourage and increase use of its website for court related services. Over the past few months, the Court has implemented reduced fee structures for its website functions. For example, registered users may now conduct up to 10 name searches per month at a fee of \$1 per search

(formerly \$4.75 per search). Document purchases have also been reduced to \$1 per page for the first 5 pages and 40 cents thereafter with a maximum of \$40. There is no longer a minimum \$7.50 per document charge. 📌

Orange County Report



Several departments in Orange County Superior Court are now offering the ability to make video-conference appearances for hearings in conjunction with Court Call. Starting in Mid-June, thirteen Courtrooms have made the video conference option available. The fee for the video conferencing is only \$10, plus the usual \$86 dollar Court Call fee. The court rooms currently participating including: C6, C10, C14, C15, C17, C18, C23, C24, C32, CX101, CX103, CX104, and CX105.

In mid-June, a court clerk noticed irregularities in a particular case which led to the OC Superior Court to initiate an internal investigation of the matter. The Court discovered a large number of cases, going back to 2010, with irregularities in the minutes all of which appeared to be

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Around the Counties – continued from page 19

entered by a single employee. Authorities, including the FBI, have become involved and an investigation into the matter is pending. According to various news sources, a lone clerk – no longer an employee of the Superior Court – may have been “fixing” cases, such as DUIs, to reduce penalties. ▼

Riverside County Report



Riverside County is seeing a lot of new Courthouse activity. May saw the opening of the new “Banning Justice Center” located at 311 E. Ramsay Street in Banning, CA. The new facility houses four trial courtrooms, one large traffic/small claims courtroom, one large arraignment courtroom, in-custody holding cells, jury assembly space, a staff training room, clerks’ offices, public service windows, judicial chambers, jury deliberation rooms, and judicial library/conference rooms.

Menifee is also set to get some new digs. The State Public Works Board (SPWB) recently approved the acquisition of a site in Menifee for the new Riverside Mid-County Civil Courthouse. The new Mid-County Civil courthouse will be located on 3.8 acres in the Menifee Town Center and will be a part of the City’s envisioned future government center. It is expected to house nine courtrooms in over 89,000 square feet and replace the aging Hemet Courthouse.

Construction of the new courthouse is currently scheduled to begin in 2018, with an expected completion date in 2021. ▼

San Bernardino County Report



On September 11, 2015, ASCDC will be hosting a Brown Bag presentation with Presiding Judge Hon. Marsha Slough in Dept. S4 of the San Bernardino Superior Court entitled “State of the Court – San Bernardino County.”

San Bernardino has initiated a new hearing-date reservation program. Effective in April, parties are now required to file their civil motion and pay the required fees within five (5) court days from the date they make the reservation for the hearing. Failure to submit

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Around the Counties – continued from page 20

moving papers within five (5) court days of reservation will result in the automatic cancellation of the reservation.

Courtrooms S1-S4 are vacant and the Court is hopeful for appointments to fill them up. There has also been some discussion of San Bernardino potentially moving to a 5-day trial week from its typical 4-day trial week. Also, the San Bernardino Superior Court court-run mediation program is completely booked for 2015 and is no longer settling MSC's or court-ordered mediation for the foreseeable future. ♣

San Diego County Report



The new County Courthouse is beginning to take shape. The \$555 million dollar construction is well underway and when completed, will house more than 70 new

Courtrooms in its 700,000 – plus square feet. Construction is expected to be completed by the end of 2016. Check out a “live view” camera-feed of the construction via the Superior Court’s website at www.sdcourts.ca.gov.

New Superior Court Rules are in progress and will go into effect on January 1, 2016. You can view the proposed changes to the rules at www.sdcourts.ca.gov under the “Rules of Court” tab. ♣

Santa Barbara County Report



On September 1, 2015, the Santa Barbara Superior Court will begin accepting electronically filed documents in civil and family law cases supported by Tyler Technology’s Odyssey case management system. ♣

Ventura County Report



There is a new Case Management Conference attorney handling the M,W,F calendars in Department 22B. Genalin Riley is a registered nurse in both New Jersey and California. She attended UCLA Law and is a 1996 admittee who began with a small Century City firm before spending thirteen years with LASC as a research attorney and most recently, as counsel for the State Bar Court. She will be a welcome addition to Department 22B. ♣

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Why Did It Take Adjusting 175 Claims Before the Insurer Learned it Was Deceived?

by *Barry Zalma, Esq., CFE*

Staffing agencies and employee leasing organizations have difficulty obtaining workers' compensation insurance for a reasonable price. The agencies and leasing organizations are sometimes tempted to misrepresent their true profession and organization's activities to obtain insurance at a more reasonable price. When the insurer learns that it has been deceived it has the option to unilaterally rescind the policy from its inception, return the premium, and refuse to pay claims. When the insurer has paid claims before it learned it was deceived, the case, as in *American Home Assurance Company v. 99 Cents Only Stores*, Not Reported in Cal.Rptr.3d, 2015 WL 3563133 (Cal.App. 2 Dist.), becomes more complicated.

