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Defense Comment would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to: Andrew R. Weiss, Baker, Manock & Jensen, 5260 North Palm Avenue, Suite 421, Fresno, CA  93704-2222. Phone: (559) 432-5400; Fax: (559) 432-5620; E-mail: arw@bmn-law.com.
Today’s column is devoted to two noteworthy events – the first is quite exciting and the second is incredibly disturbing.

First, the good news.

About once a week, I receive a telephone call or e-mail from an ADC member asking for information about a particular lawyer, judge or expert witness. Though I occasionally have some information, and often try to direct them to another Board member who may have more information, it’s not a very good way to share information. And it is going to end – but not because I’ve disconnected my phone or e-mail.

Rather, the ADC has improved our Web site with “forums” that allow all members to post inquiries and get feedback from our entire membership – on line. Much planning and hard work has gone into making these forums or bulletin boards function in a way that is user-friendly and easy to use. While our substantive law committees may continue to use e-mail listservs for some limited purposes, listservs will no longer be the preferred way to communicate within these committees. The forums are available to each and every one of you -- today. Simply go to the Web site (www.adnc.org), click on “Forums,” and get to work, asking and replying to inquiries. Only available to ADC members, this feature of the Web site will, if fully utilized, as never before, connect us as a community of defense lawyers.

Now, on to the bad news.

South Dakota may seem like a long way from California or Nevada, and it is – geographically and probably in many other ways. But there are developments afoot there that are of concern to me – and hopefully will be to you, also. In South Dakota this fall, the electorate will be voting on Amendment E, a ballot initiative called “J.A.I.L.,” or Judicial Accountability Initiative Law. Simply put, it would eliminate judicial immunity for a wide range of acts by the judiciary in the decision-making process, and subject the judiciary to criminal prosecution for their actions.

Rumor has it that this South Dakota initiative is the brainchild of a California lawyer who once attempted to get a similar ballot initiative qualified in this state, but failed. Maybe failed is the wrong word – the balloon never took flight because he realized it would take a million signatures here to qualify. So he abandoned the project here in favor of South Dakota, where he found a process far less costly and burdensome.

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As a lobbyist and lawyer, I am often struck by the fundamental disconnect between the worlds of legislation and litigation. Some litigators basically distrust the chaotic world of the legislature, and forget the fact that the Assembly and Senate can modify entire lines of case law with one bill. At the same time, lawyers in the legislative process prefer to address problems with bills, rather than “leaving it to the courts.” In reality, of course, both case law and statutes represent “the law” in an equally real sense.

A third source of law critical to defense practice is receiving increasing attention in the legal press: the role of the Judicial Council in promulgating statewide rules of court. Under the direction of Chief Justice Ron George, the Judicial Council more and more is seeking to eliminate inconsistent local rules, establish basic consistency of practice from county to county, and resolve procedural issues within the judicial branch. The recent Spring 2006 Invitations to Comment on proposed rules changes illustrate this trend.

At least twice each year the Judicial Council releases proposed changes to rules. In brief, proposals for rules changes are vetted through relevant Judicial Council subject-matter committees, such as the Civil and Small Claims Advisory Committee. If approved by the relevant committee, proposals are released for public comment. Following this period, the comments are analyzed and the proposal is considered by the powerful Rules and Procedures Committee, and if approved at that level, presented to the full Judicial Council for approval. Typically rules changes approved by the Judicial Council take effect on January 1 of the following year.

Groups such as the California Defense Counsel make a major mistake if they focus their attention on statutes and case law to the exclusion of proposed changes to statewide rules of court. Contained within the Spring Cycle Invitations to Comment are 41 proposed rule changes and four proposals for Judicial Council-sponsored legislation in 2007. While some of the proposals are not relevant to defense lawyers, since they deal with probate, juvenile or other areas of practice, fully 18 of the proposals have potential impact on ADC members. Of these, five relate to appellate practice.

ADC members who do not believe that Judicial Council proposals can dramatically affect defense practice should devote the very few minutes necessary to review the Spring Cycle items. Simply call up the Judicial Council’s Web site, www.courtinfo.ca.gov, and click on Invitations to Comment on the left margin. The text and rationale for each proposal are available. For the Spring Cycle, proposals address such critical issues as discovery of electronically stored information, the form of Section 998 offers, written objections to
Most of your most cherished beliefs about juries are wrong. How do I know? I used to believe them, too. Before becoming a trial consultant, I spent over eight years litigating and trying cases, learning from some of the best and brightest lawyers in the country. However, after hundreds of hours debriefing actual jurors and watching mock juries deliberate, I now know that a great deal of the accepted wisdom about jury psychology is completely baseless.

For example, everyone knows that closing arguments are critically important to winning cases, right? Wrong. Time and again post-verdict interviews confirm that jurors generally make up their minds on the basis of witness testimony, long before the trial concludes. By the time you get to closing arguments, the cows are not only out of the barn, they are three states away. Such “truisms,” or trial myths, abound. Based on fundamental misconceptions about jury psychology, these hoary adages are accepted as fact by generation after generation of lawyers – even though almost thirty years of empirical research demonstrates that they’re way off target.

This article examines some of these myths and the faulty thinking underlying them. It also explores the mindset that makes lawyers so vulnerable to confusing jury lore with jury wisdom.

**LAWYERS AND JURORS LIVE IN DIFFERENT WORLDS**

Lawyers are skilled at many things, but understanding and connecting to jurors is generally not one of them. This shouldn’t be a surprise when you consider that most lawyers actually have no frame of reference. In the first place, they rarely see juries in action. The vast majority of civil cases settle before trial and few litigators ever serve on juries or watch mock jurors deliberate.

In addition, lawyers typically have little in common, either socially or economically, with the average juror. Most lawyers spend their time with colleagues and friends who, like them, tend to be affluent, well educated and privileged. In other words, lawyers aren’t like regular people. In fact, by design they don’t even think like regular people.

Law school changes how students think; it trains them to think like lawyers. They are taught to logically and dispassionately apply a set of rules or legal precedent to a set of facts. Snickers of derision greet first year students who worry about whether case outcomes are fair. In exam questions, emotional issues like fairness and moral justification are usually red herrings, to distract from the correct analysis.

