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verdict

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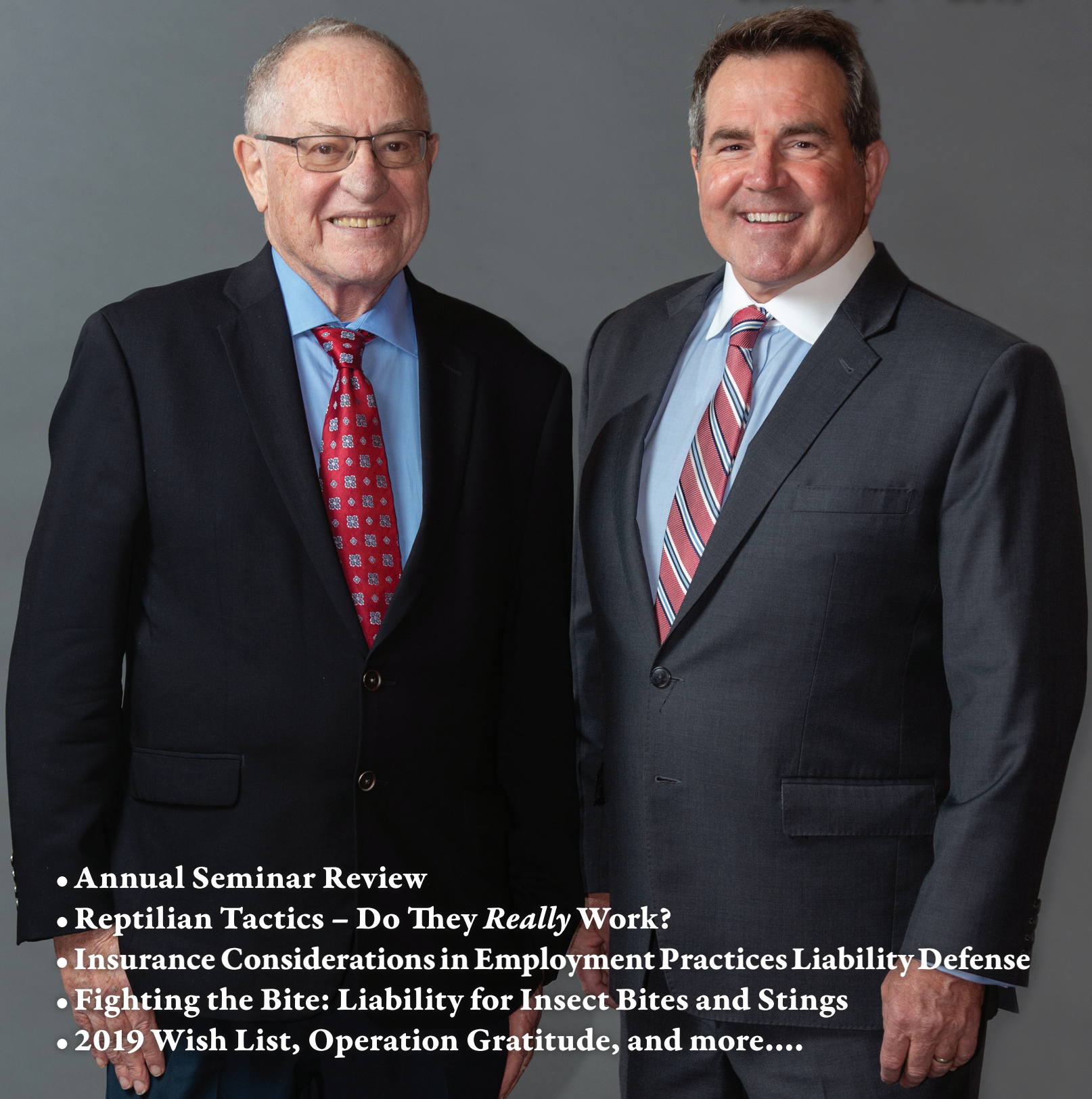

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president's message

The Push for Success Continues

Peter S. Doody
ASCDC 2019 President

I am honored to be the 2019 ASCDC President, and I am looking forward to a great year. For those who don't know me, I am a trial attorney with the San Diego law firm of Higgs, Fletcher & Mack. I'm originally from Washington D.C. and after graduating from high school, like Huck Finn before me, I "lit out for the Western Territory" and pointed my compass West. I attended college at the University of Colorado in Boulder. I'm proud to say my daughter, Kelly Ann is now a freshman at C.U.

After graduating from C.U. I moved to San Diego and put my English major degree to immediate and practical use – I got a job working at the Good Earth restaurant in La Jolla. I lived near the beach in San Diego for six months and surfed nearly every day. But after six months of bliss, it was time to get serious. I enrolled at the University of San Francisco Law School. Three years later, upon graduating in 1986, I was fortunate to begin my civil litigation defense career at the preeminent Bay Area law firm of Ropers, Majeski at their San Francisco office. Working there was an invaluable experience and provided great training. However, after four years working as a defense attorney in The City, the siren song of San Diego beckoned me once again, and I headed south, and this time I stayed.

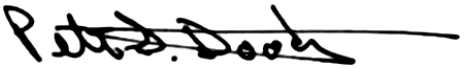
I attended my first ASCDC Annual Seminar in 1991 at the Century Plaza Hotel and the speaker was former President Ronald Reagan. The atmosphere was so positive that I couldn't wait to sign-up as a member of this great organization.

The ASCDC tradition continues. This year our 58th Annual Seminar was held on January 31 and February 1, 2019 at the J.W. Marriott at L.A. Live. It was a huge success. I would like to thank our incredibly hard-working board of directors, our panelists, and our exhibitors – all of whom contributed to making this year's annual seminar such a great meeting. We had over 550 attendees and we signed up 60 new ASCDC members, many of them young lawyers.

Alan Dershowitz, arguably the most famous lawyer in America, flew in from the east coast and was a captivating speaker for our annual luncheon. After opening remarks, Professor Dershowitz, as is his nature, encouraged our audience to ask him questions. There were two standing microphones in the audience; one on the left, the other on the right side of the room. Professor Dershowitz encouraged those who are politically left-leaning to use the left microphone, and vice-versa for the right microphone. Emblematic of the current state of our political climate in America we did not have a center microphone. Professor Dershowitz engagingly and unflinchingly answered all the questions posed to him. He was extremely well received by our ASCDC audience. After lunch, there was a book signing by Professor Dershowitz for his new book, *The Case Against the Democratic House Impeaching Trump*.

We have a great year ahead of us for the ASCDC. On May 2, 2019 we will have our annual **"Usual Suspects"** seminar where our experienced panelists will be discussing how to effectively handle the certain plaintiff experts in the areas of medical billing, pain management and life care planning. Next on the calendar is the **Joint Litigation Conference on Civility** set for May 30, 2019. We join forces for this conference with both the Consumer Attorneys of Los Angeles (CAALA) and the Los Angeles Chapter of American Board of Trial Advocates (ABOTA). This is always a popular conference where attorneys from both sides of the aisle and judges discuss the practical importance of civility in our profession. Then, we look forward to June 25, 2019 for our **Hall of Fame Awards Dinner** at the famous Biltmore Hotel. This year our Hall of Fame Award honoree is Paul R. Fine. Paul is a stalwart defense attorney and was ASCDC president in 2004. Our Civil Advocate Award recipient is Gretchen Nelson. The prestigious Judge of the Year Award goes to the Honorable Stephen Moloney. Judge Moloney was president of ASCDC in 1992.

Lastly, one of our big campaign pushes this year will be increasing our membership. If you are not already aware of this fun fact, ASCDC at 1,200 members is the largest regional civil litigation defense organization in the nation. When you are at a deposition or in court and meet a fellow defense attorney who is not already an ASCDC member, spread the good word that the ASCDC is a vibrant and active organization, and be sure to sign them up.



PETE DOODY

Augmented Reality in Sacramento

Michael D. Belote
Legislative Advocate
California Defense Counsel

Four months into the 2019-2020 legislative session, the California Assembly and Senate are busy hearing the more than 2700 new bills introduced this year. These hearings are being conducted in the context of stunning changes in Sacramento political dynamics. The new reality is Democratic party dominance never before seen in California history. In recent years, Democrats have held a two-thirds supermajority in the legislature, but now each house is approximately three-quarters Democrat, every constitutional officer is a Democrat, and the new governor, while of the same party as his predecessor, appears to be left of Governor Brown.

On behalf of defense practitioners, the California Defense Counsel has identified nearly 150 bills of interest, covering virtually every possible area of practice. Additionally, many of the most heated debates in Sacramento potentially affect defense lawyers. Among them are:

- **Wildfire Liability:** With year-round wildfires appearing to become the new normal, PG&E in bankruptcy and all investor-owned utilities in jeopardy, Sacramento is struggling to find solutions. Governor Newsom recently released the report of a task force created to examine the problem, and one possibility is modifying the "inverse condemnation" liability facing utilities. The Governor has stated that everyone must be part of the solution to the wildfire problem, meaning higher utility costs to support maintenance, more help from insurers, and changes in liability.

- **Privacy:** Last year's privacy package of bills, AB 375 and SB 1121, gave consumers a breathtaking new set of rights in the privacy arena, including the right to opt-out of personal information sharing, the right to know what information is held by covered businesses, the right to delete certain personal information, and more. The package contained a delayed effective date of January 1, 2020, in order to enact necessary refinements and clarifications this year. Businesses covered by the law must be preparing now to comply with the law in January, and more changes are coming. Not only will privacy affect ASCDC member clients, but even larger defense firms will be covered by the new laws. There are also bills, including SB 561, which would vastly expand liability for privacy act violations, even as companies are gearing up to comply with the January implementation.

- ***Dynamex:*** Last year's state Supreme Court decision in *Dynamex* threw worker classification questions into complete disarray. The new "ABC" test for determining employee vs. independent contractor status affects workers in an almost limitless number of occupational areas, perhaps none more than the new "gig" economy. Law firms utilizing lawyers on a per diem basis could be implicated as well. This year there are bills to codify *Dynamex,* and those proposing a return to the old *Borello* tests. It now appears that the legislative vehicle for addressing *Dynamex* will be AB 5 (Gonzalez Fletcher), and innumerable groups are seeking exemptions from the decision in the bill.

- **Housing:** California legislators have now fully grasped the reality of the state's housing shortage, and literally hundreds of new bills have been introduced to address the problem. How does this affect defense practice? For starters, many of the bills propose streamlining litigation timelines on CEQA actions. A number of bills propose a 270-day standard for trial *and* appellate resolution of CEQA challenges, which will further strain court resources dedicated to hearing civil motions and getting trials out.

Beyond these very high-profile issues are bills affecting specific areas of defense practice, or affecting civil procedure generally. The employment arena continues to generate very substantial numbers of bills, including proposals to again prohibit arbitration as a condition of employment, expand paid family leave, expand paid sick leave, increase penalties for failure to timely wages, and much more. Many of these proposals failed passage or were vetoed by Governor Brown in the past, and have been reintroduced.

Also reintroduced is a proposal to limit depositions of mesothelioma plaintiffs to seven hours (with judicial discretion to grant an additional three hours) without regard to the number of defendants in the case. CDC is opposed to the proposal contained in SB 645, viewing the idea as a fundamental limitation on the ability of companies to mount a defense.

Given the political dynamics constituting the augmented reality in Sacramento, it is clear that a number of bills discussed here will in fact reach the new governor's desk. By mid-October we will see how the new and untested governor charts his course.

new members september – march

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Annual Seminar Highlights

— Carol A. Sherman

ASCDC's 58th Annual Seminar returned to the popular and always lively JW Marriott LA Live in downtown Los Angeles, January 31 – February 1, 2019. Called the Super Bowl of annual conferences, the Annual Seminar featured a highly informative educational program, drawing from the best and brightest speakers on a range of timely topics of interest to the hundreds of civil defense trial attorneys and guests who attended.

The Friday luncheon program was among the highlights of the two-day event with keynote speaker Harvard law school professor and television commentator Alan Dershowitz.

The luncheon program began with the singing of the National Anthem by Sophia Schuster from Santa Barbara. In keeping with tradition, incoming President Peter Doody welcomed ASCDC members and their guests, members of the judiciary and past ASCDC presidents in attendance. Doody also introduced his wife of 24 years, Julie, and extended family members he called his "West Coast family." He also recognized members of his San Diego law firm Higgs Fletcher & Mack.

On behalf of ASCDC and its 1,200 members from Santa Barbara to San Diego, Doody thanked the Board of Directors and committee members, California Defense Counsel legislative advocate Mike Belote, and Executive Director Jennifer Blevins along with her staff for their work over the past year.

Doody awarded the President's Plaque to outgoing President Christopher Faenza. "Chris did an incredible job last year." He credited Faenza for creating the new "Usual Suspects" Seminar that sold out in its first year, and will be offered again this year.

Chris Faenza had the honor of naming Eric Schwettmann as the recipient of the Pat Long Presidential Award in recognition of "going above and beyond this past year." Schwettmann received the award for his tireless support of fellow board member Mike Colton and his family. Colton had contracted a serious illness while on vacation in Europe, resulting in a coma lasting several weeks. Schwettmann was "there for Mike and his family every step of the way. And we are so glad to have Mike back."

In his remarks, Doody said, "I'm very excited to be taking the helm as ASCDC President, the largest regional defense organization in the nation. I am proud of this organization." He cited the work of the Amicus Committee that monitors appellate decisions and the committee that reviews proposed jury instructions. "They ensure a level playing field."

He announced several upcoming events, including the Hall of Fame Awards dinner to be held at the Biltmore Hotel in June. Award recipients include defense lawyer Paul Fine, the Honorable Stephen Moloney and plaintiff's lawyer Gretchen Nelson. The highlight of the fall schedule will be the return to the Hilton in Santa Barbara for the bi-annual professional liability seminar.

Among the priorities for the coming year is a push for membership with a new initiative called the Take Two Campaign. Doody asked members to submit the names of two prospective defense civil litigation lawyers who would be good members. "Send us the individuals' names and we'll immediately send out a membership package." Doody encouraged members to reach out to spread the word about the benefits of ASCDC membership.

2019 President, Pete Doody, awards the President's Plaque to 2018 President, Christopher Faenza.

Eric Schwettmann receives the Pat Long Presidential Award, as Michael Colton looks on.


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Taking the Stand

Alan Dershowitz Addresses the 58th Annual Seminar

Carol A. Sherman

Before a packed Platinum Ballroom at JW Marriott LA Live, Harvard law school professor Alan Dershowitz told the more than 500 ASCDC members and guests, "I love defense attorneys. Whether you're defending people accused civilly or criminally, it's so important that we have both sides of every issue always presented."