FACTS

American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, PA and Illinois National Insurance Company (collectively Insurers) issued workers' compensation policies to Optima Staffing, Inc. for 2008 and 2009 based in part on Optima's representation it was a temporary staffing agency that directly hired, trained and supervised employees deployed as temporary workers in various industries and not a professional employer organization. After defending and indemnifying 175 workers' compensation

claims, the Insurers discovered Optima was operating as a professional employer organization for several temporary staffing agencies and their special employer clients. The Insurers rescinded the policies and filed an action for declaratory relief to confirm the rescission and for restitution from the temporary staffing agencies and the special employers. The Insurers appealed from the judgments entered after the trial court sustained without leave to amend the demurrers of several of the temporary staffing agencies and special employers and subsequently granted motions for judgment on the pleadings in favor of the remaining temporary staffing agencies and special employers.

After receiving an application the Insurers issued a proposal stating that issuance of any workers' compensation policy was conditioned upon Optima providing temporary staffing services only and not performing as a professional employer organization or employee leasing business. Optima accepted the proposal, and a binder for insurance was issued including the same condition. Policies were subsequently issued for the policy period February 22, 2008 through February 22, 2009.

Because Optima had no supervision or control over the employees, the operative complaint alleged, it greatly expanded the risk of workers' compensation claims.

Although most of the temporary staffing agencies and special employers answered the amended complaint, on October 14, 2011 two temporary staffing agencies demurred on grounds including there could be no rescission of the insurance policies as to them because they were not parties to the agreements between the Insurers and Optima and a contract cannot be rescinded when the rights of others have intervened and rescission would harm them. The agencies argued they had reasonably relied on the workers' compensation policies procured by Optima and, in turn, had entered into agreements with special employers to provide temporary workers.

The trial court sustained the demurrers without leave to amend.

DISCUSSION

Law Generally Governing Rescission

An insurer may rescind an insurance contract when the insured has misrepresented or concealed material information, even unintentionally, in obtaining insurance coverage. To effect rescission, the insurer must give notice to the insured and refund all premiums received before commencement of an action on the contract.

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When an insurance policy is rescinded, “it is void *ab initio*, as if it never existed.” (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [“[i]n other words, defendants, in law, never were insureds under a policy of insurance”]; *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1267 [“rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable”]; see generally Civ.Code, § 1688 [“contract is extinguished by its rescission”].) Consequently, in addition to the refund of premiums by the insurer, the insured must return any advance payments that have been received. In contrast, the cancellation of a policy terminates coverage only prospectively.

Rescission applies to all insureds under the contract, including additional insureds, unless the contract provides otherwise. When an insurer rescinds a policy in conformity with all of the requirements imposed by law, the insurer generally may avoid liability on the policy to any third party injured by the insured.

The Insurers Are Not Required to Seek Reimbursement from the Injured Workers Who Received Benefits to State a Claim for Rescission.

Defendants contend the Insurers’ rescission claim fails because, by declaring they do not intend to seek reimbursement from the injured workers or to terminate previously agreed-upon benefits, the Insurers are not truly seeking rescission. Defendants’ argument that rescission is an all or nothing proposition – either the Insurers must seek to recover from the injured workers what they paid to them or the policies remain available for all third party claimants – is without merit.

Indeed, Civil Code section 1692 itself recognizes a contract may be “rescinded *in whole or in part.*” (emphasis added) If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its

judgment adjust the equities between the parties.

The Insurers, on the other hand, argue, although prejudice to third parties may be an inevitable consequence of rescission, the law clearly provides rescission is binding on innocent additional insureds, third party beneficiaries and injured third parties.

Unjust Enrichment

The elements for a claim of unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another. The theory of unjust enrichment requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched. It is not, strictly speaking, a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. It is synonymous with restitution. Ordinarily, restitution is required only if the benefits were conferred by mistake, fraud, coercion, or request.

The Operative Complaint Adequately Alleged it Would Be Unjust for Defendants to Retain the Money Expended in Connection with Their Employees’ Workers’ Compensation Claims

Although the operative complaint does not allege defendants colluded with Optima or were aware of its fraud, participation in the fraudulent scheme is not required for a claim for unjust enrichment. Restitution may be warranted in cases in which the parties are innocent of wrongdoing, for example, in the case of a mistake of fact. This case has the added complexity that defendants may be innocent third parties, but the Insurers are also innocent third parties. How equity is best served under these circumstances is a question that can only be resolved after a

full development of all the facts. In sum, the operative complaint adequately states a claim for unjust enrichment.