In contrast, fairness and moral justification are very relevant to jurors. They believe their job is to right wrongs and they don’t compartmentalize or set aside their emotions when they make decisions. Jurors look to the law for guidance, but their verdicts are based on fairness, justice and their own life experiences. As a result, there is an inherent clash between legal reasoning and jury logic.

This clash or disconnect underlies many of the common jury myths and misconceptions. For example, the closing argument myth presumes that jurors will hold their decisions in abeyance until the end of the trial when the lawyers wrap it all up and tell them how to think. However, this isn’t how people make decisions in real life, and it’s unrealistic to expect that simply because jurors are in a courtroom the rules of human behavior don’t apply.

Over a quarter of a century of jury research shows that most jurors make their decisions by observing the witnesses and assessing the evidence as it comes in. By closing arguments most jurors have already made up their minds, and they essentially use the closings to identify facts and evidence that support those decisions. The remaining undecided jurors will make their decisions in the jury room, persuaded by arguments made by fellow jurors – not by the lawyers.

Another widespread myth is that jurors make up their minds during opening statements. Again, this simply doesn’t comport with common sense. Jurors want to see the evidence. They want to hear from the witnesses. They won’t simply accept what the lawyers say on faith.

Which is not to say that the opening statements aren’t important. Indeed, we believe opening statements are critical to jury persuasion. The problem is many lawyers don’t use this opportunity to its full advantage. For example, many litigators spend opening statement describing every single piece of evidence they will present at trial. In typical lawyer fashion they go into all the minor nuances of their case, including every last little detail.

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The result is information overload. Giving jurors too much information before they have a context confuses them. Rather, you should stick to the broad strokes in opening statements. Identify the key themes and facts that tell your story and provide moral context. Use the opening statement to frame your case, to establish the wrong that jurors must right.

Ask yourself – Is this a case about someone failing to take personal responsibility? Is this a case about someone trying to cash in on an unfortunate accident? Is this a case about a big company taking advantage of the little guy? Set up your framework at the outset and then backfill with those facts that support your theme. This will help jurors organize and assimilate the evidence as it comes in during trial. Inundating them with unnecessary detail at the outset not only interrupts the flow of your story, it damages your connection with jurors.

This connection is critical to persuasion and every time it’s broken, your case falters. Even little things can trigger a disconnect. For example, we often see lawyers start their opening statement by intoning, “This is an opening statement,” or “I’m going to give you a roadmap.” Jurors know that; everyone in the courtroom knows that. By stating the obvious the lawyer puts distance between himself and his audience. He or she has disconnected from the jurors.

In contrast, look at a 30 second television commercial. The result of millions of dollars and years of research into the art of persuasion, commercials don’t start by announcing that the viewer is about to see a commercial. They don’t start by describing what you’re going to hear. Instead, commercials grab the viewer’s attention and start right into the advertiser’s message.

An effective, persuasive commercial speaks directly to the viewer, identifying a problem and a solution. (“Your smelly underarms are why you can’t get a date; our deodorant will make them smell great!”) Using emotional cues and evocative imagery, commercials frame the problem so the obvious solution is the one the advertiser is selling. When it comes to persuasion, think less like a lawyer and more like Proctor and Gamble.

**LAWYERS OVERESTIMATE THEIR OWN IMPORTANCE**

For generations, lawyers have told each other that the jury’s opinion of the lawyer is important to their decision in the case. Trial lawyers think that what they wear and how charming they are influencing jurors. They think they can dazzle jurors with their eloquence. This is a huge misconception.

To begin with, it underestimates the jury’s intelligence. Juries are actually very smart and extremely rational. The common sense of 12 people randomly brought together is amazing. Collectively they are excellent at reading people. They can almost always spot liars and they are difficult to fool. In addition, jurors know that lawyers are salespeople selling their side of the case, so they factor that into the equation.

This doesn’t mean that jurors don’t appreciate good lawyering. They are impressed by professionalism, they are grateful for clear explanations and they recognize showmanship. However, far too many lawyers believe this translates to a vote for their side. Indeed, I recently heard a prominent defense lawyer say that in picking jurors, he looks for jurors who “like” him.

The reality is that jurors have no problem voting against a lawyer they like if he or she fails to put on enough evidence to support his/her case. After watching lawyers over the length of a trial, jurors usually have a lot to say about them. Yet these opinions almost never drive their verdicts. The one exception to this general rule is if the lawyer loses credibility with the jury. Once a jury loses trust in what the lawyer says, it has a ripple effect that tends to taint the rest of the case.

**LAWYERS DO NOT LOOK BEYOND STEREOTYPES**

Another area that’s rife with legal folklore is jury selection. Many lawyers judge prospective jurors using outmoded
stereotypes, reflecting an overly simplistic view. For example, the conventional wisdom is that Asians are pro-defense and African Americans are pro-plaintiff. However, relying on such two-dimensional stereotypes is foolhardy.

Each juror is a unique individual, and the interplay of race and ethnicity with other factors like experiences, values and attitude is what really provides insight into a juror’s thinking. For example, while many first-generation Asians, especially those with backgrounds in finance, science and engineering, tend to be pro-defense, third-generation, highly assimilated Asians with degrees in art or psychology are more likely to be pro-plaintiff.

Similarly, the stereotypical view that African Americans will side with plaintiffs in civil cases and the defense in criminal cases is an unsophisticated one. As society has changed and African Americans have moved throughout all strata of society, race may not be as significant. Other factors like education, occupation and life experience can be equally, if not more, important.

In fact, we experienced this in the Martha Stewart trial. Working for the prosecution, our research showed that across the board, the more educated and financially sophisticated people were, the more they believed that Stewart had broken the rules. Therefore, with respect to African American jurors, their race was not the important factor, their socio-economic status was.

The so-called “helping professions” are another area where lawyers get into trouble. For instance, many attorneys assume that nurses are plaintiff-oriented because their job is to help people. They see these jurors as sympathetic or empathetic types. However, if you really think about what these people do all day, you can see that this is an erroneous assumption.