He added, "The quest for justice is never achieved. It's always a process. And you're part of that process and I'm part of that process."

Speaking in a question-and-answer format, he challenged the audience to ask him tough questions. The free-form discussion was wide ranging from his passion for justice and civil liberties to his views on the case for presidential impeachment, special counsel investigation, the use of presidential executive power, the rise of global extremism and anti-Semitism, verbal attacks on judges, immigration, and political civility.

An outspoken defender of civil liberties, Dershowitz graduated at the top of his class at Yale Law School, where he was the editor of the *Yale Law Review*. Before becoming the youngest tenured law professor at Harvard University, he clerked for U.S. Court of Appeal Chief Judge David Brazelon and U.S. Supreme Court Justice Arthur J. Goldberg.

Dershowitz rose to fame with high-profile clients such as Claus von Bulow, Patty Hearst, Leona Helmsley and OJ Simpson. He has authored 41 books. The latest, *Taking The Stand,* traces the evolution of his life and thinking on fundamental legal issues.

A life-long fan of the old Brooklyn Dodgers, Dershowitz grew up in the same Williamsburg, Brooklyn, neighborhood as Dodgers great, Sandy Koufax, and kiddingly

continued on page 12

Annual Seminar: Dershowitz – continued from page 11

vowed not to return to Brooklyn until the Dodgers do.

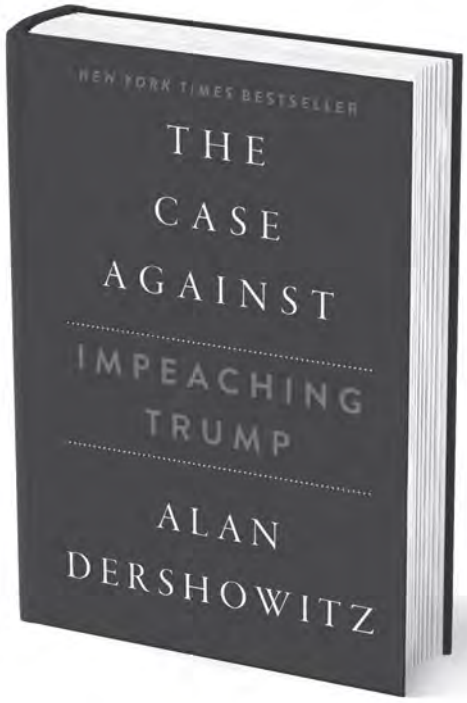
"I grew up in the shadow of the Holocaust. My friends, my neighbors, my teachers were survivors. We saw the numbers on their arms. There were people my age who didn't have parents and were being brought up by cousins who had lived in America. You can't grow up in that environment without having a passion for justice."

Interestingly early on, he struggled academically as a student at Yeshiva High School. Rebellious and outspoken, he was told he had two career choices, become a lawyer or a conservative rabbi. He quipped, "Well I wasn't smart enough to be a rabbi, so I became a lawyer." More seriously, he added, "My parents didn't even know what it was to be a lawyer. But from the first day they said you have to be a defense lawyer; you have got to defend people who are being charged."

An authority on U.S. constitutional and criminal law, he's never shied away from controversy. "I'm sticking to principals that I've had for a long time."

When asked about his book, *The Case Against Impeaching Trump*, he explained, "The original title was *The Case Against Impeaching Hillary Clinton* because I thought, like all of us, that Hillary Clinton was going to win the election. There were already people preparing articles of impeachment for the day that Hillary Clinton was inaugurated. And so I started to write a book about why impeachment would not be proper against Hillary Clinton. Well it didn't quite turn out that way." He added, "I just changed the word 'Clinton' to 'Trump.' All the arguments are exactly the same."

He believes Hillary Clinton lost the election over her use of the word 'deplorable.' "She had a chance of winning voters among Midwestern hard-working union folks who love their guns (I'm not a gun owner and I'm not a gun lover) and who love their religion. And she lost them with that one word." He added, "I don't know where it came from but it insulted so many Americans and it really helped to create this kind of polarity. Trump has helped to create that polarity as



well with his insults on people he disagrees with. We have to get back to more civil conversations and less name calling."

Dershowitz has been an outspoken critic of the appointment of special counsels and the current investigation into presidential election misconduct. "I think there are real problems when you appoint somebody to be a special prosecutor and put a target on someone's back."

When asked about the President's threat to use the National Emergencies Act to build a southern border wall, he said, "It would be absolutely wrong for him to do it. Emergencies have to be reserved for real emergencies." He added, "Nothing has changed about the border in the last seven or eight years. So you can't just declare an emergency when nothing has changed."

Early on in the Trump Administration, he advised the President on his initial travel ban. "I told him that I thought the initial travel ban might be unconstitutional. He then changed it and it was constitutional. So I ended up not supporting the ban but arguing that it was not unlawful. Unfortunately today the framers of our Constitution, and the writers of The Federalist Papers, would be turning over in their graves if they saw how much authority presidents have."

He used the Iran nuclear deal signed by President Obama as another example. "The Constitution says for a treaty to be ratified you need two thirds of the Senate. The President couldn't get two-thirds of the Senate; he couldn't get 50 percent of the Senate. Everybody opposed the Iran deal. The President wanted to make this Iran deal. So he signed it himself. He knew by signing the Iran deal and not getting legislative approval that any president who comes into office can abrogate it which is exactly what happened."

He was reminded that the framers of the Constitution weren't looking to create an

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Prof. Alan Dershowitz with President Barack Obama in the Oval Office (Courtesy)

Annual Seminar: Dershowitz – continued from page 12

efficient government. "They were looking to create a government that didn't allow for tyranny to emerge even if it meant deadlock. Deadlock is not something that the framers would be concerned about or upset about. A too-powerful executive is what they were concerned about."

When asked about the President's recent verbal attacks on the independence of the judiciary and its judges, he recounted that Presidents Roosevelt, Lincoln and Jefferson also railed against judges. "Nobody likes judges. They're too damn independent. And you can't tell them what to do. You can't whisper to a judge; you can't lobby a judge. And people who have power are afraid of judges and judges have the ability to strike down what they think is the most important legislation in the world."

While he adamantly disagreed with Trump lashing out at a judge based on the judge's Mexican heritage, Dershowitiz did think it's okay for a President to be critical of judges. "That's part of our system of checks and balances. And judges are not above criticism when they warrant that."

In an exchange with the audience on immigration, Dershowitz did not oppose sophisticated barriers of entry for border control, but he believes that walls send the wrong symbolic message.

"When it comes to saving lives, when it comes to real people who need asylum, I think the ends justify the means." He cautioned, "But we need a rational system. The President has politicized the issue and has turned it into a symbolic issue of the wall that so many liberal Democrats who previously supported tough immigration policies now can't support it because Trump supports it."

To further make his point, he recalled when Obama was President, the majority of the Jewish community favored Obama moving the U.S. embassy from Tel Aviv to Jerusalem. When Trump did it, the Jewish community opposed it. "It's the same act just done by a different person. And that's what's happened to American politics. We don't look at the substance; we look at who benefits from it."

He shared his grandfather's story, describing him as a "very poor man" who repaired pocket books and struggled to make a living to support nine children in their Williamsburg section of Brooklyn. In 1939, his grandfather received a series of letters from his paternal uncle's family living in Czechoslovakia. Fearing the Nazis, they asked for help to get immigration visas to come to the U. S. Knowing it was illegal, the elder Dershowitz persuaded his neighbors to falsify affidavits, securing visas for 29 Czechoslovakian Jews. The story didn't end there.

When a young woman was stranded in Poland when the Nazis invaded, Dershowitz's grandfather sent his younger son, with his American passport, to find this woman, marry her and bring her back to the U.S. "He did it. And as if made for a Hollywood movie, they fell in love on the boat, and lived happily 50 years thereafter."

When asked for his view on anti-Semitism, he recalled that being Jewish of Eastern European decent, he was turned down by Wall Street firms when he applied for a job out of law school in spite of graduating at the top of his class. Still today, he keeps a matchbox from a hotel where Jews were not welcome. While he agreed that this kind of anti-Semitism is no longer in view today, he expressed concern for the rise of a different kind of anti-Semitism within the Muslim community reflected not in violence but in attitudes.

He was highly critical of his friend Bill Clinton for not walking out of the memorial service for the late singer Aretha Franklin when the Reverend Farrakhan, an outspoken anti-Semite, was seated nearby the former President. "His daughter Chelsea said shortly after that there can be zero tolerance for Farrakhan's anti-Semitism. She was directing that statement at her dad. And that took a lot of courage for her to say it."

Addressing the decline in political civility, he said, "I don't think we can hold any society together with just written laws. It takes agreement on shared norms. My biggest concerns in current times are the attacks on the rule of law and political civility norms."

He advocated for establishing a process to bring people together by agreeing on a set of norms for how to disagree. "We're not going to have people agree with each other on political views. They're too far apart." He talked about his early television debates with conservative William F. Buckley Jr. "Bill and I agreed about nothing but we were friends and we loved a good argument. We can have these kinds of disagreements, but we need to bring back civil discourse."

He proposed more debate on college campuses. "The vast majority of students on university campuses today are craving intellectual exchanges. But it's a small number of radicals on both sides that come on campus and want to shout at each other. They want to insult each other. They want to say we have the moral authority and you don't."

With the rise in political extremism worldwide, he vowed to remain in the center as a principled civil libertarian. "The right is moving further and further to the right with super nationalism and populism and the left is moving further to the left."

Describing himself as "a centrist liberal, slightly leaning left on most issues," he noted that many of his friends are "centrist conservatives, slightly leaning right. We get along great." He added, "It's so easy if you're a liberal to be critical of the hard right conservative or if you're a conservative to be critical of the hard left. It's much harder if you're a liberal to be critical of the hard left and if you're a conservative to be critical of the hard right. But I think that's an obligation we all have. Look at what we share in common in this room – a love for America, a love for justice, a love for law. Those are all kinds of centrist elements."

58th Annual Seminar Coverage

*A Collection of Observations from Those in Attendance

Michael Colton: "As Chris Faenza announced the Pat Long Past President's Award, I was sitting next to recipient Eric Schwettmann and the look on his face was priceless."

Eric Schwettmann: "The MSJ panel was very well received and more than held its own against the powerhouse damages panel it faced as competition in the same time slot. They made a boring topic ... fun!"

Bob Olson: "Recently retired Judge Miller, participating in the MSJ panel, was exceedingly forthcoming about what really goes on with courts reading summary judgment motions."

Bob Olson and Chip Farrell once again (is it 19 years now?) went through their fast-paced **"Year in Review"** covering cases ranging from "game changing" to must-know to humorous, with the appellate courts continuing to provide them with ample material. It's an hour and 45 minutes that provides virtually everyone in the audience with at least a couple of gems that will be critical to pending cases in the coming year.

The session on **Secrets to Success: Women-Owned Law Firms** took place Friday morning with speakers Wendy Wilcox, Denise Taylor and Lisa Collinson. The session started with a short movie (Lisa Collinson's directorial debut) about influential women in their fields – laughs were had by all. The speakers then shared their stories about their personal victories and struggles along the way. They shared advice and anecdotes about how lawyers can excel in their firms and get themselves into power positions to open their own firms. The panel discussion was so well received that plans are in the works for an encore, potentially at the National Association of Women Judges' 41st Annual Conference. Feel free to contact the panelists for more info.

The presentation on damages that incorporated the use of social media and sub rosa investigations, moderated by Lindy F. Bradley, Esq., provided specialized insight into these often used, but little understood defense tools to combat damage claims. The speakers provided advanced guidance on protecting a case from pre-litigation through trial, including methods of admitting social media and sub rosa evidence and specific trial testimony that can be best utilized by damages experts to minimize exposure. The panel presented what amounted to a master class in the subtleties and nuances of these tried and true strategies.

Michael Lebow: I thought the presentation on combating inflated damages opinions was exceptional. It was great how Mr. Carroll took attendees on a step by step journey of how to lay the foundation in discovery for attacking experts at trial. It was a very entertaining presentation and greatly helpful.

I also enjoyed learning during the biomechanics seminar that if the whole law thing does not work out for there is a potential future out there for me as a human crash test dummy!

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Annual Seminar: The Audience Speaks – continued from page 14

Ninos Saroukhanioff: On Thursday, January 31, 2019, at 3:15 pm I had the honor and privilege to serve as the moderator for the panel entitled, "Taking the 'Damn!' Out of Damages: Successfully Countering the Multi-Million Dollar General Damages Claim." On my panel were none other than Mitchell Tarighati, Esq., a mediator with ADR Services, Inc., Walter M. Yoka, Esq. of Yoka & Smith, Robert A. Morgenstern, Esq. of Maranga*Morgenstern, and, last but not least, Michael Schonbuch, Esq., of Daniels, Fine, Israel, Schonbuch & Lebovits.

In over 58 years, I don't believe there has ever been a single panel that consisted of three Past Presidents of ASCDC; three Past Presidents of California Defense Counsel; and three Past, Present & Immediate Future Presidents of the Los Angeles Chapter of ABOTA. Furthermore, I know for a fact that there has never been a single panel whose panelists have graced the cover of the *Verdict* magazine more times than this group. The number is Eleven. Yes, between Wally, Bob and Mike they have appeared on the cover of the *Verdict* magazine at least 11 times. Oh, and did I mention that in addition to the amazing panel, we had a surprise speaker? Yup, that's right. We had the distinct honor of having plaintiff's attorney extraordinaire, Gary Dordick, Esq., of Dordick Law appear at the end of the session to provide a ten closing argument focusing on non-economic damages. This was a sample of the closing argument Gary provided in a recent wrongful death trial in Ventura which resulted in, I believe, a $126,000,000.00 verdict.

Turning to the substance of the panel. The panelists discussed how they deal with the various issues faced by defense lawyers defending claims for huge non-economic damages in cases involving catastrophic personal injury claims. We began by discussing what they look for at the outset of the case and the importance of attempting to identify all the key evidence and witnesses early on who plaintiff's counsel will be calling upon to support the claim for general damages.

We then discussed some strategies for attempting to resolve these cases through private mediation. It was during this discussion that we found out that Mike is not a great "settler." But, Mitch did provide lots of insight as to what types of strategies he likes to see from the defense when they are in the process of trying to argue for lesser amounts to resolve the general damages aspects of a case. One of the things that Mitch mentioned is that the defense rarely has a theme for their case and that by not having a theme they lose some of their ability to convince the mediator to argue their position to the other side.

The discussion then moved into the trial phase. We started by discussing the importance of voir dire. Wally, Bob and Mike each discussed the importance of "embracing the negative," (as stated by Wally) early on and letting the jurors know that this will be a difficult case for them to have to resolve. In our discussion about opening statements, Mike said that he loves it when the plaintiff's attorney begins by asking for "big money." He said the more they talk about money the better.