DISPOSITION

The orders sustaining the demurrer and granting judgment on the pleadings to the causes of action for quantum meruit were affirmed. The cause was remanded for further proceedings.

ZALMA OPINION

Insurance, as policyholder lawyers remind me continuously, is a business of the utmost good faith. They forget, just as often, that the covenant of good faith and fair dealing applies equally to both sides of the contract of insurance. Here, the insured misrepresented the risk that it asked the insurers to take and the insurers rightfully rescinded their policies. If the policy never existed the 175 recipients of workers’ compensation benefits may not have had an insurer to pay but must take their benefits directly from the employer. If the insurers succeed the workers will not be without a remedy. I can only wonder why it took 175 claims to determine the insurers were deceived. 📌



Barry Zalma, Esq., CFE

Barry Zalma



Ninth Circuit Upholds Ban on Unattended Private Structures in City Parks



by Karen S. Duryea

Though perhaps hard to believe, in the 1950s, Santa Monica was known as the “City of the Christmas Story.” The City hosted choruses, parades and all manner of holiday pageantry. Only one religious-themed tradition endured to present day: Each December in the City’s famous Palisades Park, a group of local church members erected 14 wooden dioramas illustrating the story of the birth of Christ.

In 2003, the City banned all private unattended structures in its parks, but provided an exception for permitted “winter displays.” Space in Palisades Park – a designated landmark – was allocated to applicants on a first-come, first-serve basis. The Santa Monica Nativity Scenes Committee, a group organized in 1983 to manage the life-size displays, applied for and received permits each year. Permits were also issued for a Hanukah display and a winter solstice display.

The program did not generate controversy until 2010, when an atheist sought and was granted a permit, which he used to post a provocative quote, “Religions are all alike – founded upon fables and mythologies.” National media descended on the City, and a debate on the propriety of religious speech on public property raged. In 2011, demand for permits far outnumbered the spaces. Atheists were granted permits for 11 of the 14 spaces in the City-run lottery, including one for tribute to the Flying Spaghetti Monster of the “Pastafarian” religion. The Nativity Scenes Committee received two spaces. Anticipated

participants vowed to flood the lottery with even more applications in the coming holiday season.

The large number of applicants and the increased interest in the winter displays necessitated a substantial increase in City staff and staff time. As the administrative strain increased, so too did the impact on the historic Park and on the public.

In June 2012, the City Attorney presented the Santa Monica City Council with two options: continue with the lottery system, or repeal the exception for “winter displays.” On grounds that a total ban would enhance general public shared-use of the park and its iconic ocean views, while continuation of the lottery would be time-consuming, costly and preserve private monopolization of a precious public resource, the Council opted for repeal, marking the end of the decades-long tradition. Santa Monica Municipal Code section 4.55.060, as amended, (Ordinance No. 2401)

Feeling their message had been targeted, the Nativity Scenes Committee sued, alleging violation of the Free Speech and Establishment Clauses of the First Amendment. In its Rule 12(b)(6) motion to dismiss, the City argued the ban on unattended structures was content-neutral, constituted a valid time, place and manner regulation, and was enacted for secular purposes. The District Court granted the City’s motion to dismiss in *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 2012 WL5870487, and on April

30, 2015, the Ninth Circuit Court of Appeal affirmed that dismissal in *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F. 3d 1286 (2015).

The opinion notes the well-settled precedent for municipalities to impose content-neutral bans on all private unattended displays in public forums. *Nativity*, 1292 (citing *Capitol Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) and *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 384 (1996)).

Since all agreed Palisades Park was a traditional public forum, the analysis turned on whether the ordinance was content-based, requiring strict scrutiny, or content-neutral, allowing time, place and manner restrictions that are narrowly tailored to a significant government interest and leave open ample channels of communication. *Nativity*, 1292.

The Nativity Scenes Committee conceded the ordinance was facially content-neutral, but argued it should be considered content-based pursuant to the “heckler’s veto” doctrine. *Nativity*, 1292. A heckler’s veto is government regulation of speech on grounds that the speech will cause its hearers anger or discomfort. Regulation of speech is content-based when “listeners react to speech based on its content and the government then ratifies that reaction by restricting the speech ...” *Id.*, 1292-1293 (citations omitted).

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Nativity – continued from page 25

The Court resoundingly rejected the Committee's position that Ordinance 2401 appeared to be a heckler's veto, simply because it restricted speech following the "controversy" stirred up by the atheists. *Nativity*, 1294. It concluded this case is far afield from the heartland of the heckler's veto doctrine, especially because the City banned all unattended displays, not just religious ones, without "discrimination between particular displays based on their content." *Nativity*, 1292. Furthermore, the right to impose a content-neutral ban did not evaporate simply because a controversy preceded it. *Id.*, 1294-1295.