Nurses, who spend all day caring for sick and dying people, are usually very pragmatic and fairly callous. They spend a lot of their day saying no: “No, the doctor can’t see you yet,” or “No, it’s not time for more pain medication.” They also worry about liability all day long in every aspect of their work. As a result, nurses are much more likely to be defense jurors than plaintiffs.

**LAWYERS MISAPPREHEND THE PURPOSE OF VOIR DIRE**

A good voir dire is designed to elicit information that helps you to see the jurors as individuals. This sounds obvious, but many lawyers don’t seem to get it. Instead, they use this valuable opportunity to try and educate or condition jurors. This is a wasted opportunity.

Jurors’ opinions and biases are formed over their lifetimes. It is impossible to change them in the brief time they spend listening to and/or answering a few questions. Do you really think a diehard football fan will reconsider his passion because a lawyer says, “You know a lot of people are injured playing football, don’t you?” Will a lifelong Democrat start thinking like a Republican after hearing another juror extol the virtues of the GOP or denigrate the DNC? Of course not.

Rather than affecting a change in the jurors’ thinking, such questions actually puzzle them and cause them to feel manipulated. In the jurors’ minds the case hasn’t begun. They haven’t seen any evidence and at best they only have a vague idea of the issues. The lawyers’ questions seem pointless because the answers don’t provide any meaningful information. Moreover, leading questions designed to elicit rote affirmative answers are not the kinds of questions people use in real life. Jurors experience the lawyer talking at them, not to them and that essential connection is broken.

Another myth predicated on the belief that voir dire can change long-held beliefs is the concept of contamination. Accepted lore is that you need to avoid this at all costs. As a result many lawyers will avoid asking important questions just so juror Three isn’t contaminated by juror Five’s bias. For example, a lawyer in a bad faith case might worry that Mrs. Smith’s description of problems with her insurance company would lead Mrs. Smith to think the lawyer is trying to influence her thinking.

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will affect other jurors. They think hearing about Mrs. Smith’s problems will cause other jurors to suddenly start disliking insurance companies too.

However, research and common sense show that jurors are unlikely to change their beliefs on the basis of a stranger’s situation. It’s far more dangerous to avoid probing the depth of Mrs. Smith’s bias than to have the other jurors exposed to it. Indeed, careful observation of other jurors’ reactions to her statements can provide valuable information which might not be uncovered otherwise.

Seeking commitments from jurors that, for example, they will follow the judge’s instructions or return a verdict for the defendant if the plaintiff fails to meet his burden of proof is also a wasteful and potentially adverse use of this valuable time with jurors. Jurors find these questions patronizing. Instead, you should spend your time during voir dire building a rapport and getting to know the jurors as individuals in order to most effectively utilize your preemptory challenges.

This brings us to one of the most obvious, and most common, misconceptions, i.e. that the purpose of voir dire is to identify your best jurors. Nothing could be further from the truth. The real purpose of voir dire is to identify the most unfavorable jurors, because in reality what you are doing is not jury selection, but jury deselection.

During voir dire you want to spend your time asking questions to determine which jurors have biases or attitudes that will negatively impact their impression of your case. In addition, you should be using this time to get those adverse jurors talking, leading them towards a potential cause challenge. Every juror you get to talk himself off the jury saves a precious preemptory.

**HOW TO STOP THINKING LIKE A LAWYER**

The first step to reorient your thinking is to critically evaluate the conventional “wisdom.” In this article I have attempted to debunk some of the more common lawyer myths. There are many others. You should make it a practice to consider any statement about juror tendencies or behavior carefully. Does it comport with common sense? Is it based on empirical evidence? Or is it just something that “everyone knows.”

In addition, you have to recognize and acknowledge the lawyer overlay that colors all of our thinking. When making trial strategy decisions, formulating arguments and designing graphics, don’t rely on the feedback from other lawyers. Ask yourself, “Would this be comprehensible and persuasive to my postal worker, my grocery clerk or my maiden Aunt Betty?” Better yet, ask these folks directly.

Consider, too, whether your case, and the way you’ve framed it, is based on clever legal arguments or on righting a wrong. As discussed earlier, lawyers are trained to place a very high value on the former, and too often forget that jurors do not. This clash, between legal analysis and jury logic, was illustrated recently during a discussion with new clients.

Our clients represented defendants who sought specific performance of a settlement agreement. During the course of litigation, plaintiff’s counsel had offered to settle if defendants withdrew a dispositive motion. Defense counsel carefully confirmed the arrangement via email before taking the motion off calendar. However, after the motion was withdrawn, plaintiff refused to settle.

The attorneys were confident that a jury would hold plaintiff to her lawyer’s agreement. We disagreed, explaining that jurors strongly believe you are free to change your mind until you actually sign an agreement. “Not a problem,” countered one of the lawyers, “all we have to do is explain the law.”

Wrong. Legal arguments alone rarely influence jurors. Jurors live in the real world and their solutions are real world solutions. They will not ignore their life experience and core belief in fundamental fairness for a brilliant legal analysis. Yet time and time again we hear lawyers say they can remedy case problems with a particular jury instruction or that jurors will ignore negative facts because they’re legally irrelevant.

The bottom line is that in many ways legal training hinders your ability to understand, persuade and communicate with juries. And while you can never really undo the damage law school and litigating have wrought (just ask your non-lawyer friends and family), with respect to jury matters you can try to compensate by recognizing how your legal overlay affects your conclusions. In other words, ask yourself, “Am I thinking like a regular person or am I thinking like a lawyer?”

As a former litigator and award-winning investigative journalist, Patricia Steele brings a unique perspective to Varinsky Associates of Emeryville where she works as a jury consultant. Eight years as a civil litigator and white collar criminal defense attorney have given her an in-depth understanding of litigation and trial practice. This understanding, combined with another eight years spent as an investigative journalist and television producer, makes her highly effective at helping trial lawyers reduce complicated cases into persuasive jury presentations.