Congratulations to the ASCDC on another fine conference, with attendance up 10%, reflecting the ever-increasing value of the program.

As mentioned above, one of the highlights of the presentation was the surprise closing argument provided by Gary. It was spectacular and after getting a glimpse of Gary working his magic it is no wonder why he gets amazing results on behalf of his clients. But, what may have been even better than Gary's closing argument, was the discussion among Wally, Bob and Mike as to the different strategies and techniques that they each use when defending against these cases at trial. Wally made it clear that one of his favorite tactics is to poke a little fun or sends jabs at his opponent as only Wally can. Bob talked about maintaining credibility and reminding the jury that their role is to provide reasonable and fair compensation to plaintiff's based on the facts and evidence of the case. Mike gave several great examples of how he gets the jurors to understand the value of the money being asked for by plaintiff's counsel and how the amounts being requested are not based in reality.

Unfortunately, due to my mistake, I stopped the session 15 minutes early. But, nevertheless, I have received nothing but positive comments about the session. It certainly was a thrill for me to stand on the same stage as Gary, Mitch, Wally, Bob and Mike. This was really, really fun.

CLASSICS COME IN ALL FORMS...

GARY DONOVAN, ESQ.
Full Time Mediator since 2007

PETER SEARLE, ESQ.
Full Time Mediator since 2000

A sincere thank you to ASCDC members
for selecting us to help steer your cases to resolution.

We will see you ***further on up the road!***

JUDICATE WEST
Alternative Dispute Resolution
PROUDLY SERVING 25
Results Beyond Dispute℠

Also, many thanks to everyone at Judicate West
for all of your help and support over the years.

ASCDC Gives Back

On January 31, and February 1, the ASCDC held a toiletry drive at the Annual Seminar. We collected numerous toiletries from our generous members. The toiletries collected were donated to My Friend's Place, a day shelter for homeless teen and young adults. If you would like to donate to My Friends Place you can contact them at *www.myfriendsplace.org.*

ASCDC THANKS THE TROOPS!

On November 15, 2018, following the Law Firm Management Seminar, the ASCDC Board of Directors and Committee Chairs held a public service project in honor of the many men and women who serve our country. We got together and wrote thank you notes and collected dozens of Beanie Babies (yes Beanie Babies) for care packages for the troops, which will be distributed via Operation Gratitude. In each care package, Operation Gratitude packs a handwritten letter thanking the troops for their service as well as a Beanie Baby.

Apparently, the troops love getting these and decorating their space with them. The troops also give the stuffed animals to the local children, who in turn may provide valuable information to them. If you would like to express your thanks to our troops, you can do that by sending your own note to Operation Gratitude: *www.operationgratitude.com.*

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MEDIA AWARENESS WEEK

RESOLUTION

Sponsor Paul Koretz, Councilmember, 5th District

Mediation Awareness Week

March 25 – March 29, 2019

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

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

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

WHEREAS, the State of California has promoted mediation efforts through enactment of mediation related statutes, and

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

WHEREAS, mediation has proven to resolve conflicts amicably, improve relations among people and within neighborhoods and families, and between consumers and businesses and relieve the burden of litigation; and

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

WHEREAS, Mediation Week will increase public awareness and add support for alternative dispute resolution:

NOW THEREFORE, BE IT RESOLVED that by the adoption of this resolution, The Los Angeles City Council does hereby declare March 25 – March 29, 2019 Mediation Awareness Week in the City of Los Angeles.

March 27, 2019

green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

Emily Cuatto

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

LPerrochet@horvitzlevy.com or *ECuatto@horvitzlevy.com*

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

PROFESSIONAL RESPONSIBILITY

The substantial factor causation standard applies to claims against an attorney for breach of fiduciary duty.

Knutson v. Foster (2018) 25 Cal.App.5th 1075

The defendant attorney agreed to help the plaintiff resolve an employment dispute with USA Swimming, without disclosing that he had a long-running professional relationship with that organization. The attorney shared privileged communications, did not ensure the plaintiff understood all of her legal options, and convinced the plaintiff to agree to a new contract containing onerous terms with which she ultimately could not comply, forcing her to quit swimming. When the plaintiff learned about the attorney's conflicts of interest, she sued for fraudulent concealment and intentional breach of fiduciary duty and sought emotional distress damages. A jury found in her favor, but the trial court granted a new trial on the ground of insufficient evidence of causation because she had not proven she would have obtained a better deal with USA Swimming "but for" her attorney's conflicts of interest.

The Court of Appeal (Fourth Dist., Div. Three) reversed, holding that the substantial factor causation standard applied to the plaintiff's claims, and that "but for" causation was not required because plaintiff had alleged an intentional tort against the attorney.. Under that standard, the jury's findings were supported by the evidence. The opinion conflicts with other authorities stating that substantial factor causation subsumes "but for" causation, which remains an essential element even when wrongdoing – either negligent or intentional – is shown.

Attorney disqualification may properly be denied based on implied consent to concurrent representation of potentially adverse interests.

Antelope Valley Groundwater Cases (2018) 30 Cal.App.5th 602.

A law firm undertook to represent public entities in long running consolidated cases. Another entity (AVEK) became enmeshed in the litigation. The law firm acted as general counsel for AVEK, but AVEK hired different counsel to represent it in the consolidated actions. AVEK participated in the litigation for ten years, at which time it terminated the law firm as its general counsel and, for the first time, sought to disqualify the firm as counsel for the co-defendants. The trial court denied the motion to disqualify, finding that AVEK effectively consented to the concurrent representation. Notably, there was no evidence that the firm acquired AVEK's confidences material to the litigation and used them against AVEK.

The Court of Appeal (Fifth Dist.) affirmed. Substantial evidence supported the trial court's factual findings, and no bright line rule of law provides that parties may not impliedly consent to a firm's concurrent representation of their interests and opposing interests. " because the right to nonconflicted counsel belongs to the client [Citation] the client may consent to an attorney undertaking simultaneous representation of another client with potential (or even actual) adverse interests." Importantly, there was substantial evidence that AVEK's decision not not object to the concurrent representation by its

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counsel was an "an *informed* decision." (Original emphasis.) "When a client has made an informed decision to consent to an attorney's concurrent representation of themselves as well as another client with potentially adverse interests, courts will not grant a subsequent motion to disqualify that attorney." Although the rules of professional conduct require that consent be in writing, and there was no such writing in this case, "courts analyzing questions of disqualification may obtain guidance from the Rules of Professional Conduct, but 'the California State Bar's Rules of Professional Conduct govern attorney discipline; they do not create standards for disqualification in the courts.'"

See also *City of San Diego v. Superior Court (Hoover)* (2018) 30 Cal.App.5th 457 [Fourth Dist., Div. One: Attorney disqualification may be properly denied where the attorney improperly obtains the opposing side's privileged information but that information is irrelevant to the lawsuit]

ATTORNEY FEES AND COSTS

When determining whether to award prevailing party costs, trial courts may not consider the losing party's ability to pay.

LAOSD Asbestos Cases (2018) 25 Cal.App.5th 1116

In this asbestos action, the defendant served a Code of Civil Procedure section 998 offer to compromise, which the plaintiff rejected. After the jury found for the defendant, it sought over $300,000 in prevailing party costs and expert witness fees under section 998. The trial court granted the plaintiff's motion to tax costs on the ground she had no ability to pay and it would be unjust to award significant costs.

The Court of Appeal (Second Dist., Div. Four) reversed and remanded for reconsideration of whether the offer was made in good faith and whether the expert fees were reasonably necessary to the litigation. Code of Civil Procedure section 1033.5 gives courts discretion to determine which costs are "reasonable in amount" and "reasonably necessary to the conduct of litigation," but does not permit courts to deny costs based on the plaintiff's ability to pay.

A section 998 offer that is silent on pre-offer costs and fees includes them.

Martinez v. Eatlite One, Inc. (2018) 27 Cal.App.5th 1181

The defendant served an offer to compromise under Code of Civil Procedure section 998. This offer said nothing about pre-offer costs and attorney fees. Following a jury verdict in the plaintiff's favor for slightly more than the offer, the trial court awarded plaintiff about $64,000 in costs and attorney fees. The court then included these costs and fees in comparing the section 998 offer to the plaintiff's judgment and therefore determined that the plaintiff did better than the offer. Thus, the trial court denied defendant's request for post-offer costs and instead awarded plaintiff post-offer costs and fees.

The Court of Appeal (Fourth Dist, Div. Three) reversed, holding that the section 998 offer, which had been silent as to costs, necessarily included the pre-offer costs and fees that the defendant would have been liable for had the offer been accepted the offer. The trial court therefore erred by failing to compare the jury's award plus the plaintiff's pre-offer costs and fees with the amount of the section 998 offer plus those same pre-offer costs and fees. Because the offer exceeded the judgment under that comparison, the trial court was required to award post-offer costs and fees to the defendant under section 998.

In an action asserting both survival and wrongful death causes of action, a 998 offer must be apportioned between the estate and wrongful death beneficiaries.

Williams v. The Pep Boys Manny Moe & Jack of California (2018) 27 Cal.App.5th 225

In this asbestos action, the decedent's children sued a product distributor asserting survival causes of action as well as a claim for wrongful death. The defendant served an offer to compromise under Code of Civil Procedure section 998, offering to pay plaintiffs $60,000, "contingent upon acceptance by all plaintiffs." Plaintiffs rejected the offer. After a bench trial, the court entered judgment for the plaintiffs, but held that the entire judgment was offset by their pretrial settlements with other defendants. Having done better under the net judgment than its section 998 offer, the defendant sought and obtained its expert witness fees.

The Court of Appeal (First Dist., Div. Four) reversed the fee award, concluding that, since the plaintiffs had asserted both survival and wrongful death claims, they were not seeking to recover for a single, indivisible injury as occurs in a case rising only a wrongful death claim. Under "[t]he general rule is that a section 998 offer to multiple plaintiffs is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them," the defendant's section 998 offer did not apportion the offer between the estate and wrongful death beneficiaries, contingent on acceptance by all the plaintiffs, it was invalid.

(See also discussion of this case under Torts.)

Where there is a fee shifting statute, plaintiffs may recover attorney fees incurred following an invalid settlement offer even if they could have easily resolved the case by making a counteroffer.

Etcheson v. FCA US LLC (2018) 30 Cal.App.5th 831.

In this lemon law case, the defendant served an offer to compromise under Code of Civil Procedure section 998 promising to pay restitution in an amount equal to the actual price paid for the vehicle less an offset for plaintiffs' personal use, plus reasonable costs, expenses, and attorney fees. The plaintiffs objected to this offer as too vague. About three months later, the defendant served another 998 offer for $65,000, plus reasonable costs, expenses and attorney fees. The parties settled about a month later for $76,000 plus attorney fees, costs and expenses to be determined. When the plaintiffs sought attorney fees, the trial court found the hours and rates were reasonable, but substantially reduced the fee award on the ground that it was unreasonable for plaintiffs to continue litigating the case after the first 998 offer, which, while invalid, showed defendants were trying to end the case.

The Court of Appeal (Fourth Dist., Div. One) reversed. The initial 998 offer was invalid, and by continuing to litigate, plaintiffs obtained a more favorable result. The trial court abused its discretion by effectively punishing plaintiffs for continuing to litigate until they obtained an acceptable settlement offer.

See also *Warren v. Kia Motors America, Inc.* (2018) 30 Cal. App.5th 24 [In cases governed by the Song-Beverly Act or other consumer protection statute with a mandatory fee shifting provision designed to incentivize attorneys to take on consumer protection cases, a trial court abuses its discretion when it reduces a potential fee award based on the low amount of the plaintiff's damages (Fourth Dist., Div. Two)]

ANTI-SLAPP

The litigation privilege does not apply to wrongful eviction claims brought under Code of Civil Procedure section 1942.5, subdivision (b).

Winslett v.1811 27th Avenue, LLC (2018) 26 Cal.App.5th 239

A tenant sued her landlord, alleging habitability claims and wrongful eviction based on the filing of an unlawful detainer action against her. The landlord filed an anti-SLAPP motion, arguing that the unlawful detainer action was protected petitioning activity and the tenant could not show a likelihood of prevailing on her claims because they would be barred by the litigation privilege. The trial court granted the motion and the tenant appealed.

The Court of Appeal (First Dist., Div. Four) reversed. Although filing an unlawful detainer action is protected activity, Code of Civil Procedure sections 1942.5, subdivision (d), and 1942.5, subdivision (h), provide civil remedies for actual or attempted wrongful eviction, including specifically a landlord's bringing an unlawful detainer action in retaliation for the tenant's exercise of his or her rights. Claims arising under this statute are therefore an exception to the litigation privilege and this privilege did not bar the tenant's claims.

An action alleging that an employee breached an arbitration agreement by filing a lawsuit was properly subject to a motion to strike.

Moss Brothers Toy, Inc. v. Ruiz (2018) 27 Cal.App.5th 424

The defendant's employee filed an employment-related class action against the defendant's agent. This agent unsuccessfully moved to compel arbitration. Later, the defendant sued the employee for breach of contract, alleging he breached his arbitration agreement clause by filing the lawsuit against the agent. The employee filed an anti-SLAPP motion to strike the lawsuit, which the trial court granted.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. "But for" the employee's filing his employment lawsuit, there would be no factual basis for the defendant's breach of contract claims. The complaint thus arose out of protected petitioning activity and was properly stricken.

Anti-SLAPP motions may not be brought in limited civil cases.

1550 Laurel Owner's Assn., Inc. v. Appellate Division of Superior Court (Munshi) (2018) 28 Cal.App.5th 1146

In this limited civil case arising out of an alleged breach of a settlement agreement between the defendant and his homeowners' association, the defendant filed a special motion to strike alleging that the association's claims arose out of protected petitioning activity. The trial court denied the motion, reasoning that Code of Civil Procedure section 92, subdivision (d), permits motions to strike in limited civil cases "only on the ground that the damages or relief sought are not supported by the allegations in the complaint." The appellate division of the superior court reversed, holding that anti-SLAPP motions are not "motion[s] to strike" for purposes of section 92, subdivision (d), and therefore may be filed. The association sought a writ of mandate.

The Court of Appeal (Second Dist., Div. Three) granted the writ. Section 92, subdivision (d) is clear that all motions to strike other than the type described in that section are prohibited, and that includes special motions to strike under the anti-SLAPP statute. This holding was supported by, among other reasons, the fact that anti-SLAPP litigation can be time consuming and costly; permitting anti-SLAPP motions in limited civil cases would undermine the legislative goal of ensuring "efficient and cost-effective" resolution of such cases.