The Court gave credence to the City's proffered significant government interests of preserving aesthetic qualities of Palisades Park and conserving administrative resources. *Nativity*, 1296-1297. Because the ordinance only affected *unattended* displays, it did not burden substantially more speech than was necessary to further these legitimate interests. *Nativity*, 1297-1298. Nor did the ban foreclose the Committee from conveying its religious message to the intended

audience through "one-day, attended displays, leafleting, preaching, holding signs and caroling," even if such modes proved costlier. *Id.*, 1298-1299.

The Court further concluded the ban did not violate the Establishment Clause. The City's secular purposes of protecting the park aesthetics and conserving staff resources were adequate rationales for adoption of the ban, and it was ridiculous to think the ordinance's primary effect was to disapprove of religion

given the City's decades-long history of accommodation of the Christian group. ▼



Karen Duryea is a Deputy City Attorney at the City of Santa Monica.

Karen S. Duryea



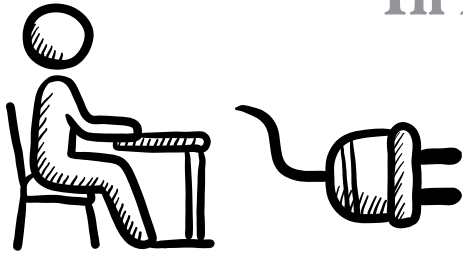
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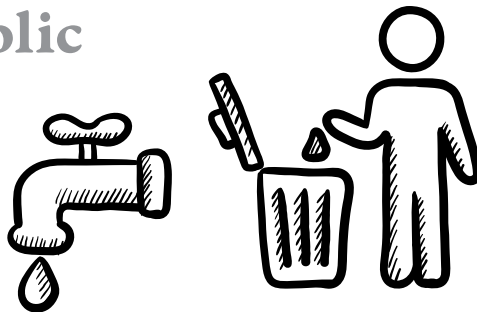
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In Defense of the Public



A Message from the Public Entity Sublaw Committee



by Robert L. Kaufman, Committee Chair

Late last year, a new committee was formed by the ASCDC – the Public Entity Committee. Why? Maybe because there are 58 counties, 407 water districts, 482 cities, and 977 school districts in California (just to name a “few” types of public entities), all of whom get sued and need attorneys such as members of ASCDC to represent them. That is a large client base. There is specialized law as to each type of public entity (and, thus, lawsuits with subject matter peculiar to the type of public entity) – eminent domain, zoning, civil rights violations, ADA claims, FHA claims, etc. Most of these claims carry potential for award of attorneys’ fees against the defendant. In addition, of course, these entities get sued for the typical slip and falls, employment problems, premises liability, auto accidents, and so on.

So I thought I would like to introduce you to your Committee, which currently consists of three members and is open to welcoming more. At this point, only Los Angeles and Orange Counties are represented on the Committee, and we are anxious to expand the geographical breadth of the Committee make-up.

Our first and primary goal is to be a resource to all members of ASCDC whenever issues arise which are peculiar to, or common in, this area of practice. Since governmental entities seem to be more vulnerable to claims for attorneys’ fees than other defendants, this area is a sub specialty of the Committee. We welcome your questions and comments regarding anything within the general subject area covered by the Committee.

In addition, the Committee will be publishing a short article in each issue of *Verdict* concerning an interesting case or current issue within our Committee’s purview. If you have an issue or case you would like addressed in one of these brief articles, let us know.

Finally, we will be developing seminars on various topics, such as the one on attorney fee disputes at the last ASCDC annual seminar, in which the Committee participated, along with Linda Miller Savitt and Steve Fleischman. These seminars will be presented not only to the ASCDC membership, but also to outside groups in the hope of increasing the visibility of the organization and, thus, its growing its membership.

So keep those cards and letters coming, as Dean Martin used to say (am I showing my age now?), and we will do our best to respond. You can send questions, comments, and inquiries to me through the ASCDC

administrative offices, and they will forward them to me. ♥



Robert L. Kaufman

Mr. Kaufman is a senior trial counsel at Woodruff, Spradlin & Smart. He is a member of ABOTA, FDCC, & NALFA, and has been named a Top Attorney in Los Angeles and Orange Counties multiple times. For the last 40 years, he has specialized in insurance defense and representation of public entities. He also is a certified expert in attorney fee disputes and awards.