Steele received her JD, *cum laude,* from Georgetown University Law Center and practiced law at O’Melveny & Myers and O’Neill, Lysaght & Sun. She was a member of the American Inns of Court, and Special Counsel to the Warren Christopher Commission. Steele also earned an MFA from UCLA’s graduate film program, where she was awarded a Fulbright Scholarship in Journalism. Her work has appeared on NBC, ABC and PBS, and has won both Emmy and Associated Press awards. Steele was a contributing producer to The Center for Investigative Reporting and a Fellow at USC’s Annenberg School of Justice and Journalism. She is a member of the American Society of Trial Consultants.

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**DEFENSE COMMENT**  
**SUMMER 2006**  
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The California Supreme Court has issued a new decision limiting the liability of landowners and general contractors for injuries sustained by employees of independent contractors. (Kinsman v. Unocal (2005) 37 Cal.4th 659.) The Court held that a carpenter employed by an independent contractor that installed scaffolding could not sue the landowner for exposure to hazardous conditions unless the carpenter could establish both that the landowner knew or should have known of the dangerous condition and the independent contractor did not know and could not have reasonably known of the dangerous condition. (Kinsman, supra, at 675.) The court went on to state that if the hazard was, in fact, created by the independent contractor itself, there could be no liability. (Kinsman, supra, at 675, fn. 3.)

This is the latest statement from the California Supreme Court in what one court of appeal has referred to as “a body of law known as the Privette doctrine.” These cases define the circumstances under which an injured worker, who is an employee of an independent contractor, may sue the hirer of that contractor. (Michael v. Denbeste (2006) 137 Cal.App.4th 1082.)

FACTS OF THE CLAIM

In Kinsman v. Unocal, a carpenter was hired to dismantle scaffolding used by other trades while the Unocal refinery was being repaired. Some of the repair work included removal and replacement of the asbestos insulation. While the carpenter did not work on the insulation, the allegation was that the carpenter was exposed to asbestos material and developed mesothelioma. The carpenter presented evidence that established that the risk of mesothelioma was well known at the time this carpenter was working, but that Unocal did not warn the carpenter of the danger. The jury, who did not receive limiting instructions relating to the liability of Unocal, awarded $3,000,000, assessing fifteen percent of the fault to Unocal.

In its lengthy opinion the Court reversed the verdict for failure to properly instruct. The Supreme Court began by discussing the history of “the Privette doctrine.” (Kinsman, supra, at 667.) The history, as traced by the Supreme Court, illustrates the evolution of the cases from elimination of the “peculiar risk” doctrine to elimination of negligence claims of certain types brought by injured workers under certain circumstances.

THE FACTORS THAT MOTIVATED THE SUPREME COURT

This theoretical leap was motivated by a number of considerations not all of which are applicable in every case. They include the following factors:

- The hirer does not have actual control over the mode of work;
- The liability of the hirer is generally vicarious;
- The injury is typically compensable under the workers’ compensation system;
- Liability would lead to the anomalous result that a non-negligent employer has greater liability than the independent contractor who may have caused or contributed to the injury;
- The hirer of the independent contractor indirectly pays the cost of the workers’ compensation insurance and should not have to bear the burden of the cost of additional liability insurance for the same injury;
- The injured employee receives an unwarranted windfall;
- Liability penalizes those who hire “experts” who perform dangerous work; and
- The hirer cannot seek equitable indemnity from the employer who may be primarily at fault.
THE PRIVETTE DOCTRINE

In Privette v. Superior Court ((1993) 5 Cal.4th 689), the injured worker was an employee of a roofer. The injured worker sued the homeowner under the “peculiar risk doctrine” for injuries arising from the work that created a peculiar risk of harm. The Supreme Court concluded no such cause of action could be stated. The homeowner had no right to control the work. Workers’ compensation was the remedy for this injured worker, and placing the workers’ remedy in workers’ compensation placed the cost where it belonged, on the independent contractor roofer.

Five years later, in Toland v. Sunland Housing ((1998) 18 Cal.4th 253), an injured worker sued asserting that the hirer had a duty to provide in the contract for “special precautions.” The Supreme Court rejected this assertion and said that this was merely another form of vicarious liability for the acts of the independent contractor. Employees of the hired contractor are barred from recovery when the liability of the contractor who is primarily responsible for the on-the-job duties is limited to workers’ compensation coverage.

At this point, it was generally thought that direct negligence claims against the hirer of the independent contractor would survive. Three years later, the first variant of the direct negligence cases reached the Supreme Court in the guise of a negligent hiring case. (Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235.) There, the Supreme Court concluded that “negligent hiring” was merely another form of vicarious liability and “just as in peculiar risk cases,” it would be unfair to impose liability for that on the hirer.

Two years later, in late 2002, the Supreme Court decided two cases back-to-back intending no doubt to clarify two remaining issues: Right of control as a basis for liability, and providing defective equipment as a basis for liability. (Hooker v. Department of Transportation (2002) 27 Cal.4th 198 and McKown v. Wal-Mart Store (2002) 27 Cal.4th 219.) In Hooker, the plaintiff argued that because CalTrans had retained the right of control in its contract, it should be liable to the injuries sustained by an injured worker. The Supreme Court rejected this argument and concluded that only where the hirer “exercised the control” and did so in a manner that “affirmatively contributed to the injury” would there be liability on the part of the hirer. (Hooker, supra, at 210.)

In McKown, Wal-Mart provided demonstrably defective equipment that caused all or part of the injury. The Supreme Court did hold that Wal-Mart, as the hirer of the independent contractor may be liable where the hirer provided defective equipment that contributed to the injury.

According to the Supreme Court, each of these cases, with the exception of McKown, was properly a matter to be resolved on summary judgment. In each case, the court determined the liability issue as a matter of law. The determination of these cases as a matter of law rather than as an issue of fact is significant. It recognizes the high “transactional cost” of litigation in these cases. By providing a “bright line test” that can be used for resolution as a matter of law, it avoids settlements motivated by trial costs and the risk of an adverse verdict at trial.

THE KINSMAN REASONING AND RULE

The Supreme Court used what it called the “framework of delegation” to understand the trend of the pre-Kinsman, Privette doctrine cases. Using these principles, the court then analyzed the application of the Privette doctrine to worker injury claims arising out of alleged general landowner negligence under Code of Civil Procedure section 1714 and Rowland v. Christian ((1968) 69 Cal.2d 108).