ARBITRATION

Arbitrator's failure to disclose his work as a neutral in other matters involving the defendant required the defendant's favorable arbitration award to be vacated.

Honeycutt v. JPMorgan Chase Bank, N.A. (2018) 25 Cal.App.5th 909

In this employment arbitration between a bank and one of its employees, the arbitrator disclosed that he had accepted offers to serve as a neutral in four matters involving the bank, but failed to disclose another four such matters. After the arbitrator found for the bank, the employee sought additional information about the arbitrator's potential conflicts and learned about the other four matters. The employee sought to vacate the arbitration award, but the trial court confirmed it.

The Court of Appeal (Second Dist., Div. Seven) reversed and ordered the trial court to vacate the award. The arbitrator's disclosure obligations were governed by the Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Ethics Standard 12(d) obligated the arbitrator to disclose his receipt of an offer of employment in another case involving the same parties or lawyers within five days, as well as his acceptance of that offer within five days. The arbitrator did neither in this case. Further, Ethics Standard 7(b) imposed a continuing duty to disclose. Although an arbitration award will not be vacated for violation of a disclosure rule unless the arbitrator was "actually aware" of the grounds for disqualification, the arbitrator was obviously aware of the four other arbitrations he was involved in, and his failure to disclose them under either Ethics Standard 12(d) or 7(b) mandated vacatur of the award: "[t]he arbitrator disclosure rules are strict and unforgiving."

But see *Cox v. Bonni* (2018) 30 Cal.App.5th 287 [arbitrator's failure to disclose ground for disqualification did not require vacatur of award where the party moving to vacate had reason to know of the basis for disqualification before the arbitration began but did nothing until after an unfavorable award].

A "partial" arbitration award is not reviewable in the superior court.

Maplebear, Inc. v. Busick (2018) 26 Cal.App.5th 394

The plaintiff filed a class action arbitration demand claiming that her employer had misclassified her and others similarly situated as independent contractors rather than employees. The first issue present to the arbitrator was whether the parties' arbitration agreement authorized the arbitrator to certify a class. The arbitrator entered a "partial final award" finding she had authority to certify a class. The defendant petitioned to vacate this award. The plaintiff opposed the petition, arguing that the decision was not subject to immediate review in the trial court because it was not a final award. The trial court agreed with the plaintiff and dismissed the petition.

The Court of Appeal (First Dist., Div. Two) affirmed. Under Code of Civil Procedure section 1285, a party to an arbitration may petition the superior court to confirm, correct or vacate an arbitrator's "award." But under Code of Civil Procedure section 1283.4, this "award" must "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." No reviewable "award" exists where issues remain to be decided. The parties cannot create a reviewable award by labeling an interim award a "partial final award," no matter how important the issue is to the remaining issues.

Under the Federal Arbitration Act, where a contract delegates the threshold question of arbitrability to the arbitrator, the issue must go to the arbitrator even if the claim to arbitrability is "wholly groundless."

Henry Schein, Inc. v. Archer and White Sales, Inc. (2019) 139 S.Ct. 524

The defendant in this business dispute moved to compel arbitration under the parties' contract that provided for arbitration before the American Arbitration Association of any dispute arising under the agreement, unless the dispute sought injunctive relief. Because the plaintiff was seeking some injunctive relief, the plaintiff opposed arbitration. Under the AAA rules, the arbitrator decides questions of arbitrability. Nonetheless the district court decided the arbitrability question, holding that the defendant's claim to arbitration was "wholly groundless" given that the complaint sought injunctive relief and such claims were plainly not arbitrable under the contract. The Fifth Circuit affirmed.

The United States Supreme Court reversed. The FAA contains no "wholly groundless" exception, and the courts cannot rewrite the statute to create that exception even if it would be efficient. Further, it will not always be clear when a claim to arbitrability is "wholly groundless." Engrafting such an exception onto the general rule that arbitrability questions are to be determined by the arbitrator where the contract so provides would likely result in more litigation, not less.

But see *New Prime Inc. v. Oliveira* (2019) 139 S.Ct. 532 [Even if a contract delegates arbitrability questions to the arbitrator, the court must determine whether section 1 of the Federal Arbitration Act (prohibiting compelling arbitration of certain employment disputes involving transportation workers) applies].

CIVIL PROCEDURE

A motion to compel further deposition responses is untimely unless all papers supporting the motion are filed within 60 days after completion of the deposition.

Weinstein v. Blumberg (2018) 25 Cal.App.5th 316

Under Code of Civil Procedure section 2025.480, a motion to compel further deposition responses "shall be made no later than 60 days after the completion of the record of the deposition." In this case, the plaintiff filed a notice of motion to compel further responses within this 60-day deadline but did not serve the supporting papers until after the had elapsed. The defendant argued the motion was not timely filed. The trial court disagreed and entered discovery sanctions against the defendant in connection with granting the motion. The defendant appealed from the ruling granting discovery sanctions.

The Court of Appeal (Second Dist., Div. One) reversed. Under Code of Civil Procedure section 1005.5, a motion is "made" when the notice of motion is filed. But under Code of Civil Procedure section 1010, outside the context of a motion for new trial, supporting papers must be filed with the notice of motion. Accordingly, the plaintiff's failure to file all of the papers upon which the motion was based with its notice within the 60-day deadline meant the motion was untimely. While Code of Civil Procedure section 1005 generally provides that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing," that general rule does not apply where "otherwise . . . specifically provided by law." Section 2025.480's 60-day deadline is such an exception.

Except on issues of state of mind, a party cannot create a triable issue of fact simply by saying the jury could disbelieve a witness. *Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487

In this automobile accident case, the plaintiff sought to impose respondent superior liability on the defendant driver's employer, a court reporting agency. The driver, the agency's scheduling manager, admitted that she had been on her phone at the time of the accident with one of her court reporters. But both she and the reporter said they were friends in addition to colleagues and the phone call, which occurred after hours, was about personal matters and not business. The agency moved for summary judgment because there was no evidence the defendant was acting in the course and scope of her employment at the time of the accident. The plaintiff sought to create a triable issue of fact by showing that the defendant's cell phone records did not support the defendant's claim she spoke with the reporter frequently, and so a jury could infer that the two were not actually friends and were instead discussing a business matter at the time of the accident. The trial court granted summary judgment.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. The agency presented undisputed evidence that the defendant made after-hours calls for work only rarely and that the defendant and reporter were friends. The reporter confirmed that the call was personal. While the plaintiff offered reasons why the reporter might have had an incentive to lie about the conversation to protect her employer, "merely offering reasons why a witness might have an incentive to lie, without offering any evidence to suggest [the witness] actually was lying, is not enough to create a disputed issue of material fact." Because simply disputing a witnesses credibility is not enough to prove the opposite of the witness's testimony is true, the plaintiff needed to show the call was about work to survive summary judgment. Plaintiff had no such evidence, so summary judgment was properly granted.

TORTS

Industry custom and practice evidence may be admissible in a strict products liability action alleging a risk-benefit theory of defect.
Kim v. Toyota Motor Corp. (2018) 6 Cal.5th 21

In this automotive products liability case, the plaintiffs argued their Toyota pickup truck was defectively designed because it was not equipped with electronic stability control. Toyota sought to introduce evidence that such a feature was not standard in the industry at the time. The trial court permitted that evidence and the jury found the vehicle was not defective under the risk-utility test for product defect. The Court of Appeal (Second Dist., Div. Seven) affirmed.

The Supreme Court likewise affirmed. Industry custom and practice evidence may be admissible in a strict products liability case where it would be relevant to the jury's assessment "of whether the product is as safely designed as it should be, considering the feasibility and cost of alternative designs." "[E]vidence of other manufacturers' design decisions" may aid the jury's understanding of the complexities and trade-offs of a particular design "in determining whether the manufacturer has balanced the relevant considerations correctly."

Golf course owed a duty to protect patrons from yellow jacket nests on the course.
Staats v. Vintner's Golf Club, LLC (2018) 25 Cal.App.5th 826
The plaintiff sued the defendant for negligence and premises liability after she was severely stung by a swarm of yellow jackets during a golf lesson at the defendant's course. The defendant had "never set traps or [taken] other measures to control yellow jackets because it did not perceive them to be a problem." The defendant moved for summary judgment, arguing that it had no duty to protect patrons from " 'an attack by a wild swarm of insects' " absent prior knowledge of the nest. The trial court granted the motion.

The Court of Appeal (First Dist., Div. One) reversed. Under the general duty of a premises owner to maintain its property in a reasonably safe condition, the defendant had a duty to inspect for yellow jacket nests and set traps to prevent their formation. Given the prevalence of yellow jackets in the area, it was foreseeable that yellow jacket nests could form on the grounds and pose a danger to patrons; imposing a reasonable duty to protect patrons from yellow jacket nests would not impose a heavy burden; golf course operators were in a better position to guard against yellow jacket nests than patrons; and insurance should be available for the risk of injury.

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See also *Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal. App.5th 627 [Fourth Dist., Div. Two: hotel owed duty to guest to protect her from black widow bite where it was known that black widow spiders could be on the premises]

Premises owner had no duty to use Automatic External Defibrillator (AED) on permissive user of the premises.

Jabo v. YMCA of San Diego County (2018) 27 Cal.App.5th 853

The decedent was a member of a private soccer league that rented a field from the defendant. While playing soccer on the field, the decedent suffered a heart attack and died. The family filed a wrongful death lawsuit claiming that the defendant had a duty to use an automatic external defibrillator (AED) on the decedent. The trial court granted summary judgment for the defendant, ruling that it owed no common law or statutory duty to use an AED on an adult who was a permissive user of its premises under a rental agreement with a private soccer league.

The California Court of Appeal (Fourth Dist., Div. One) affirmed. Although the defendant owed a statutory duty to its members to acquire and maintain AEDs and train its staff on proper AED use, it did not owe this same duty to a non-member participating in a private soccer league. Further, the defendant owed no common law duty to the decedent because athletes assume the risk of cardiac arrest during strenuous activities, and businesses that voluntarily acquire and maintain AEDs "should not be penalized" by imposing a common law duty in addition to any statutory duty.

The required vehicle exception to the going-and-coming rule does not apply simply because an employee sometimes uses his or her car for work.

Newland v. County of Los Angeles (2018) 24 Cal.App.5th 676

Donald Prigo, a deputy public defender, was driving home from the Norwalk Courthouse, his usual place of work, and turning to go to the post office, when he caused an accident that injured the plaintiff, who sued Prigo and Prigo's employer, Los Angeles County. The County maintained that this accident did not occur within the course and scope of Prigo's employment, and that the going-and-coming rule applied to preclude the County's vicarious liability. But the trial court refused the County's proposals for course-and-scope related jury instructions and used a verdict form that permitted the jury to find – as it ultimately did – that the County was vicariously liable for the accident if Prigo had ever been required to use his car for work.

The Court of Appeal, (Second Dist., Div. Five) reversed with directions to enter judgment for the County. The required vehicle exception to the going-and-coming rule applies only where the employer either requires the employee to bring a car to work or reaps a benefit from the employee's use of his car. The County did not require Prigo to use his car for work. And although the County might obtain some incidental benefit from Prigo's use of his car when he performed certain job duties making appearances in branch courts, visiting jails and crime scenes, and meeting witnesses, there was no evidence he was doing engaged in such duties when the accident occurred.

But see *Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568 [Fifth Dist.: where employer required employee to be on-call 24 hours a day to respond to work requests, and the employee drove a company-owned vehicle, the employer was vicariously liable for the employee's traffic accident even when the employee was traveling after work hours from a family gathering]

Absent advance knowledge that a contractor is unfit, the hirer of that contractor cannot be liable for punitive damages based on the contractor's negligent work performance.

Butte Fire Cases (2018) 24 Cal.App.5th 1150

In this mass action arising out of a forest fire that began when a tree contacted a PG&E power line, the plaintiffs claimed PG&E was liable for punitive damages because it breached a nondelegable duty to operate its power lines safely by failing to ensure the contractors it hired to manage vegetation were qualified and properly trained to do their work and failing to have appropriate risk management procedures despite its knowledge of the fire risk. PG&E moved for summary adjudication, arguing these facts were insufficient to create a triable issue on punitive damages. The trial court denied the motion and PG&E sought writ relief.

The Court of Appeal, (Third Dist.) granted the writ, directing the trial court to reverse the denial of summary adjudication. The evidence that PG&E failed to employ sufficient risk management controls showed only negligence; it was not clear and convincing evidence of malice. Further, evidence that PG&E delegated its responsibilities to contractors was insufficient to create a triable issue on malice where there was no clear evidence PG&E "engaged in low bidding or other pricing behavior that might cast doubt on the bona fides of the company's contractual arrangements" or that PG&E was aware its contractors were failing to fulfill their contractual obligation to train their employees to do their jobs.

In granting summary judgment based on assumption of the risk, the trial court did not abuse its discretion in excluding the plaintiff's conclusory expert declarations.

Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC (2018) 25 Cal.App.5th 344

While skiing at the defendant's resort, the plaintiff collided with a snowcat (a large vehicle used to break up snow). The plaintiff sued, but trial court held that her claims were barred by the primary assumption of the risk doctrine because she expressly assumed the risk when she signed a season pass liability waiver that warned of the risk of collisions. The plaintiff sought to avoid this ruling by introducing testimony from three experts that the vehicle was driven in a grossly negligent manner across her path, but the trial court excluded this testimony as irrelevant and lacking foundation.

The Court of Appeal (Third Dist.) affirmed. The trial court did not abuse its discretion by excluding these declarations, which did not address the standard of care for driving the vehicle at issue and instead simply provided conclusory statements that the defendant's conduct fell below industry standards and "constituted gross negligence."

See also *Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715 [Third Dist.: risks of being injured while skiing and while being transported off the mountain after an injury are inherent in the sport]

But see *Mayall on Behalf of H.C. v. USA Water Polo, Inc. (9th Cir. 2018) 909 F.3d 1055 [9th Cir.: primary assumption of risk doctrine did not bar negligence claim based on allegation that athlete suffered a second head injury after being returned to the game following a concussion].*

Professional standard of care applied to yoga instructor.

Webster v. Claremont Yoga (2018) 26 Cal.App.5th 284

The plaintiff sued a yoga studio for negligence, claiming one of its instructors injured her while positioning her during a class. The defendant moved for summary judgment based on expert testimony from a medical doctor and an orthopedic surgeon, who said that the plaintiff's injuries resulted from " 'chronic degenerative disc disease and arthritic changes' " rather than from a yoga class. The expert, who was also a yoga instructor, further opined that the instructor's positioning met the standard of care for a yoga instructor. The plaintiff opposed summary judgment, relying on her own testimony to dispute these expert conclusions rather than providing a declaration from a yoga instruction expert explaining how the defendant breached the standard of care. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. One) affirmed. A professional standard of care applied to the yoga instructor, and the plaintiff failed to satisfy this standard because she did not provide expert testimony to contradict defendants' expert testimony concerning the instructor's compliance with the standard of care.