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Summer Reading



Book Review: *Run Brother Run,* by David Berg

by N. Denise Taylor

I had the opportunity of attending a meeting recently in which the author of this gritty, mesmerizing memoir was a speaker. David Berg is an acclaimed trial attorney who is a member of the Texas and New York bars, and is best known as a criminal defense attorney as well as a high profile civil plaintiff lawyer. Spoiler alert: this book is about the murder of Mr. Berg's brother Alan. However, it is much more; Berg writes about his chaotic upbringing and a family tragedy of which the murder was only a part; it connects the criminal underworld, the legal world and Hollywood. The presentation that I heard by Mr. Berg was profane, irreverent, funny and engrossing, during which he read brief excerpts from the book. I had the opportunity to meet Mr. Berg and got a signed copy of his book. I started reading it and couldn't put it down.

Run Brother Run is not Berg's first book (*The Trial Lawyer: What It Takes to Win*, 2003), but it is his most personal one and tells the story of a life more dramatic than most of the cases he has handled in his career. It contains a history that was unknown to

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Book Review: *The Onion Field* by Joseph Wambaugh

by Wendy L. Wilcox

The *Onion Field* is a 1973 nonfiction book written by Joseph Wambaugh. Wambaugh was a sergeant for the Los Angeles Police Department (LAPD). He is a descriptive writer who helps the reader understand not only the backgrounds of each of the four protagonists but how each viewed life in general. This type of writing is quite refreshing and rather different than the typical modern crime books published today.

The book moves quickly and tells a gripping story about a tragedy that occurred one night where two plainclothes officers and two career criminals met in Los Angeles during a routine traffic stop which ultimately led to kidnapping, an execution of one of the officers and a legal saga that lasted for years.

On the night of March 9, 1963, two LAPD officers and former Marines, Ian Campbell and Karl Hettinger pulled over career petty criminals Gregory Powell and Jimmy Smith who were looking for a liquor store to rob. All four men were about the same age ranging from 28 to 32 years old. However,

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Movie Review: *Class Action* (1991)

by Ninos Saroukhanioff

Okay, so last week while very bored I watched (or rewatched *Class Action*). This is a movie from 1991 starring one of my favorite actors, Gene Hackman. The story is about a civil lawsuit concerning injuries caused by a defective automobile. What makes the story so great (well, pretty good) is that the plaintiff's attorney, Jedidiah Tucker Ward (played by Mr. Hackman) discovers that the automobile manufacturer's attorney Maggie Ward (played by the curly haired Mary Elizabeth Mastrantonio) is his estranged daughter. Yes, I said it. The plaintiff's attorney is the father of the defense attorney! It's nuts! That's like _____ (fill in the name of your favorite plaintiff's lawyer) going up against his daughter _____ (fill in the name of the daughter of your favorite plaintiff's lawyer).

Mr. Ward, like most of our brethren on the plaintiff's side of the bar, is a liberal civil rights lawyer who has based his career on helping those unfortunate people injured by rich and powerful businesses. Of course, like most, if not all, plaintiff's lawyers, he has vigorously pursued principle at the expense

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Run Brother Run

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his professional colleagues and even many of his family members until he wrote this book. This is a story about David Berg's striving Jewish family, broken apart when their parents' divorced and David and his older brother were separated, with David staying with his mother and Alan going with his father. They reconnected when Alan moved back with his mom for a short time and became David's savior and protector. David loved and admired his brother more than anyone in the world, and they were very close despite the very different paths they took in life.

While David attended law school and became a respected young member of the Texas bar, his brother went into business with their father as a carpet salesman. Both Alan Berg and their father had questionable business practices, and Alan additionally had a gambling problem that may have contributed to his downfall. Alan, a loving husband and father, disappeared in Houston in 1968 after being lured to a bar by a mysterious woman, and was thereafter kidnapped and murdered. The chief suspect was Charles Harrelson, a notorious hit man who also happened to be the father of Woody Harrelson, the actor. It was suspected that Harrelson was hired by a business rival of Berg's father.

After describing the rich background of the Berg family and David's upbringing, Berg brings to life the rough-and-tumble boomtown that was 1960's-era Houston, and conveys with unflinching force the emotional damage his brother's death did to his family. Only a portion of the book deals with the actual trial, which ended in Harrelson's acquittal. Berg describes the countless ways in which the prosecutor mishandled the case, out-foxed by the defense at every turn. There was an eyewitness to the murder – Mr. Harrelson's girlfriend, who testified for the prosecution at the trial, to no avail. The type of good-ol'-boy-style Southern injustice prevalent in that era is highlighted by the countless unethical practices engaged in by famed lawyer Percy Foreman, who at the end brought in a group of men of good repute to provide alibies for

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The Onion Field

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their lives were quite different as Wambaugh describes in great detail in the book.

After Campbell and Hettinger pull Powell and Smith over, Powell panics and kidnaps the officers while Smith tags along (as usual – this was their relationship as Wambaugh describes in the book). They drive out to the onion fields in Bakersfield where Campbell is shot and Hettinger escapes. Powell and Smith go their separate ways until they are soon detained and arrested and eventually convicted of murder and sentenced to death. Ultimately, Powell and Smith received life sentences as their death sentences were vacated when the California Supreme Court ruled the death penalty was cruel and unusual punishment.