In Kinsman, the landowner (Unocal) delegated to the independent contractor the responsibility for supervising the job. As such, if there is an obvious danger, the independent contractor “could reasonably be expected to see it, the condition

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itself serves as a warning, and then the
landowner is under no further duty.” (Kinsman, supra, at 673.) If the hazard
is concealed from the contractor, but known to the landowner, the rule must be
different. (Kinsman, supra, at 674.) The Supreme Court then defined the rule of
liability as follows:

“The hirer as landowner may be
independently liable to the contractor’s
employee, even if it does not retain control
over the work, if: (1) it knows or reasonably
should know of a concealed, pre-existing
hazardous condition on its premises; (2)
the contractor does not know and could
not have reasonably ascertained the
condition; and (3) the landowner fails to
warn the contractor.” (Kinsman, supra, at
675 [Emphasis Added].)

The Supreme Court expressly excepted
the landowner from liability in situations
where the independent contractor, itself,
created the hazard. (Kinsman, supra, at
675, fn. 3.) The Supreme Court did add that
the landowner’s duty “generally includes
a duty to inspect for concealed hazards,
but the responsibility of an independent
contractor also includes the general duty
to inspect for concealed hazards on the
portion of the premises involved in the
work.” (Kinsman, supra, at 677.) Further,
merely because the substance containing
the hazard is visible, is not the end of the
inquiry. If the hazard, itself, is concealed,
the rule applies. (Kinsman, supra, at
678.)

The Supreme Court reiterated its previous
statement in Toland rejecting the “superior
knowledge” formulation of the test. The
court noted while this has “superficial
appeal when considered in the abstract,” its
practical application presents significant
difficulties. (Kinsman, supra, at 679.) This
may reflect the realization that utilizing
the “superior knowledge” as the test almost
always precludes resolution by motion for
summary judgment.

Ultimately, the Supreme Court in Kinsman
reversed the jury verdict because the jury
had not received instructions that properly
defined and limited the landowner’s duty.
The Supreme Court followed the general
rule of appellate procedure and examined
the instructions from the standpoint of
“reasonable probability” that the instruction
actually misled the jury. (Kinsman, supra,
at 682.) The Supreme Court reiterated
the applicable definition of “reasonable
probability” stating:

“‘Reasonable probability’ in this context
‘does not mean more likely than not, but
merely a reasonable chance, more than
an abstract possibility.’” (Kinsman, supra,
at 682, citing College Hospital v. Superior
Court (1994) 8 Cal.4th 704, 715 [Emphasis
Added].)

The court then concluded that the
instructional error in Kinsman was
prejudicial error. A properly instructed jury
may have concluded that the independent
contractor knew or should have known
about the airborne asbestos hazard which
would have required a verdict in favor of the
landowner. (Kinsman, supra, at 683.)

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THE KINSMAN FACTORS AND ROWLAND CONSIDERATIONS

Before the 1968 Rowland v. Christian decision, landowner liability turned on the rote application of three classifications: trespasser, licensee and invitee. (Rowland v. Christian, supra, at p. 113.) In Rowland, the Supreme Court rejected the use of these classifications describing them as “unrealistic, arbitrary and inelastic” rules that “obscure rather than illuminate the proper considerations” that should be used to determine duty. (Rowland, supra, at pp. 116 and 118.) The Supreme Court in Rowland declined “to follow and perpetuate” the rigid classifications and, instead, stated and restated the factors that should be considered to determine liability. (Rowland, supra, at pp. 113 and 117.) The Court based this interpretation on the general principle that all persons are required to exercise ordinary care in their conduct to prevent others from being injured as a result of that conduct. (Rowland, supra, at p. 112, citing Civil Code section 1714.)

In defining what constituted ordinary care in a particular case, the Court did not reject the concept of classification. Instead, the Court required that the determination of liability be contingent on factors that are “based on proper considerations.” (Rowland, supra, at p. 117.) In Rowland, these considerations include seven factors:
1) fortuity of the harm; 2) the degree of certainty of injury; 3) the closeness of the connection between the defendant’s conduct and the injury; 4) the moral blame attached to defendant’s conduct; 5) the policy of preventing future harm; 6) the extent of the burden on the defendant and the consequences to the community of imposing a duty with resulting liability; and 7) the availability and prevalence of insurance. (Rowland, supra, at p. 113.)

The Kinsman factors all fall within the last five of the seven Rowland categories. This opinion is, therefore, consistent with the principles enunciated in Rowland and, by extension, in Civil Code section 1714.

HOW IS THIS BEING APPLIED?

The Privette doctrine has gone far beyond its narrow beginnings and has now been used to rewrite the law relating to general tort liability for injuries to workers. In a recent Court of Appeal opinion, the Court of Appeal applied these rules to a claim where the injured plaintiff is not an employee of the independent contractor but is, instead, another independent contractor hired by an independent

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In *Michael*, the Court of Appeal rejected the argument that because the workers’ compensation system was inapplicable, the Privette doctrine was inapplicable. Instead, the Court utilized the “delegation” framework as defined in *Kinsman*. The Court refused to allow the injured worker to sue the “other” independent contractor. The Court of Appeal noted that without the limitations set forth in the Privette doctrine, the injured worker would have greater rights than a direct employee of the “other” independent contractor. This, the Court concluded, is against public policy.

**COUNTERVAILING CASE AUTHORITY**

The new case authority is not all adverse to worker plaintiffs, however. A significant limitation on the Privette doctrine was created by the California Supreme Court in *Elsner v. Uveges* ((2004) 34 Cal.4th 915). It is unclear from the reasoning utilized in that case whether the exception was intended or unintended.