In a survival action, the estate is not entitled to recover the cost of providing future household services during the "lost years."

Williams v. The Pep Boys Manny Moe & Jack of California (2018) 27 Cal.App.5th 225

In this asbestos action, the plaintiffs sought damages for the value of home health care services the decedent's estate incurred in caring for the decedent's elderly wife. Following a bench trial, the trial court awarded damages for these services, including for the services provided after the decedent's death.

The Court of Appeal (First Dist., Div. Four) reversed the damages award for the home health care services provided to the decedent's wife after his death. Under Code of Civil Procedure section 377.34, damages in a survival action are limited to those "sustained or incurred before death." This excludes damages for "lost years."

CONSUMER PROTECTION

A plaintiff who alleges he would not have purchased a product but for a misrepresentation that it was being offered at a discount has suffered a loss of money or property for purposes of establishing standing under the consumer protection laws.

Hansen v. Newegg.com Americas, Inc. (2018) 25 Cal.App.5th 714

The plaintiff brought claims under the Unfair Competition Law, the False Advertising Law, and the Consumers Legal Remedies Act, alleging the defendant falsely advertised that it was offering electronic products for below the retail price. The defendant moved to dismiss the claims on the ground the products were worth what the plaintiff paid for them and the plaintiff therefore lacked standing to bring his claims because he had not suffered the necessary economic loss. The trial court agreed, dismissing the complaint.

The Court of Appeal (Second Dist., Div. Seven) reversed. To establish standing under the Unfair Competition Law and False Advertising Law, the plaintiff must show a loss of money or property caused by the unfair business practice or false advertising. Furthermore, the parties agreed that the Consumers Legal Remedies Act standing requirement turned on the same inquiry. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310 makes clear that a "consumer who relies on a product label and challenges a misrepresentation contained therein" satisfies this standing requirement "by alleging ... that he or she would not have bought the product but for the misrepresentation." Kwikset's holding is not limited to misrepresentations about "attributes" of the product, such as where the product is made. It extends to misrepresentations about price. Any contrary result that prohibited standing in cases like this one "would effectively preclude consumers from bringing false advertising claims predicated on deceptive former price and discount information, despite the fact that the Legislature has specifically prohibited that practice."

Food and Drug Regulations governing the content of a product's Nutrition Facts Panel does not preempt state unfair competition and false advertising laws.

Hawkins v. Kroger Company (9th Cir. 2018) 906 F.3d 763

A consumer who had purchased the defendant's products sued the defendant for placing a label on the face of the products saying they contained "0g Trans Fat," when in reality they had 0.5 grams of trans-fat per serving. The defendant moved to dismiss, arguing the claims were preempted by federal Food and Drug Administration regulations that required it to say the product contained "0g trans-fat" on the Nutrition Facts Panel. The district court dismissed the complaint.

The Ninth Circuit reversed. FDA regulations governing the labels placed on the face of a product are different than the regulations governing nutrition labels. " '[A] requirement to state certain facts in the nutrition label is not a license to make that statement elsewhere on the product.' " Because the FDA regulations did not authorize, much less require, a product containing 0.5g trans-fat to have a face label saying it contained no trans-fat, the FDA regulations did not permit the defendant's labeling practice and did not preempt state consumer protection laws.

See also *Durnford v. MusclePharm Corp.* (9th Cir. 2018) 907 F.3d 595 [9th Cir.: federal Food, Drug, and Cosmetic Act preempted state law claims concerning the amount of protein contained in the defendant's product, but not claims concerning the origin of the protein]

See also *Dachauer v. NBTY, Inc.* (9th Cir. 2018) 913 F.3d 844 [9th Cir.: federal Federal Food, Drug, and Cosmetic Act preempted state-law requirements for claims about dietary supplements different from the FDCA's requirements]

INSURANCE

Insurance unfair practices regulations can be violated based on a single knowing act.

PacifiCare Life & Health Ins. Co. v. Jones (2018) 27 Cal. App.5th 391

The defendant health insurer sought to enjoin the California Department of Insurance from penalizing it for "over 900,000 acts and practices in violation of the Insurance Code." The insurer argued that the Department's definition of a "violation" of the unfair claims settlement practices regulations as either a "single occasion" of an unfair practice or a "general business practice" was inconsistent with Insurance Code section 790.03(h), which defined an "unfair claims settlement practice" as an Insurance Code violation committed "with such frequency as to indicate a general business practice." The trial court granted the injunction, agreeing that an insurer can violate the unfair claims settlement practice regulations only by engaging in a "pattern of misconduct." The Insurance Commissioner appealed.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Section 790.03(h) applies to an insurer's "single knowing act." Thus, a "violation" of the unfair claims settlement practice regulations can occur either as the result of a pattern of misconduct or a single occurrence.

A standard liability policy's "per person" limit for bodily injury includes loss of consortium suffered by an uninjured spouse.

Jones v. IDS Property Casualty Ins. Co. (2018) 27 Cal. App.5th 625

In a personal injury suit, the jury awarded $1.35 million to the injured plaintiff and $150,000 to the plaintiff's wife for loss of consortium. The defendant's insurer tendered $250,000—the "per person" bodily injury limit. In subsequent coverage litigation, the plaintiffs argued that they were entitled to $250,000 *each*. Resolution of the dispute turned on the proper interpretation of the policy language stating that "[t]he bodily injury liability limits for each person is the maximum we will pay as damages for bodily injury, including damages for care and loss of services, to one person per occurrence." The trial court held that the $250,000 limit applied to all damages derived from a bodily injury to a single person, not the damages suffered by each claimant, so the insurer had satisfied its obligations.

The Court of Appeal (Third Dist.) affirmed. The policy expressly included "damages for care and loss of services" as damages for bodily injury. And "[t]he reasonable interpretation is that 'to one person' modifies 'bodily injury.' Thus, the per person limit applies to all damages, including loss of consortium, arising from 'bodily injury' 'to one person.' "

The notice-prejudice rule applies to a policyholder's obligation to notify her life insurer of a disability.

Lat v. Farmers New World Life Ins. Co. (2018) 28 Cal. App.5th 212.

Plaintiffs' mother purchased a flexible premium life insurance policy from Farmer's naming plaintiffs as the beneficiaries. The policy provided that Farmers agreed to waive the premium during any periods of the mother's disability if mother provided proof of the disability to Farmers. The mother became disabled due to cancer and stopped paying premiums, but did not notify Farmers of her disability. She remained disabled until her death. Farmers declined to pay out any benefits on the policy to plaintiffs, claiming the policy had lapsed. The beneficiaries sued for breach of contract and bad faith. The trial court granted summary judgment for Farmers.

The Court of Appeal (Second Dist., Div. One) reversed. Under California's notice prejudice rule, "an insurance company may not deny an insured's claim under an occurrence policy based on lack of timely notice or proof of claim unless it can show actual prejudice from the delay." Because the mother was actually disabled during the time she did not pay premiums, Farmers would not have received greater premium payments than it did had it been timely notified of her disability. It had therefore not established prejudice from the lack of proper notice and was not entitled to summary judgment.

Modification of operating permit restricting use of property constitutes loss of use of tangible property covered by liability policy.

Thee Sombrero, Inc. v Scottsdale Ins. Co. (2018) 28 Cal.App.5th 729.

Plaintiff's lessees operated a nightclub. After a fatal shooting at the nightclub, plaintiff's conditional use permit (CUP) was revoked and replaced with a modified CUP, which provided that the property could be operated only as a banquet hall.

Plaintiff sued its security guard provider, alleging that the security guards' negligence caused the shooting, that the shooting caused a modification of the CUP, and that the modified CUP, by limiting the use of the property, caused a diminution in its value. Following entry of a default judgment against the security guard provider, plaintiff filed a direct action against the provider's liability insurance company under Insurance Code section 11580(b)(2). The security guard provider's policy covered liability for "property damage," which was defined to include "[l]oss of use of tangible property that is not physically injured." Plaintiff contended that the partial loss of use of the property caused by modification of the CUP constituted "loss of use of tangible property that is not physically injured."

The Court of Appeal (Fourth Dist., Div. Two) agreed that because the insured's negligence caused revocation and modification of the CUP, the resulting loss to plaintiff of the ability to use the property as a nightclub was a "loss of use" of "tangible property" covered by the policy, and not a strictly economic loss ordinarily excluded from coverage under a liability insurance policy.

LABOR & EMPLOYMENT

California's common law test for determining who qualifies as an independent contractor is not preempted by the Federal Aviation Administration Authorization Act.

California Trucking Association v. Su (9th Cir. 2018) 903 F.3d 953

S. G. Borello&$ Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 articulated a standard for determining whether a worker is an employee or independent contractor. In this case, the California Trucking Association filed a declaratory relief action against the California Labor Commissioner to determine whether this standard governed commercial truck drivers who drive their own trucks. The Association alleged that the Federal Aviation Administration Authorization Act (FAAA) preempted the because the federal law prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The district court dismissed the complaint.

The Ninth Circuit affirmed. The FAAAA was not intended to prevent states from enforcing general safety, welfare, or business rules like labor laws that affect "rates, routes, and services in only tenuous ways." The *Borello* standard is not "related to" motor carrier prices, routes, or services, and is therefore not preempted.

See also *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558 [Fourth Dist., Div. One: *Dynamex*'s standard for determining whether a worker is an employee or an independent contractor applies to wage order claims, whereas the *Borello* standard applies to non-wage-order claims].

HEALTHCARE

Workers' compensation is the exclusive remedy for injuries allegedly caused by negligent employer health care utilization review.

King v. CompPartners, Inc. (2018) 5 Cal.5th 1039

A worker sued a utilization review physician and his employer after the reviewer denied a request to continue a prescribed medication. The employee alleged that the negligent refusal to continue the medication caused him injury. The trial court dismissed the case, finding that the claims were preempted by the Workers' Compensation Act exclusive remedy rule.

The Supreme Court agreed. Workers' compensation provides the exclusive remedy not only for workplace injuries but also for injuries " ' "collateral to or derivative of" ' " workplace injuries, such as those alleged by the employee here.

CALIFORNIA SUPREME COURT PENDING CASES

Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

Addressing whether parties can privately contract around the Hague Service Convention.

Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology (2018) 24 Cal.App.5th 115, review granted Sept. 26, 2018, S249923

When a business relationship between an American company and a Chinese company soured, the American company instituted an arbitration per the parties' agreement, which provided for service of process by Federal Express. The Chinese company did not respond and the arbitrator entered an award for the American company. The American company petitioned to confirm the award and served the petition by mail. After the Chinese company failed to respond, the trial court confirmed the award. The Chinese company then moved to vacate the judgment, arguing mail service was improper under the Hague Service Convention. Agreeing with the Chinese company, the Court of Appeal (Second Dist., Div. Three) ordered the trial court to vacate the judgment because that "the Hague Service Convention does not permit Chinese citizens to be served by mail, nor does it allow parties to set their own terms of service by contract."

The Supreme Court granted review of the following issue: "Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?"

Addressing whether Proposition 51 applies to intentional tort claims.

B.(B.) v. County of Los Angeles (2018) 24 Cal.App.5th 115, review granted Oct. 10, 2018, S250734

Darren Burley died from suffocation and cardiac arrest during a violent struggle with the police. Burley's family brought an action for wrongful death alleging intentional excessive force against the officers. The jury found for plaintiffs and awarded $8 million in noncomic damages. Despite the jury's finding that Burley was 40 percent at fault and officer Avila only 20 percent at fault, the trial court entered judgment against officer Avila in the full amount because the jury found he had acted intentionally and so could not take advantage of Civil Code section 1431.2's limitation on a defendant's liability for non-economic damages to his proportionate share. The Court of Appeal (Second Dist., Div. Three) reversed.

The Supreme Court has granted review to consider whether a defendant who commits an intentional tort may invoke Civil Code section 1431.2 in order to have his liability for damages reduced based on principles of comparative fault.

Addressing whether an attorney is bound by confidentiality provisions in a settlement agreement he approved "as to form and content."

Monster Energy Co. v. Schechter (2018) 26 Cal.App.5th 54, review granted Nov. 14, 2018, S251392

Plaintiffs and defendant entered into a confidential settlement of a wrongful death suit. Plaintiffs' attorneys signed the agreement "as to form and content," but were not identified as parties to the agreement. Plaintiffs' attorneys gave a media interview disclosing various terms of the settlement. The defendant sued the attorneys for breach of contract and other claims. The attorneys filed a motion to strike the complaint, arguing, among other things, they were not parties to the contract and so could not be sued for breaching it. The Court of Appeal (Fourth Dist., Div. Two) held that the attorneys' signature approving the settlement agreement "as to form and content" meant only that "they were signing solely in their capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it." This did not make them parties to the agreement. Nor did the various terms of the contract purporting to bind the parties' "attorneys" make the attorneys parties to the agreement. It meant only that the parties had an obligation to control their attorneys.

The California Supreme Court granted review to decide (among other issues) whether attorneys consent to be bound by a confidentiality provision in a settlement agreement, in which the provision is explicitly binding on the parties and their attorneys, where the attorneys sign the agreement under the legend "approved as to form and content."

Addressing the "retained control" exception to the Privette rule barring recovery against the hirer of an injured person's employer.

Sandoval v. Qualcomm Inc. (2018) 28 Cal.App.5th 381, review granted January 16, 2019, S252796

Plaintiff was severely burned by an "arc flash" from a live circuit breaker while working with contractor at a cogeneration plant owned by the defendant. The jury found the defendant plant owner retained control over the safety conditions at the jobsite; that it negligently exercised such control; and that its negligence was a substantial factor in causing Sandoval's harm. The jury found plaintiff and the contractor each bore some fault for the accident as well. The Court of Appeal (Fourth Dist., Div. One),affirmed, rejecting defendant's argument on appeal that plaintiff failed to proffer any evidence to show that the plant owner, as the hirer of an independent contractor, "affirmatively contributed" to plaintiff's injury under the "retained control" exception to the general rule that a hirer is not liable for

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the injuries of an independent contractor's employees or its subcontractors.

The California Supreme Court granted the defendant's petition for review, which presented the following issues: (1) Whether a hirer of an independent contractor may be liable to a contractor's employee under a retained-control theory based *solely* on the hirer's failure to undertake measures to ensure the safety of the contractor's employees, where the hirer did not direct the contractor's work, induce the contractor's reliance, or otherwise affirmatively interfere with the contractor's delegated responsibility to provide a safe worksite; and (2) Whether the statewide pattern jury instruction on hirer retained-control liability, CACI No. 1009B, is erroneous because it omits the "affirmative contribution" element required in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198.