Although Hettinger escaped, he was plagued by survivor's guilt and had difficulty moving on from the death of his partner. He was purportedly caught for shoplifting and forced to leave the department in 1966. However, years later he put his life back together and served as county supervisor. He died in 1994, at age 59.

Smith was released on parole in 1982 only to return back to jail several times where he eventually died of an apparent heart attack in April 2007, at age 76.

Powell was denied parole multiple times and died in August 2012, at age 79. On August 14, 2012, CNN and LA Times reported about Powell's death and how he was the last of the four men to die. The LA Times quotes Wambaugh as saying "Now there is nobody left alive from that tragic nighttime encounter that ended in an onion field, where Ian Campbell died and from which Karl Hettinger never really escaped."

One of the main players in the "Onion Field Trial" and one of the last surviving if not the last surviving persons involved is Marshall Schulman, a prosecutor who prosecuted Powell and Smith and provides his insight in this book review. He is currently a criminal defense attorney in San Francisco. Schulman was interviewed by Wambaugh; however, Schulman thought Wambaugh

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Class Action

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of his own profit. But, Mr. Ward has a bad habit of not paying his clients after their cases have been settled.

Turn now to the personal drama and tension of the relationship between Mr. Ward and his daughter, Maggie. Ooh, they haven't had a relationship since Maggie learned that her dad was cheating on her mother. To avoid any resemblance to her dad, Maggie has taken a very different approach to her legal career by working for a high-powered corporate law firm.

Back to the case. Mr. Ward is hired to help field a lawsuit against a major auto manufacturer whose station wagons have a dangerous propensity to explode on impact while making a left turn. Sound familiar? Even though the evidence indicates he has an all but airtight case against the manufacturer, the tide turns when Mr. Ward learns that his daughter, Maggie is representing the manufacturer that he is suing.

We come to learn that the manufacturer uses a "bean-counting" approach to risk management, whereby it looks to what it will cost to pay off people who are killed or injured versus what it will cost to recall and/or rebuild the car without the defect. You know what they decide don't you? Yup. The manufacturer decides to keep the car as-is because of short term profitability.

The case goes to trial where Mr. Ward and Maggie go at it. (They skip past the part about how these personal injury claims were certified for class treatment.) While getting ready to take on the plaintiff's key witness – a former engineer for the manufacturer – Maggie inspects the files, visits the witness, and learns an important fact about the design of an electronic part. Maggie finds the important stored data. What will she do with this key evidence? It should be turned over as an item of discovery. So, Maggie does what all defense lawyers do with bad evidence, she buries it in a blizzard of papers.

Maggie then begins her cross-examination of the former employee, Mr. Povel. Maggie is known for her ability to discredit witnesses.

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Run Brother Run

– continued from page 29

Mr. Harrelson, providing reasonable doubt. Mr. Berg writes: “If I were on that jury, I would have had to vote for acquittal, too.”

Charles Harrelson was ultimately convicted of the 1968 murder of grain dealer Sam Degelia Jr. and spent five years in prison. After serving his time for that murder, he killed again and was sentenced to two consecutive life terms for the assassination of United States District Judge John H. Wood Jr. Harrelson died in prison in 2007. It was in 2008, after decades of being unable to talk about the killing, that David Berg began writing this book. With the help younger sister Linda, he pored over old police reports and legal files, and tracked down and interviewed innumerable people involved in the case. This research forms the basis for the narrative of the legal case.

Run Brother Run is much more than the story of a murder and it grips the reader much more than one would expect from an author who is also a trial lawyer. It is a raw and painful memoir that taps into the darkest of human behavior, and is a fascinating portrait of a Jewish-American family as well as being a true-crime courtroom murder drama. 🍷



N. Denise Taylor, Taylor Blessey LLP

N. Denise Taylor

The Onion Field

– continued from page 29

did not contemplate him being in the book because Wambaugh was focused on other characters and how Hettinger was treated by the department. In fact, Schulman was surprised he was mentioned in the book. Schulman thinks Wambaugh may have favored Smith in his description of him by pointing out Smith’s tattoo on his hand spelling “LOVE” without pointing out the other hand spelled out “HATE.” Schulman also thinks Wambaugh’s portrayal of Smith as a follower is opposite to how Schulman saw the evidence. For example, Schulman sees the evidence as showing Smith as the shooter who killed Campbell, not Powell based on ballistics showing it was Hettinger’s weapon that was connected to the five shots into Campbell’s chest area and Hettinger’s weapon was found on Smith when he was arrested. This is quite compelling considering the paths of Smith and Powell following their convictions.