In *Elsner v. Uveges*, the Supreme Court explained that the OSHA regulations are admissible to establish a duty of care in a lawsuit brought by a worker against a general contractor. (*Elsner*, supra, at 924.) The Cal-OSHA regulations (8 CCR 1513, 1637, and 1640) are a maze of picayune requirements that have little connection to reality and almost none to the factors the California Supreme Court has relied upon in sculpting the Privette doctrine cases. Nonetheless, according to the Supreme Court, these regulations can create a duty. How that duty squares with the more limited duty as defined in the Privette doctrine has not yet been clarified. *Elsner* was decided almost without reference to the Privette doctrine cases. It is unclear, therefore, what the court will do to harmonize that decision with Privette and *Kinsman*.

*Elsner v. Uveges* only applies to commercial activity. The Supreme Court in *Fernandez v. Lawson* concluded that Cal-OSHA does not apply to homeowners who hire workers. (*Fernandez v. Lawson* (2003) 31 Cal.4th 31, 37.) In *Fernandez*, the court recognized the “complex regulatory scheme” created by Cal-OSHA and used that as a reason for not applying those rules to homeowners.

**WHERE DOES THIS LEAD?**

The Supreme Court, under the leadership of Chief Justice George, like its predecessor under Chief Justice Lucas, has a well-defined view of the nature and scope of tort liability that may be asserted by injured workers. That vision exists in the light of and against a backdrop of the other legal remedies, including California’s well developed workers’ compensation system. That vision combines practical considerations with the foundation of important public policy factors. That vision and the system flowing from it will continue to limit the liability of landowners, general contractors and “other” independent contractors on the same job to claims that the injured worker and employer could not have reasonably foreseen.
Anti-SLAPP Motions to Strike:  

By Melissa M. Holmes and David A. Levy – Law Offices of David A. Levy, Burlingame

California Code of Civil Procedure § 425.16, commonly referred to as the “anti-SLAPP statute,” can be a helpful tool for defense counsel when their client is served with a retaliatory and vindictive suit after exercising a constitutional right of free speech or making a petition for redress of a grievance. A § 425.16 motion to strike is broader than a § 435 motion to strike and provides more benefits for the defendant. Once a moving defendant has shown that its conduct falls under the statute, the burden is immediately shifted to the plaintiff to prove a probability of success on the merits of the suit. If the plaintiff is unable to do so, the complaint is stricken with prejudice before the defendant has to file an answer, spend significant resources on discovery or file a traditional motion for summary judgment.

“SLAPP” stands for Strategic Litigation Against Public Participation. Section 425.16 was enacted to address the “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances.” C.C.P. § 425.16(a).

THE ANTI-SLAPP STATUTE AT WORK

Our practice focuses on medical malpractice, business, employment and personal injury cases, not First Amendment free speech litigation, so we did not expect that our clients would ever benefit from the anti-SLAPP statute. However, § 425.16 recently proved to be the ideal remedy for one of our clients.

Denise was sued by an ex-boyfriend, Charlie, who harassed and assaulted her after their brief relationship ended. Charlie was arrested and eight charges were brought against him. Upon the insistence of the District Attorney, Denise agreed to testify against Charlie. Charlie was convicted of five counts and sentenced to jail time, probation, and ordered to attend domestic violence counseling.

Even though Charlie was ordered to stay away from and stop stalking Denise, Charlie continued his harassment by filing a lawsuit against Denise alleging fraud, malicious prosecution, abuse of process and intentional infliction of emotional distress. Charlie alleged that his acquittal on three of the counts warranted compensatory and punitive damages from Denise.

Denise, a legal secretary, was embarrassed and ashamed of the relationship and was dreading the litigation process. Because Denise’s statements in the judicial proceeding and to the police officers who arrested Charlie were protected by §§ 425.16(e)(1) and (e)(4), we filed an anti-SLAPP motion to strike. The Court granted the motion and dismissed Charlie’s complaint, with prejudice, prior to us having to file an answer on Denise’s behalf. Denise avoided unnecessary costs and disruption to her work schedule, as well as the humiliation she would have suffered if she had to attend depositions. We were also able to secure a judgment against Charlie for Denise’s attorney’s fees and costs pursuant to § 425.16(c).

As this example illustrates, § 425.16 can provide defense counsel with a streamlined procedure to get rid of suits at the pleading stage, sparing your client the costs and delay of protracted litigation by bringing the anti-SLAPP motion to strike instead of filing an answer or a demurrer.

WHEN TO BRING AN ANTI-SLAPP MOTION TO STRIKE

Section 425.16 motions can be made in suits involving: a) statements or writings made before a legislative, executive, judicial or other official proceeding; b) statements or writings made in connection with an issue under consideration by an official proceeding; c) statements or writings made in a public forum or in connection with an issue of public interest; and d) “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue of public interest.” C.C.P. § 425.16(e)(4). Actions brought in the name of the state by a public prosecutor are not subject to the anti-SLAPP statute, nor are certain narrow actions brought solely in the public interest on behalf of the general public and certain claims against business entities. C.C.P. §§ 425.16(d) and 425.17.

California’s anti-SLAPP statute can be used to strike state law claims or counter-claims.
in federal court. *Thomas v. Fry's Electronics, Inc.*, 400 F.3d 1206, 1207 (9th Cir., 2005). The anti-SLAPP statute can be used to strike a complaint brought for a client’s statements in a previous suit. *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1583 (2005). § 425.16 motions to strike are often used to strike causes of action for defamation, business tort, nuisance and intentional infliction of emotional distress.

**REQUIREMENTS FOR BRINGING AN ANTI-SLAPP MOTION TO STRIKE**

A section 425.16 motion to strike must be filed within 60 days of service of the complaint. Because SLAPP suits are retaliatory in nature, plaintiffs bringing such litigation will often bombard the defendant with discovery in an attempt to increase the costs of defense. However, once a notice of motion to file a § 425.16 motion to strike is filed, discovery in the matter is automatically stayed. C.C.P. § 425.16(g). Discovery remains closed unless the trial judge determines there is good cause to permit discovery.

The moving defendant must show that the plaintiff’s “causes of action arise from acts in furtherance of the defendant’s right of free speech or petition.” *Navarro v. IHOP Properties, Inc.*, 134 Cal. App. 4th 834, 839 (2005). This can be accomplished by showing that the plaintiff’s causes of action fall into one of the categories in § 425.16(e). The defendant only needs to make a prima facie showing that the suit arises from his or her constitutionally protected speech or petition rights. The defendant does not need to show that plaintiff intended to chill, or actually did chill, a constitutional right of speech or a right to petition. Thus, declarations are required to state facts showing why the anti-SLAPP statute is applicable. C.C.P. § 425.16(b).