Addressing whether testimony about receipts or invoices is hearsay when offered to identify the source of a product or service.

Hart v. Keenan Properties, Inc. (2018) 29 Cal.App.5th 203, review granted Feb. 27, 2019, S253295

In this asbestos personal injury action, the plaintiff claimed he was exposed to asbestos-containing pipes the defendant supplied to his worksite in the 1970s. The only testimony supporting the plaintiff's exposure to the defendant's products was testimony from the worksite foreman that he saw the defendant's name on invoices. The jury found for plaintiffs and the defendant appealed. The Court of Appeal (First Dist., Div. Five) reversed the judgment. The foreman's testimony about what the invoices said, offered to prove who supplied the pipes, was hearsay not subject to any exception. Without the invoices themselves (which would be party admissions) being introduced into evidence, there was no substantial evidence to support a jury finding that the plaintiff was exposed to the defendant's products.

The California Supreme Court has granted review (no issues yet specified).

Filed 1/4/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BANN-SHIANG LIZA YU, Plaintiff and Appellant, v. LIBERTY SURPLUS INSURANCE CORPORATION et al., Defendants and Respondents.	G054522 (Super. Ct. No. 30-2014-00737800) ORDER GRANTING REQUESTS FOR PUBLICATION; PETITION FOR REHEARING DENIED; NO CHANGE IN JUDGMENT

The Association of Southern California Defense Counsel and counsel for respondents have each filed requests that our opinion filed on December 11, 2018, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The requests are GRANTED. The opinion is ordered published in the Official Reports.

On December 28, 2018, Mohammed K. Ghods, on behalf of appellant, filed a response to the requests for publication, in which he requested that if the opinion is ordered published we first "reopen the case for rehearing." To the extent the request is intended as a petition for rehearing, the petition is DENIED as untimely. (Cal. Rules of Court, rule 8.268(b).)

Reptilian Tactics – Do They *Really* Work?

Tami G. Vail

As many defense counsel, risk managers and insurance representatives are aware, plaintiffs' attorneys regularly employ the reptilian method throughout discovery and trial to increase settlements and verdicts, particularly in cases with six figure medical specials. We are also all well aware that the tactics works...at least, sometimes. Attorney Don Keenan and jury consultant David Ball, Ph.D. developed the reptilian method, and claim that plaintiffs' attorneys who have utilized their tactics have secured more than **$6 billion** in verdicts and settlements.

The goal of the reptile attorney is, of course, economic leverage. The theory relies heavily on creating fear and psychological discomfort in jurors first and foremost, but also in defense witnesses, defense counsel, in-house risk managers and insurance carriers. With respect to counsel, risk managers and carriers, the reptilian approach plays off of the fear of the "heads will roll if this case goes south" mentality that often accompanies large exposure cases.

The reptile approach relies on psychological manipulation to get defense witnesses to agree with four primary "rule" questions. The four questions fall into the following categories:

- General safety rules (broad safety promotion)
- General danger rules (broad danger/risk avoidance)
- Specific safety rules (safe conduct, decisions and interpretations)
- Specific danger rules (dangerous/risky conduct, decisions and interpretations)

Getting defense witnesses to agree with these four types of questions creates substantial psychological pressure during subsequent questioning of key case issues. The reptile approach utilizes four different phases of questioning that build off of each other to ultimately force the defense witness into admitting fault in case specific contexts, thereby significantly increasing the claim's value.

Plaintiffs' attorneys top this approach with a focus at trial on emotional and stray (i.e., irrelevant) details in an effort to tug on the emotional heartstrings of the jurors, and dissuade them from focusing on the facts. The question is: does this approach consistently work? Do jurors really award damages irrespective of the specific facts of the case and simply because they feel sorry for the plaintiff?

Certainly, we all hope this isn't the case. Although we regularly hear about cases in which such an approach results in a significant jury award, all hope is not lost – the defense can prevail in the face of exaggerated claims, damages, and emotional pleas. We recently tried a case in which opposing counsel's reliance on these tactics and approaches backfired and resulted in a net defense verdict. Here are a few things we learned in our most recent reptilian battle:

1 Develop a Theme, and Stick with the *Facts*

While acknowledging that various jurisdictions pull from different jury pools, our experience and conversations with colleagues from other counties confirm that no matter what the jurisdiction, jurors will pay attention to and give great weight to *facts*. Skilled plaintiffs' attorneys can certainly muddy the waters, but if we, as defense counsel, develop a theme tied to the irrefutable *facts*, we can overcome the exaggerated emotional plays.

We all know that every case has good facts, and bad facts – it's what keeps us employed and makes our legal world go 'round! But sometimes we forget to acknowledge the bad facts, and plaintiffs' attorneys employing a reptilian and emotional approach pounce on this error. It is imperative to be realistic, and honest with your jury. Our job is to spin those "bad" facts into something a little less terrible, and something jurors can accept and even side with. Pretending the bad facts don't exist will likely lead to disaster, while accepting and acknowledging them goes a long way towards creating and maintaining credibility with the jury.

In our most recent jury trial, the plaintiff was an independent contractor hired to remove surplus material from our client's property. The plaintiff suffered injury when a large piece of commercial grade equipment

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slid off of the forklift being utilized to load it onto plaintiff's trailer. The forklift was our client's property and the operator was our client's employee. These were not good facts for us, but we did not shy away from them. Instead, we acknowledged them, and focused the jury's attention on the plaintiff's role in the loading operation. Our opponent, on the other hand, refused to accept the reality of his client's involvement, and presented plaintiff to the jury as an innocent bystander who just happened into an unfortunate situation. Plaintiff's counsel was unsuccessful in his efforts to demonize our client and its employee because he disingenuously represented the facts to the jury. As a result of our rational and honest presentation of these facts, the jury assigned plaintiff 40% comparative fault – a great result under the circumstances.

Similarly, plaintiff's counsel failed to deliver the "facts" he identified during his opening statement with respect to the key element of causation. We acknowledged that plaintiff suffered injury, but we were worlds apart in terms of the nature and extent of those injuries that resulted from the subject incident.

Again, we relied on the *facts*.

We called the emergency room physician and the responding paramedic to testify at trial to confirm the actual injuries suffered on the day of the incident. We also focused the jury on the facts that demonstrated plaintiff resumed service of his client accounts (including our client's) one month after the incident, and treated his mostly soft tissue injuries for the expected six-to-eight week period.

Plaintiff's counsel ignored these facts. Instead, he chose to play upon the plaintiff's status as a former marine – intimating he was exceptionally hard working, and was going to do whatever he had to do, even though he was in excruciating pain, to earn a living for him and his son. Plaintiff's counsel relied solely on plaintiff's self-serving testimony of his post-incident pain, large lien numbers and the testimony of a treating surgeon who first saw plaintiff nearly one-and-a-half years after the incident occurred to establish causation. Plaintiff's counsel intentionally left dates out of questions, and highlighted conditions which were far too removed from the incident. Plaintiff's counsel focus was on emotion, not *facts*.

We repeatedly brought the jury's focus back to the details and particularly the facts in the weeks following the subject incident. As a result, the jury agreed that plaintiff's injuries were fairly minor in nature, and only awarded plaintiff $38,000 in past medical specials, and not the nearly $400,000 plaintiff requested.

2 But Sticking to the Facts Does Not Prohibit You from Demonstrating Sympathy

In liability trials, showing the jury that you (and your client) are sympathetic to plaintiff's plight can lend credibility to your version of the facts. In fact, letting the jury know you and your client are sensitive to the issues plaintiff experienced and/or faces as a result of what he or she believes is a life-altering event can assist in countering plaintiff's counsel's reptilian and emotionally charged approach. It gives the defense a human component, particularly where the defendant is a company or other non-person entity.

3 Do Your Homework

In the face of unrelenting dramatization of the defendant's supposedly bad acts, preparation is key. That sounds pretty straight forward, but I am talking more about the extra digging that helps you really understand your opponent and witnesses. Review jury verdicts and settlement summaries in which your opponent has participated. This can help give you great insight into their skill level, and what you can expect to see from them at the time of trial.

Read any and all transcripts you can get your hands on for all percipient and expert witnesses you expect will testify for plaintiff. We know that plaintiff's attorneys regularly work together to attack the defense. Thankfully, we have organizations like ASCDC to assist us in our fights – don't be afraid to ask our amazing community for their insight and experience.

And lastly, Google the witnesses – all of them, including your own. You never know when you might find articles on an opposing expert or treating physician, which assist in attacking the witness' credibility. Better yet, you might just find information that forces opposing counsel to eliminate at trial a key witness bragged about in opening, which enables you in closing to highlight the holes in the plaintiff's case.

4 Keep Courtroom Antics to a Minimum

It's true – jurors want to be entertained, especially in today's attention-span challenged society. But drama only distracts from the facts for so long. In our recent trial, plaintiff's counsel had witnesses scream out in court as they heard plaintiff scream on the date of the incident. He had a treating physician perform a sample examination in an effort to discredit the doctor's conclusions concerning plaintiff's status in the weeks following the subject incident. He ran all over the courtroom waiving his hands in the air with the hopes that the jury would be moved by the drama. After all, how can you *not* feel sympathy for someone after hearing how they screamed out in pain?

But plaintiff's counsel's antics were so frequent, they lost their impact. In fact, one of the jurors told plaintiff's counsel that his dramatic style was a *disservice* to plaintiff's case. You can engage the jury without dramatic flair. Which leads me to the final point.

5 Stay True to *Your* Personal Style

In trial, don't attempt to be someone else. While plaintiff's counsel in my recent case felt comfortable dancing all over the courtroom, I did not. I moved around some, but it just isn't my style to be all over the courtroom, leaning against the lectern or gallery wall with my hands in my pockets. While you should step out from behind the lectern every now and again, it's important to do what makes *you* feel comfortable so that you can connect more honestly with the jury.

And although plaintiff's counsel had no problem being on stage, it was also clear he

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Reptilian Tactics – continued from page 20

was mimicking others' styles – from attire to stances. The jury may not have realized he was imitating others, but I expect that subconsciously, they were aware that his style was forced and not true to him.

In sum, and to answer the question in the title – we all know that reptilian and emotional attacks are successful, but these antics can also go too far and create a disconnect with jurors. If the defense focuses on a rational and honest presentation of the facts, jurors will see through the dramatic ploys and justice will prevail.

Tami Vail

Tami Vail is a partner in the firm of Liedle, Larson & Vail, LLP. Tami represents public entities and private companies, including hospitality and construction clients, in personal and catastrophic injury claims, including wrongful death matters, and employers in claims of discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act. LLV has offices throughout California.

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Alan, Rosemarie, and **Var**
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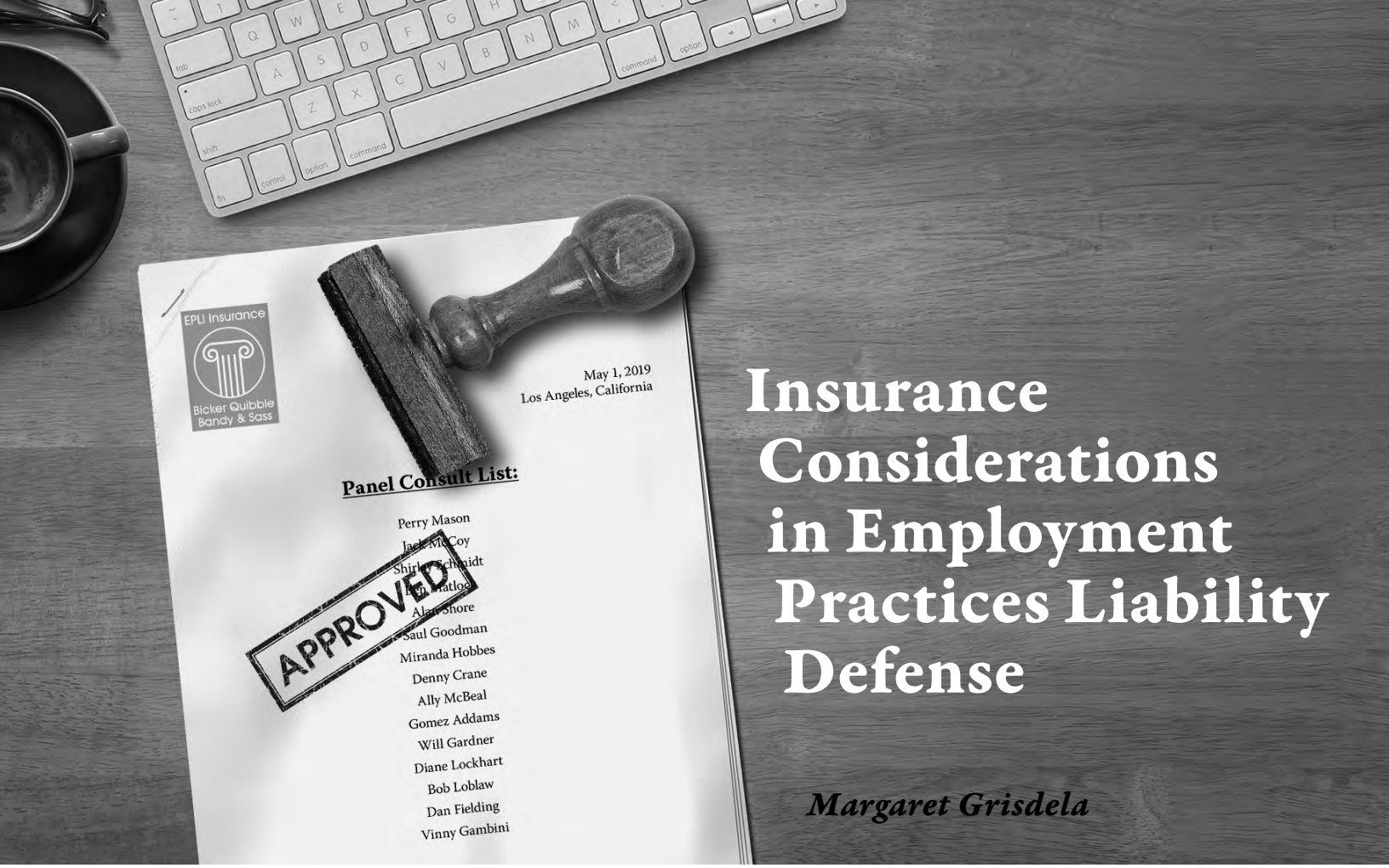

Insurance Considerations in Employment Practices Liability Defense

Margaret Grisdela

Imagine not being able to defend your own client in a litigated matter. This is the situation many employment defense law firms find themselves in when one of their corporate clients, insured by an employment practices liability insurance (EPLI) policy, is named as a defendant in employment litigation.