On March 9, 2013, *Daily News* reported on the Onion Field events pointing out it has been 50 years since that tragic night and described an exhibit dedicated to the officers that “immortalizes the officers’ memory and sacrifice” which is located at the Los Angeles Police Museum in Highland Park.

This book inspired a movie in 1979 also called *The Onion Field*. It has been said that this movie put James Woods on the proverbial movie map. The book purportedly also inspired TNT’s *Southland*, Season 5, Episode 9 (“Chaos”; airdate April 10, 2013). 🍷



Wendy Wilcox, Skane Wilcox, LLP

Wendy Wilcox

Class Action

– continued from page 29

Mr. Povel testifies about the malfunction. Maggie’s cross-examination tests Mr. Povel’s memory. But, Maggie asks about a “missing report.” Hmm. A missing report. Well, the judge calls a recess to discuss a witness. A defense lawyer (Maggie’s boss and lover) takes the stand. He knows nothing about a report. They then call an analyst who testifies about the 1985 model. There is another meeting with the judge, who offers advice.

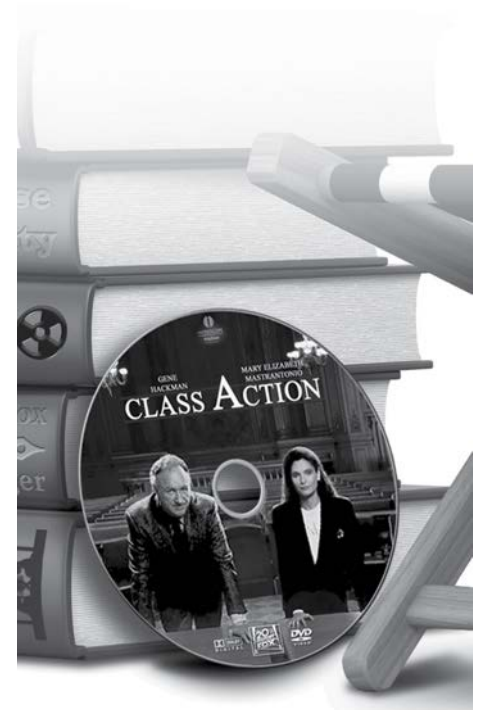
Without giving away the ending, I will tell you that the case settles. There is a victory celebration.

If you’re stuck at home on a hot Sunday afternoon with nothing else to do then I would highly recommend watching this movie. 🍷



Ninos Saroukhanioff, Maranga Morgenstern

Ninos Saroukhanioff



Sean D. Beatty
Beatty & Myers, LLP
Cazares v. Hyundai Motor America
McKinzie v. Toyota Motor Sales, U.S.A., Inc.

Janette Bodenstein & Jonathan Cole
Nemecek & Cole
Broadway Victoria, LLC v. Norminton et al.

David A. Clinton
Clinton & Clinton
Taylor v. Westfield

Louise M. Douville (for Dr. Basmajian)
Brobeck, West, Borges, Rosa & Douville
Patrick Stockalper (for Dr. Vangsness)
Reback, McAndrews, Kjar, Warford, Stockalper & Moore, LLP
Adams v. Vangsness

Louise M. Douville
Brobeck, West, Borges, Rosa & Douville
Ward v. Lee

Anthony Kohrs & Michael Schonbuch
Daniels, Fine, Israel, Schonbuch & Lebovits
Buchanan v. Twin Rock Partners
Wintermute v. Wendel

Kevin J. McNaughton & Katrina J. Valencia
Schaffer Lax McNaughton & Chen APC
Hubbard v. Allied Packing & Supply, Inc. et al.

Terry A. Rowland
Demler, Armstrong & Rowland, LLP
Celis v. 1995 Grett Trust

Thomas Scully
Walsworth, Franklin, Bevins & McCall
Macpherson v. Pace

Timothy M. Smith
McKinley & Smith, APC
Forrester v. Trimont Land Co., Sierra at Tahoe, et al
McGovern v. Sugar Bowl Corporation

Joshua C. Traver
Cole Pedroza LLP
Wascher v. Kaiser Foundation Health Plan, Inc.

Michael A. Zuk
Herzfeld & Rubin LLP
Harter v. Katzen

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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.