**FORCING THE PLAINTIFF TO PROVE A “PROBABILITY” OF SUCCESS**

Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to show there is a “probability” that he/she will prevail. C.C.P. § 425.16(b). Thus, plaintiff is required to show that the complaint is “both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Matson v. Dvorak*, 40 Cal. App. 4th 539, 548 (1995). The plaintiff cannot merely rely on the allegations in the complaint, but instead is forced to present admissible evidence to the court, before the defendant has to file an answer.

If the court grants the § 425.16 motion to strike, the complaint will be dismissed and the court is precluded from providing plaintiff with leave to amend the complaint. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*, 122 Cal. App. 4th 1049, 1055 (2004). A fee award is mandatory for a successful anti-SLAPP motion to strike. However, plaintiff might be able to recover costs and fees if the anti-SLAPP motion is found to be “frivolous or solely intended to cause unnecessary delay.” C.C.P. § 425.16.

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BENEFITS OF BRINGING A § 425.16 MOTION, EVEN IF IT IS DENIED

Even if the trial court denies an anti-SLAPP motion to strike, there are still immediate benefits for the defendant bringing the motion. From the date that a defendant files a § 425.16 motion, discovery is automatically stayed absent an order from the trial court re-opening it. This provides another useful tool for defense counsel to limit costs.

Even if a defendant’s anti-SLAPP motion to strike is denied because the plaintiff is able to convince the court that there is a “probability” of prevailing at trial, the court’s determination is not admissible as proof later in the proceeding. Moreover, in opposing the motion, the plaintiff is forced to reveal the legal theories, as well as the factual basis of the claim, even before the defendant is required to file an answer.

If a defendant’s § 425.16 motion is denied, the defendant is entitled to an immediate appeal of the trial court’s decision. (However, there are certain exceptions codified in § 425.17.) Should the defendant prevail on appeal, the suit is automatically dismissed.

“In this respect, an appeal from the denial of an anti-SLAPP motion is no different than an appeal from the denial of a motion to compel arbitration.” Varian Medical Systems, Inc. v. Delfino, 35 Cal.4th 180, 193 (2005).

RECENT STATUTORY CHANGES

In 2003, the legislature enacted § 425.17 to limit the application of California’s anti-SLAPP statute. Under § 425.17(b), an “action brought solely in the public interest or on behalf of the general” that meet the other requirements of statute is exempt from an anti-SLAPP motion to strike. Some suits involving commercial transactions between business competitors when one party makes an unlawful statement to lure away customers are also exempt from a § 425.16 motion under subdivision (c) of § 425.17. Section 425.17(d) goes further to limit the type of suits that are exempt from an anti-SLAPP motion to strike under subdivisions (b) and (c) of the statute.

In 2005, § 425.18 was added to do away with “SLAPPback” suits. A SLAPPback suit is a “cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under [§] 425.16.” § 425.18(b)(1). With this change, the legislature prohibited defendants from filing a new action for malicious prosecution after they successfully employed an anti-SLAPP motion to strike the underlying suit.

In the right situation, anti-SLAPP motions to strike can be an efficient and effective tool for defense counsel to save their clients the expense and burden of protracted litigation. The statutory scheme set forth in C.C.P. §§ 425.16 through 425.18 warrants a closer look if your client is sued for exercising a constitutional right of free speech or for making a petition for redress of a grievance.

1 All references to statutes are to the California Civil Code of Procedure.
2 All names are pseudonyms.
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Summary of Selected Federal and California Supreme Court and Appellate Cases

By Michael J. Brady – Ropers, Majeski, Kohn & Bentley, Redwood City

Editor’s Note: The summaries in Defense Comment do not include all of the California cases summarized by Mike Brady, as the ADC is limited by the expense of printing and mailing all cases summarized. However, all cases summarized by Mike Brady (approximately 40% more than published in some issues) can be found on the ADC Web site (www.adcnc.com). Just another reason to use the Web site!

Also, as always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or review granted.

U.S. SUPREME COURT

GOVERNMENT LIABILITY AND IMMUNITY; NEGLIGENCE; TORT; FEDERAL TORT CLAIMS ACT; DELIVERY OF MAIL

Dolan v. United States (2006) 126 S.Ct. 1252, 163 L.Ed.2d 1079

FACTS: Plaintiff filed a suit against the federal government alleging that she had tripped over a package that had been negligently placed on her step. The federal government was successful in having the action dismissed on grounds of an exception to tort liability in the Federal Tort Claims Act for claims arising out of the “loss, miscarriage, or negligent transmission of letters or portal matter.” See 28 U.S.C. §2680(b). The Third Circuit affirmed.

U.S. SUPREME COURT DECISION: Reversed. The “immunity” exception only applies when people have been damaged financially because of mis-transmission or lost mail or when the mail itself has been damaged. The immunity does not apply to torts committed in connection with the actual delivery of the mail, such as occurred here.

FEDERAL CIVIL RIGHTS ACTION; SECTION 1981; STANDING

Domino’s Pizza, Inc. v. McDonald (2006) 126 S.Ct. 1246

FACTS: Plaintiff, who was black, was the president and sole shareholder of JWM Investments, Inc. Domino’s Pizza entered into a contract with JWM. Plaintiff sued, claiming that Domino’s breached the contract on grounds of racial discrimination and the suit was brought under 42 U.S.C. §1981 (the 1866 Civil Rights law intended to confer contracting rights upon blacks after the Civil War). The lawsuit was filed in plaintiff’s own name.

The district court threw the case out on grounds that plaintiff had no standing to sue on behalf of the corporation. The Ninth Circuit reversed.

U.S. SUPREME COURT DECISION: The Ninth Circuit was reversed. The contract was entered into with the corporation, not the president. The president cannot sue on behalf of the corporation. The president has no standing and cannot pursue a section 1981 Civil Rights claim as a representative or agent of the corporation.