The first reaction on the part of the law firm is likely to be surprise, or even disbelief.

Frequently, the insured employer is required under the EPLI policy to be represented by "panel" counsel, meaning an outside law firm that has been pre-approved by the insurance carrier to handle cases at a certain negotiated rate. If the employer's law firm of choice is not on the insurer's EPLI panel of pre-approved defense counsel, the law firm may lose the right to represent their own client.

Since litigation is typically one of the most lucrative actions in employment law, the loss hurts financially. Additionally, it is embarrassing and frustrating for the employer's firm to have to turn the matter over to a competing law firm that may not handle the case as well.

Seeking EPLI Panel Recognition

Being a pre-approved panel member with the carrier that provides EPLI coverage to a client is clearly an ideal situation. Getting on an employment practices liability panel can be quite difficult, however, and may or may not be an option.

One way to minimize this risk is to be named as counsel of choice in the client's EPLI policy. This is frequently accomplished through some type of endorsement to the policy and may require the insured to pay an additional fee. The benefit to the insured (the employer) is that they are then defended by the law firm that knows them well and understands their long-term strategies.

If a choice of counsel provision is not in place, the employer can also ask the insurer to appoint their employment defense law firm for a specific claim. This is often known as an "accommodation" and may be facilitated by the insurance agent or broker. Approval of an accommodation is at the discretion of the insurer and may be granted inconsistently. If an accommodation is approved, it is not the same as being on the EPLI panel.

Employment defense law firms, particularly those that are not traditional "insurance defense" firms, should be aware that an accommodation, endorsement, or panel appointment is subject to hourly rates that are negotiated by the insurance carrier. These rates are often significantly less than a law firm's standard corporate rates, so an understanding of pricing practices in advance of the appointment is advised.

The best time to be named in a client's EPLI policy is: a) when the policy is initially bound, or b) when the policy is up for renewal.

The worst time to seek panel appointment is after litigation has been initiated. Starting the request for approval process in advance of a claim gives the carrier sufficient time to review law firm credentials and educate the firm on applicable litigation guidelines.

In the author's experience, very few employment defense law firms track the EPLI policies either in force or planned at employer clients. This back-door route to EPLI policy inclusion can be time consuming but effective.

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The primary reason law firms don't track this data may be simple lack of time and resources. In fairness, it can be a tedious process. A complicating factor can be that the person or department who purchases insurance within the client organization is removed from the law firm's contacts within the HR department. For example, a chief financial officer (CFO) or risk manager may coordinate insurance coverage without much input from the HR director and/or the law firm. An additional challenge can occur when an employer moves its EPL coverage to a new insurance company.

Starting to track client EPLI policies early can help a law firm to maximize EPLI representation opportunities within the client firm over time.

As you survey clients about their EPLI carriers and brokers, patterns will begin to emerge in regard to the leading local providers. Use the insight you gain to seek out EPLI seminar partners from local insurance carriers and/or agencies.

Traditional Legal Marketing Channels for EPLI Visibility

Insurance defense law firms that demonstrate thought leadership on topics and situations that might trigger an EPLI claim may strengthen their chances for panel approval. Successful marketing campaigns can include article publication, blog posts, client alerts, continuing education seminars, social media visibility (especially on LinkedIn), speaking engagements, videos, and website content.

On a related note, you can also partner with a local accounting firm to offer their corporate clients educational seminars on employment-related legal issues.

Average Employment-Related Claim is $160,000

Hiscox Insurance Company Inc. reports that the average cost of all types of employment-related cases resulting in a payment was $160,000 in 2017. This number is up by $35,000 since 2015. Hiscox also revealed that the average employment-related case takes nearly a year to resolve.

Similarly, Chubb reports that the average EPLI loss is $102,915. These averages differ due to variation in exactly how a claim is measured, whether defense costs are included, and other factors.

According to the Chubb 2018 Private Company Survey, the majority of all employment-related claims stem from harassment, bullying, retaliation, and discrimination. Between 2015 and 2018, more than a quarter of respondents experienced an EPL loss, with sexual harassment being the most common issue. While 65% of respondents are covered by EPL insurance, 1/3 of those companies that were not covered incorrectly assumed their other insurance policies covered such claims.

According to EEOC data reviewed by the 2017 Hiscox Guide to Employment Lawsuits, charges of retaliation are made in half of all cases for sexual harassment or discrimination on some other basis, and retaliation is the most common finding of discrimination. More than 75 percent of all claims are unfounded and result in no payment by the insurance company. However, competent and careful representation is necessary to adequately help companies successfully reach the determination that a case is baseless.

An EEOC analysis underscores the magnitude and frequency of employment claims. The agency received 84,254 private sector workplace discrimination charges during fiscal year 2017. The EEOC obtained $355.6 million in settlements from private sector and state and local government employers in 2017.

Background on the Insured Market for EPLI Coverage

Employee-intensive industries are most likely to purchase EPLI policies, including construction, hospitality, manufacturing, healthcare, employee leasing, professional services, restaurants, and transportation.

Some industry sectors – such as gambling casinos, churches, or schools – may be excluded from EPLI coverage offered by certain carriers.

Research conducted by Legal Expert Connections, Inc. indicates that more than 100 insurance carriers offer some form of employment practices liability insurance. Many of these include the expected national multi-line carriers, but regional and niche-oriented insurers also offer some form of EPLI coverage.

Directors and officers are often included under an EPLI policy, recognizing that this remains separate from D&O coverage. Features can vary however, and every employer (and employment defense law firm) should understand what is included or excluded in a particular policy.

In Summary

Start now! Marketing for employment defense success is a long-term process that benefits from a continuous focus on high visibility business development campaigns.

Margaret Grisdela

Margaret Grisdela is president of Legal Expert Connections, Inc., a national legal marketing agency based in Florida. She is also author of the legal marketing book, Courting Your Clients. *Contact her at 866-417-7025 or* mg@legalexpertconnections.com.

Some of Your ASCDC Board Members Hard at Work!

(L-R) Mike Colton, Heather Mills, and Eric Schwettman

FIGHTING THE BITE:

Strategies for Countering Two Recent Appellate Decisions Expanding Liability for Insect Bites and Stings

Scott Dixler and Ryan Chapman

Have you or a loved one been bitten by an insect? If so, call 1-800-BUG-CASH.

While ads hawking the services of personal injury lawyers are ubiquitous, insect-bite litigation has not yet reached the mainstream. There is a good reason for the absence of such cases – the duty requirement, which serves "to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act.' " (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*)), has ensured that routine bug bites do not spawn costly litigation.

But two recent appellate decisions addressing businesses' liability for injuries caused by insects (or arachnids, in the case of spiders) threaten to open the floodgates. And even if the pro-plaintiff decisions in *Coyle v. Historic Mission Inn Corporation* (2018) 24 Cal. App.5th 627 (*Coyle*) and *Staats v. Vinter's Golf Club, LLC* (2018) 25 Cal.App.5th 826 (*Staats*) do not spawn a swarm of insect-bite suits (pun intended), these cases reflect an expansive view of duty that threatens to diminish the duty element's function as a barrier against limitless liability. Defense counsel should be prepared to confront these decisions. After summarizing these cases, we propose some ideas for doing so.

The *Coyle* and *Staats* Opinions

In *Coyle,* the plaintiff sued the owner of the Mission Inn in Riverside after she was bitten by a black widow spider while eating on an outdoor patio. (*Coyle, supra,* 24 Cal. App.5th at p. 631.) Reversing summary judgment for the Mission Inn, Division Two of the Fourth District Court of Appeal held that the Mission Inn owed the plaintiff a duty of care to guard against such insect bites, explaining that it is commonly known that black widows are present in the Riverside area, and the restaurant had spotted some in the past. (*Id.* at p. 636.) The court reasoned that, absent a tort duty, restaurants would have little incentive to protect patrons from spider bites. (*Id.* at p. 638.) The court also found that the restaurant's failure to prevent the bite was morally blameworthy, because "it is morally wrong to do nothing while exposing unknowing patrons to a risk of harm." (*Ibid.*)

Similarly, in *Staats,* Division One of the First District Court of Appeal followed *Coyle* and held that a golf club owed a duty of care to protect its patrons from a swarm of yellow jacket wasps and reversed summary judgment for the golf club. (*Staats, supra,* 25 Cal.App.5th at p. 830.) In *Staats,* a golfer was attacked by wasps that, unbeknownst to the golf club, had built a hive on the course. (*Id.* at pp. 830-831.) The court concluded that this was foreseeable in a region where wasps are endemic. (*Id.* at pp. 838-839.) The court also rejected the club's argument that the burden of ongoing wasp control would be prohibitively expensive. (*Id.* at pp. 840-841.) The court explained that, because the club was in the best position to control an infestation, imposing a duty would prevent future harm, and the club's failure to search for hives was morally blameworthy. (*Id.* at p. 842.)

Coyle and *Staats* thus required business to face the uncertainty and expense of trial based on injuries to their patrons caused by common insects. In so doing, *Coyle* and *Staats* deviated from older precedent precluding liability arising from injuries inflicted by wild animals, and aggressively applied the familiar, multi-factor duty test articulated in *Rowland v. Christian* in a manner that threatens to vastly expand business' potential liability to their customers.

The *Rowland* factors include "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached

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to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.) Foreseeability is generally treated as the most important of these factors, but the application of that factor by the *Coyle* and *Staats* courts, regarding interaction with natural, indigenous pests, brings to mind the oft-quoted words of the California Supreme Court in *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668: "there are clear judicial days on which a court can foresee forever and thus determine liability[,] but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury."

Strategies for challenging *Coyle* and *Staats*

The first strategy for combatting *Coyle* and *Staats* is to direct courts' attention to these cases' departure from precedent holding that landowners have no duty to guard against wild animals present on their property. Because trial courts are not obligated to follow appellate decisions that conflict with earlier authority (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454 (*Auto Equity Sales*)), defense counsel confronted with *Coyle* and *Staats* should bring this conflict to the court's attention.

In *Brunelle v. Signore* (1989) 215 Cal.App.3d 122 (*Brunelle*), the Court of Appeal held that a homeowner had no duty to protect a guest from a spider bite in the home. The court noted that the common law doctrine of *ferae naturae* supports the conclusion that "a landowner has no duty to protect against attacks by indigenous animals or insects" (*Id.* at p. 129, fn. 5), and it reasoned that concluding otherwise risked creating a burden that "would be enormous and would border on establishing an absolute liability" (*Id.* at p. 130).

The court in *Brunelle* made clear that some general level of foreseeability that potentially harmful creatures might be indigenous to the area would not be enough to create a duty to eradicate any potential for those creatures' presence on a defendant's property. "Imposition of a duty even in those cases where the [defendant] shared general knowledge with the public at large that a specific harmful insect was prevalent in the area but the [defendant] had not seen the specific harmful insect either outside or inside the home would impose a duty on the owner or occupier of the premises that would be unfair and against public policy." The court also cited the Restatement and out-of-state authority as "support for the conclusion that a landowner has no duty to protect against attacks by indigenous animals or insects." (*Id.*, at p. 129, fn. 5.)

Similarly, in *Butcher v. Gay* (1994) 29 Cal. App.4th 388, 392, 401 (*Butcher*), the court held that a homeowner was not liable to a guest who claimed she had contracted Lyme disease after being bitten by a tick on the homeowner's dog. Following *Brunelle*, *Butcher* also observed that rule holding landowners liable for injuries inflicted by wild animals would risk creating an " 'absolute liability.' " (*Ibid.*)

Coyle expressly declined to follow *Brunelle*, reasoning that *Brunelle* made factual findings inconsistent with the Court of Appeal's proper role in reviewing a grant of summary judgment. (*Coyle, supra,* 24 Cal.App.5th at pp. 641-643.) But duty is a question of law for the court, so *Coyle's* criticism of *Brunelle* does not withstand scrutiny. Defense counsel should urge other courts to follow *Brunelle* rather than *Coyle*.

Rather than disavowing precedent, *Staats* attempted to distinguish *Brunelle* and *Butcher*. According to *Staats*, *Brunelle,* and *Butcher* apply only to injuries caused by stray insects, rather than insects originating from a nest on the landowners' property. (*Staats, supra,* 25 Cal.App.5th at pp. 835-836.) But this is a distinction without a difference. Insects are fact of life, and imposing a duty on landowners to guard against insect bites threatens landowners with what *Brunelle* aptly characterized as absolute liability.

Ultimately, only the Supreme Court can conclusively resolve the inconsistency

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between *Coyle* and *Staats,* on the one hand, and *Brunelle* and *Butcher,* on the other. And the Court recently declined the opportunity to do so when it denied petitions for review in *Coyle* and *Staats*. Until the Supreme Court resolves the conflict, defense counsel should urge lower courts to follow *Brunelle* and *Butcher*.

Defense counsel seeking to counter *Coyle* and *Staats* should also emphasize these cases' inconsistency with the Supreme Court's recent pronouncements concerning the duty requirement in *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077. Directing lower courts' attention to this tension could help convince those courts to follow *Brunelle* and *Butcher,* rather than *Coyle* and *Staats*.

In *Vasilenko,* the Supreme Court declined to impose a duty on a church to assure the safety of its congregants crossing a public street to reach the church's additional parking lot. The Court reasoned that "there is ordinarily no duty to warn of obvious dangers," so the church had no obligation to warn congregants that crossing the street can be dangerous. (*Id.* at p. 1088.) The Court further explained that imposing liability on the church "could result in significant burdens," because landowners "would have to continuously monitor the dangerousness of the abutting street and . . . they may have to relocate their parking lots as conditions change." (*Vasilenko, supra,* 3 Cal.5th at p. 1090.)

Coyle and *Staats* – which found a duty to guard against insects in part because spiders and wasps are common (*Coyle, supra,* 24 Cal.App.5th at p. 636; *Staats, supra,* 25 Cal. App.5th at pp. 838-839) – conflict with the Supreme Court's teaching in *Vasilenko.* It is obvious that spider bites and wasp stings can occur in regions where those insects live, and can be dangerous. *Coyle* and *Staats* thus depart from *Vasilenko* to the extent they impose a duty on landowners to guard against obvious risks.