Please visit www.ascdc.org/amicus.asp

RECENT AMICUS VICTORIES

The Amicus Committee has recently participated as *amicus curiae* in the following case:

County of Los Angeles Board of Supervisors v. Superior Court (ACLU), 235 Cal.App.4th 1154, review granted July 8, 2015. The ACLU has filed various actions against Los Angeles County involving alleged use of excessive force in County jails. The ACLU then filed this action seeking to obtain the defense attorney's legal bills from the County as public records. Addressing an issue of first impression, the Court of Appeal held that defense counsel's bills are privileged and, therefore, not subject to being produced to the ACLU. Lisa Perrochet, Steven Fleischman and Jean Doherty from Horvitz & Levy submitted ASCDC's amicus letter. Note that the California Supreme Court granted review on July 8, 2015 and, at this time, ASCDC intends to submit an amicus brief on the merits before the Supreme Court. ▼

PENDING CASES AT THE CALIFORNIA SUPREME COURT AND COURT OF APPEAL

ASCDC's Amicus Committee has also submitted *amicus curiae* briefs in the following pending cases:

Sanchez v. Valencia, docket no. S199119, pending in the California Supreme Court. 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, Polsinelli LLP, submitted an amicus brief on behalf of ASCDC.

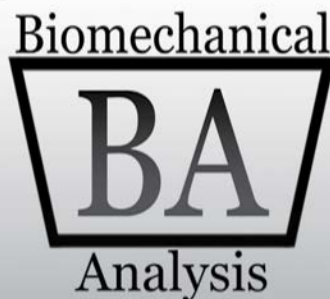
Winn v. Pioneer Medical Group, Inc., docket no. S211793, pending in the California Supreme Court. Plaintiffs' claims are against defendant physicians for elder abuse arising out of the care provided to the plaintiffs' deceased mother, who died at the age of 82. The Court of Appeal had held that elder abuse claims are not limited to custodial situations. The Supreme Court has framed the issue presented as follows: "Does 'neglect' within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code,

§ 15657) include a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis, or must an action for neglect under the Act allege that the defendant health care provider had a custodial relationship with the elder patient?" Harry Chamberlain, Buchalter Nemer, submitted an amicus brief on behalf of ASCDC.

Hudson v. County of Fresno, docket No. F067460, pending in the Fifth District Court of Appeal, Fresno. The defendant claims that the plaintiff improperly used "Reptile" arguments during closing argument. Robert Wright, Lisa Perrochet and Steven Fleischman from Horvitz & Levy submitted an amicus brief on the merits supporting the defendant's position.

Lee v. Haney, docket No. S220775 pending in the Supreme Court. The Supreme Court has granted review to determine if the one-year statute of limitations for legal

continued on page 33



Aaron L. Souza, Ph.D.

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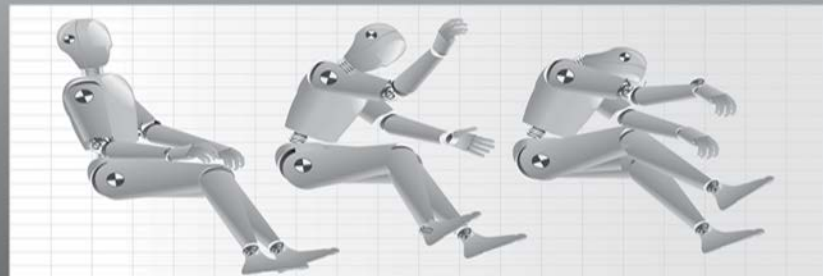
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LIABILITY & CAUSATION ANALYSIS
for Personal Injury Cases

Amicus Committee Report – continued from page 32

malpractice actions (Code Civ. Proc., § 340.6) applies to a claim brought by a client against a lawyer for return of money allegedly held in the lawyer's trust account. Harry Chamberlain of Buchalter Nemer has submitted a brief on the merits supporting the defendant's position and presented oral argument to the Supreme Court on May 26, 2015. An opinion is expected by the end of August. 📍

HOW THE AMICUS COMMITTEE CAN HELP YOUR APPEAL OR WRITE 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 favorable unpublished California Court of Appeal decisions.

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

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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Horvitz & Levy
818-995-0800

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

J. Alan Warfield
Polsinelli LLP
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Joshua Traver
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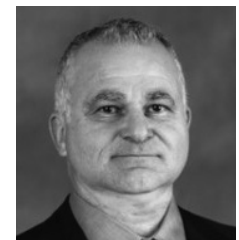
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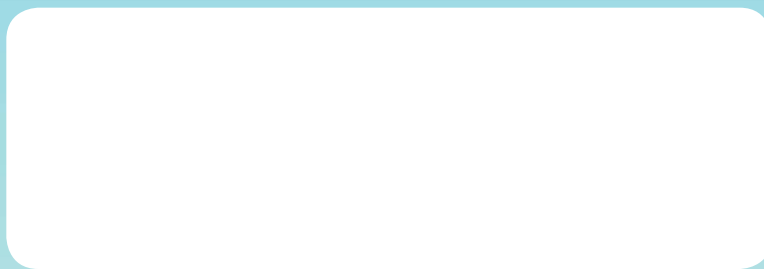
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