Coyle and *Staats* are also inconsistent with *Vasilenko's* teachings regarding the need to incentivize businesses to take safety precautions. In *Vasilenko,* the Supreme Court declined to impose a duty on the landowner in part because "landowners already have incentives to provide parking that is safe." (*Vasilenko, supra,* 3 Cal.5th at p. 1088.) By contrast, neither *Coyle* nor *Staats* properly considered whether imposing a tort duty is necessary to incentivize pest control. Customers are obviously less likely to patronize businesses that are infested by dangerous insect, and online reviews such as those on Yelp are bound to spread the word of such infestations). Moreover, businesses have good reasons to want to protect their employees from harm that causes absenteeism and can raise workers compensation costs. Businesses thus already have an incentive to reasonably guard against insects in the absence of potential tort liability. Neither *Coyle* nor *Staats* accounted for this common-sense proposition.

Finally, *Coyle* and *Staats* did not account for unintended consequences of imposing liability, such as encouraging the overuse by businesses of abatement measures that harm the environment. The law should not create a perverse incentive for businesses, government entities, and other landowners to remove beneficial vegetation, apply pesticides, and otherwise attempt to sterilize outside dining patios, golf courses, parks and the like, for fear of liability due to interaction with elements of nature.

These concerns confirm that *Brunelle* and *Butcher,* but not *Coyle* and *Staats,* are consistent with the rule that "foreseeability is not synonymous with duty, nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) While a great many events may be objectively foreseeable, especially in hindsight, a court's analysis must be "tempered by subjective reasonableness" "to bring imposition of duty in line with practical conduct." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306-307; see *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476 [" 'social policy must at some point intervene to delimit liability' even for foreseeable injury"]; see *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 340-341 [retailers owe no duty to provide defibrillators at stores, even though it is foreseeable that some number of patrons will suffer heart attacks].)

The Bottom Line

Coyle and *Staats* illustrate some appellate courts' willingness to stretch the *Rowland* factors to avoid ending negligence suits at the summary judgment stage. Defense counsel should be prepared to confront these decisions in the trial court and on appeal.

Defense counsel should emphasize *Coyle* and *Staats'* departure from precedent precluding liability arising from insect bites, and should marshal evidence bearing on the *Rowland* factors that do not support imposition of a duty. When confronted with conflicting appellate decisions, trial courts are free to follow the authority they believe to be correct. (*Auto Equity Sales, supra,* 57 Cal.2d at p. 454.) Defense counsel should argue that the expansive view of liability reflected in *Coyle* and *Staats* should not be adopted, particularly because it conflicts with the Supreme Court's teachings in *Vasilenko* and other duty cases from the California Supreme Court.

Scott Dixler is an appellate lawyer at Horvitz & Levy LLP in Burbank.

Scott Dixler

Ryan Chapman is an attorney practicing in Los Angeles. He is currently an Appellate Fellow at Horvitz & Levy LLP's Burbank office and will be clerking on the 9th Circuit in 2020.

Ryan Chapman

ASCDC 2019 Wish List

Ninos Saroukhanioff

All I want is Peace and Love. Peace and Love between the Plaintiff and Defense Bars. Peace and Love between Attorneys and the Courts. Peace and Love in the Middle East.

Stephan, George J.

Shorten time for hearing MSJ's to 30 days.

Laura E. Inlow

Some reining in of attorney's fees in 1983 cases. Has become a cottage industry where plaintiffs won't settle early because want to run up fees even on terrible cases. We pay $50K to the plaintiff and $500K in fees. GRRRRR.

Daniel Crowley

I'd like a couple form rogs: a 15.1 for the plaintiff's case and a 12 series interrogatory re plaintiff's damages witnesses.

Dwayne Beck

I wish So Cal law and motion would follow the No Cal system. A tentative ruling is given; if a party wishes to argue you call in between 2-4 the day before, otherwise the tentative is adopted. Would save time for courts who don't issue tentative, or if it's well reasoned and you lose, no need to waste a trip. So much better than not knowing until the judge tells you at the hearing, which is what happens most of the time in So Cal.

Lena Marderosian

I don't know if my "there ought to be a law" wish is worthy of your list but here's my beef:

A plaintiff who files any type of a lawsuit in California and then moves out of state for any reason (can't find a job in California, moving back with family etc.), **must** return to California to the county in which he/she filed the lawsuit for his/her deposition, ***at plaintiff's expense*** – similar to the practice in federal court. It's only fair – why should the defense be required to pay to fly the plaintiff back to California to be deposed in a lawsuit that the plaintiff initiated, or alternatively, have all the defense counsel travel to plaintiff's new residence?

Yes, I realize that there is video-conferencing available; however, I find that taking a deposition via video-conferencing doesn't always work well in all situations.

Robert A. Olson

In no particular order:

Adopt the federal rule that judgments have to be a separate document with no extraneous matter. In particular I'd ban the stupid practice of putting the jury verdict in the judgment (a practice that causes real confusion when a motion strikes one portion, such as punitive damages).

Fix the MSJ notice deadlines. They are absurd.

Throw out all of employment law and start from scratch, applying any rules first to the legislators.

Add a jury instruction on reasonable value and one on Howell.

Reverse *Pebley*.

Create separate rules for collections actions (e.g. require attaching proof of the debt and ownership to the complaint), unlawful detainers (getting rid of the Atty fees for Even de minimis recovery) and a new system using social workers rather than judges to handle most divorce issues. These are the categories of cases swamping the system with self represented and leading to calls to reform the part of the system that is not seriously broken.

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Wish List – continued from page 30

Have real teeth in misconduct rules. As it is now Lawyers who commit misconduct are lashed with a wet noodle, the conduct is found to be not prejudicial and they laugh all the way to the bank. In particular, protect young Lawyers from such incivility (I have a case where opposing counsel argued to the jury that the defendant didn't care because it sent a "rookie" lawyer trying his first case to defend it and the trial court did nothing. Institutionalize opportunities for young Lawyers (e.g. the 9th Cir. Will hold argument if a 5 yr or younger lawyer argues, etc.)

Michael Lebow

I would like for Bob Olson to receive the gift of people not replying all on listservs.

Federal Court Practice Tips

Peder Batalden

Every year, on December 1, various amendments to the Federal Rules take effect. The Ninth Circuit has adopted changes to its own rules and forms to coincide with the changing national rules. A few of those procedural changes, of particular interest to appellate practitioners, are highlighted below:

BONDS AND STAYS. The hoary term "supersedeas" has been eradicated and Fed. R. Civ. P. 62 has been rewritten to acknowledge that forms of security other than bonds are permitted. Thus, under revised Rule 62 and Fed. R. App. P. 8, a party may now offer a "bond or other security" to create a stay of enforcement. The automatic stay of enforcement that arises upon entry of judgment has been extended from 14 days to 30 days. (Very helpful to defendants trying to line up a bond) The rule on supplying a bond to stay a money judgment has been relocated from Rule 62(d) to Rule 62(b), and the rule on staying injunctions pending appeal has been moved from Rule 62(c) to Rule 62(d). (Expect this to complicate future research projects.)

NEW NINTH CIRCUIT FORMS. The Court has rolled out about two dozen new forms on its website. There is a new form motion for an extension of time, a new Rule 27-3 certificate for emergency motions, and a new mediation questionnaire, to name but a few. In addition, certain forms (like the oral argument acknowledgment form) have been replaced by new events within ECF (allowing boxes to be checked online in lieu of any form).

FEWER PROOFS OF SERVICE REQUIRED. Under revised 9th Cir. R. 25-5(f), a party filing a document by ECF need no longer include a certificate of service. But a certificate of service is still required for documents filed on paper (such as some sealed materials, or case-opening filings, like writ petitions).

Peder Batalden

Peder Batalden is a partner at Horvitz & Levy LLP. He specializes in federal practice and procedure. He is a co-author of the Rutter Group's Ninth Circuit Civil Appellate Practice *treatise.*

defense successes october – january

Robert W. Armstrong
Demler, Armstrong & Rowland, LLP
Gonzalez v. Amin

Sean D. Beatty
Beatty & Myers, LLP
Volk, Aviel v. Toyota Motor Sales

Rob Bergsten
Hosp, Gilbert & Bergsten
Barbera v. Del Grande

Raymond Blessey
Rayback, McAndrews & Blessey, LLP.
Alaniz v. Chang
Clark v. Owens

Sandra Brislin
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Lesle v. Los Arcos
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Julianne M. DeMarco
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Robert Gonter, Jr. & Vincent H. Brunello
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Robert Gonter, Jr. & Gina Y. Kandarian-Stein
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Michael G. Martin
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Robert L. McKenna
Kjar, McKenna & Stockalper, LLP
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Lisa J. McMains & Nathan Malone
Bassett Discoe McMains & Kargozar
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Robert J. O'Connor
Wade & Lowe
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Terry A. Rowland
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Bush v. OHI Resort Hotels, LLC et al
Ring v. Aken

James Savage
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Kalpakyan v. Shapiro

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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*

Don't miss these recent amicus *VICTORIES!*

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

1 ***Stokes v. Muschinske* (Mar. 14, 2019, No. B280116) __ Cal.App.5th __ [2019 WL 1513208]. Favorable evidentiary ruling on damages affirmed on appeal.** A trial court made an evidentiary ruling during a personal injury trial allowing the defense medical billing expert to offer opinions regarding the reasonable value of the medical services plaintiff received on a lien basis based upon 130 percent of the Medicare reimbursement rate. On appeal, plaintiffs contended that this ruling violated the collateral source rule. The Court of Appeal disagreed and held that the testimony regarding Medicare reimbursement rates were "helpful and even necessary to the jury's understanding of the issues" such that the trial court did not abuse its discretion in permitting such testimony. Furthermore, there was no evidence that the defense billing experts made any deductions for amounts expected to be paid by Medicare. The appeal was handled by Barry Levy and Steven Fleischman at Horvitz & Levy, and Stephen Pasarow, Peter Senuty and Maria Grover at Knapp, Petersen & Clarke. Ted Xanders from Greines, Martin, Stein & Richland LLP submitted a successful request for publication on behalf of ASCDC.

2 ***Martin v. Western Oilfields Supply Company d/b/a Rain for Rent* (S253154). Review granted by the California Supreme Court and discovery issue transferred to Court of Appeal.** A trial court made an evidentiary ruling that pursuing an overbreadth/burdensomeness challenge to an e-discovery request waives any privilege challenge to the request. The party's counsel, Lisa Perrochet of Horvitz & Levy LLP, filed a writ petition to the Court of Appeal (5th Dist.), which was denied, and then filed a petition for review to the California Supreme Court to grant-and-transfer the case. Eric C. Schwettmann from Ballard Rosenberg Golper & Savitt, LLP submitted an amicus letter supporting the petition for review. The California Supreme Court issued a "grant and transfer" order and the writ petition is now pending in the Court of Appeal.

3 ***Yu v. Liberty Surplus Insurance Corporation* (2018) 30 Cal.App.5th 1024. Publication of Favorable opinion on default judgment granted.** Plaintiff filed a complaint against a general contractor for "not less than $10 million" in damages. The general contractor cross-complained against a subcontractor for "compensatory damages according to proof." The general contractor won a default judgment against the subcontractor but the judgment was later found void because the cross-complaint did not state an amount of damages. The Court of Appeal (4/3) affirmed, holding that the cross-complaint, which incorporated the underlying complaint by reference, did not sufficiently state the amount sought for default judgment purposes. The Executive Committee approved submitting a publication request, which J. Alan Warfield from Polsinelli LLP submitted. The request was granted on January 4, 2019.

Keep an eye on these PENDING CASES:

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

1 ***Pierce v. Gray*** (case no. G055432): This is a *Howell* case pending before the Court of Appeal (Fourth District, Division Three in Santa Ana). An insured plaintiff sought lien treatment from Dr. Gerald Alexander. After a 402 hearing, it was disclosed that plaintiff had Medicare and that Dr. Alexander accepts Medicare. The trial court ruled that the "billed" lien amount was thus inadmissible. Bob Olson and Ted Xanders from Greines Martin Stein & Richland submitted an amicus brief on the merits on behalf of ASCDC. Oral argument was held on April 15, 2019.

2 ***Burch v. Certainteed Corporation*** (case no. A151633): This is an asbestos case pending in the Court of Appeal addressing whether apportionment under Proposition 51 applies to intentional tort claims. The California Supreme Court recently granted review in a case involving a similar issue: (*B.B. v. County of Los* Angeles, case no. S250734.) J. Alan Warfield and David Schultz from Polsinelli, Susan Beck from Thompson Colgate and Don Willenburg from Gordon Rees submitted an amicus brief on behalf of both ASCDC and the Association of Defense Counsel of Northern California and Nevada in the *Burch* case, which is now fully briefed. Oral argument was held on February 19, 2019.

3 ***Jarman v. HCR Manorcare, Inc.*** (case no. S241431): In this case arising out of plaintiff's claims that he received inadequate care at a nursing home, the Court of Appeal held that the plaintiff can seek punitive damages, despite an express Legislative intent to foreclose punitive damages. The opinion also allows serial recovery against nursing

continued on page 35

homes for violations of the resident rights statute, Health & Safety Code section 1430(b). The opinion expressly disagrees with two other recent Courts of Appeal published opinions, in which those courts decided that plaintiffs can recover only one award for up to $500. In this case, the court allowed a $95,500 recovery based on repeated violations of the same statute. Harry Chamberlain from Buchalter submitted an amicus letter in support of the defendant's petition for review and has now submitted an amicus brief on the merits. Oral argument has not yet been scheduled.

4 ***Gonzalez v. Mathis*** (case no. S247677): The Supreme Court has granted review to address this issue in a *Privette* case: Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor? Ted Xanders and Ellie Ruth from Greines, Martin, Stein & Richland have submitted an amicus brief on the merits and oral argument has not yet been scheduled.

5 ***Fera v. Loews*** (case no. B283218): This is an employment case pending before the Court of Appeal (2nd Dist., Div. 3), in which the trial court granted two summary adjudication rulings in favor of the defendant, Loews Hollywood Hotel. The two issues on appeal are (1) what does the phrase "regular rate of compensation" in Labor Code §226.7(c) mean in a context where an employee receives a number of forms of wages (I.e., base hourly pay, service charge payments, non-discretionary bonuses, etc.) for the work she performs, and (2) are there triable issues of fact as to whether Loews' time rounding system is neutral in application and on its face? Laura Reathaford from Blank Rome LLP submitted an amicus curie brief on the merits. The case remains pending.

6 ***Kim v. Reins Internat. California, Inc.*** (case no. S246911): The Supreme Court has granted review of the Court of Appeal's (Second Dist., Div. Four) decision to address this issue: Does an employee bringing an action under the Private Attorney General Act (Lab. Code, § 1698 et seq.) lose standing to pursue representative claims as an "aggrieved employee" by dismissing his or her individual claims against the employer? Laura Reathaford from Blank Rome LLP has submitted an amicus brief on the merits. Oral argument has not yet been scheduled.

How the Amicus Committee can help your Appeal or Writ Petition, and how to contact us

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

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