EMPLOYMENT TORTS; DISCRIMINATION; RACIAL DISCRIMINATION


FACTS: The plaintiffs were managers at Tyson Foods. They applied for a promotion, but the jobs were given to white males. Plaintiff sued for discrimination. They claimed that their superintendent kept referring to them as “boy.” Evidence indicated the supervisor referred to whites and blacks as “boy.” In a jury trial in the district court, plaintiffs recovered a compensatory and punitive damages verdict for discrimination. The district court in effect granted a new trial and set aside the verdict. The Eleventh Circuit affirmed in part and reversed in part, but allowed the new trial to go ahead.
Recent Cases

U.S. SUPREME COURT DECISION: The U.S. Supreme Court disagreed with some of the language of the circuit court opinion but did remand the case for further proceedings. The court indicated that it disagreed with the circuit court’s opinion that the term “boy” was not discriminatory.

CALIFORNIA SUPREME COURT

PRIVILEGE; LITIGATION PRIVILEGE; ABUSE OF PROCESS

Rusheen v. Cohen (2006) 37 Cal.4th 1048, 39 Cal.Rptr.3d 516

SUPREME COURT DECISION: California Supreme Court holds that the litigation privilege (Civil Code § 47(d)) bars action for abuse of process against attorney for post-judgment enforcement techniques and strategies, even though some of the measures adopted by the attorney were based upon perjured documents.

NEGLIGENCE; GENERAL CONTRACTOR; OWNERS; PRIVETTE DOCTRINE; GENERAL NEGLIGENCE CAUSE OF ACTION

Kinsman v. Unocal (2005) 37 Cal.4th 659

FACTS: Unocal owned a refinery. Plaintiff was a carpenter hired by general contractor to dismantle scaffolding. The work done by the carpenter involved exposure to asbestos insulation. The carpenter claimed to have contracted mesothelioma and suit was filed against Unocal. The jury returned a verdict of $3 million.

SUPREME COURT DECISION: Reversed. The theory is that Unocal did not warn the carpenter of the danger. The case is a variation of the Privette doctrine with allegations of general negligence against the owner. Following are the applicable rules in such a case; when the landowner delegates to the general contractor (true here) responsibility for supervising the work, and an obvious danger is involved, which the general contractor should see, the obviousness of the danger serves as the warning and the landowner is not liable. If the danger is concealed, but known to the owner, and not reasonably discoverable by the general contractor, then liability of the owner may exist. When the general contractor creates the hazard, the owner will not be liable. The case is remanded because of error in the giving of instructions.

CALIFORNIA COURT OF APPEALS

INSURANCE COVERAGE; DUTY TO DEFEND; ENVIRONMENTAL CLAIMS


FACTS: This is the well-known case involving Lockheed and charges by the government that it polluted various sites throughout the country through its aircraft manufacturing operations, including the Burbank site where it operated for 60 years. Various governmental agencies (federal and state) ordered Lockheed to clean up the problem. Lockheed sought coverage from its insurer, principally Harbor and Continental. The insuring agreement promised to defend against “suits or actions.” Following are the holdings of the appellate court (all in favor of the insurer):

The promise to defend “any suit or action” does not include claims by government agencies to clean up pollution sites. The word “action” refers to a matter that is in court.

Even though the insuring agreement uses the term “occurrence,” occurrence means accident (a term used in other portions of the policy). Accident means something that happens suddenly, the damages must also happen immediately thereafter. Furthermore, the insurer bears the burden of proving that there was property damages caused by an accident.

The personal injury section of the policy (wrongful entry) will not provide coverage because, if so, this would render meaningless the other portion of the policy requiring the property damage to be caused by an accident.

GOVERNMENT LIABILITY AND IMMUNITY; DANGEROUS CONDITION OF PUBLIC PROPERTY

City of San Diego v. Superior Court (2006) 137 Cal.App.4th 21, 40 Cal.Rptr.3d 26

FACTS: There was a one-quarter mile straight stretch of street in San Diego County, which had been popular for drag racing for years. During an evening when there was a drag race, some pedestrians were killed and hurt. They brought suit against the City claiming that the street was poorly lighted and that this made it difficult to gauge the speed of the racers (the speed limit was 50 miles per hour). They sued the City under the theory that the street constituted a dangerous condition of public property under Government Code § 835. The trial court denied the City’s motion for summary judgment. The City petitioned for a writ.
Recent Cases

**APPELLATE COURT DECISION:** Writ issued to compel the dismissal of the case. There was nothing inherently dangerous about the street; there was no showing that if the street had been used with due care, it would have been dangerous when used by the ordinary driver. Even if there were poor lighting, this had nothing to do with attracting people to race. No dangerous condition of public property existed.

**PRIVILEGE; LITIGATION PRIVILEGE; DEFAMATION**

*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 39 Cal.Rptr.3d 547

**FACTS:** Tuscany Hills and Healy got into a dispute. Tuscany Hills had the duty to do weed abatement on the Association property and needed access through Healy’s property to do so, but Healy prevented this. A lawsuit resulted. Tuscany Hills sent a letter to all the homeowners explaining the necessity and the basis for the dispute, but Healy claimed this was defamatory and sued. Tuscany Hills moved to dismiss under the Anti-SLAPP statute, but the trial court denied the motion.

**APPELLATE COURT DECISION:** Reversed. What Healy claimed was defamatory was a letter written after the lawsuit was filed and which related to the lawsuit. Hence, it was protected by the litigation privilege. Since it was protected by the litigation privilege, this means that Healy would have no probability of prevailing in the defamation action against Tuscany Hills, and the Anti-SLAPP motion should have been granted.

**TRIAL; EXPERT TESTIMONY**


**APPELLATE COURT DECISION:** Court of appeal holds that when an expert files a declaration in a products case, but ignores crucial undisputed testimony as to the cause of the brake failure, summary judgment was improperly granted on the basis of the expert declaration.

**PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; STATUTE OF LIMITATIONS**


**APPELLATE COURT DECISION:** Court of appeal holds that when an attorney allegedly prepared a defective promissory note, and there is underlying litigation concerning the note, a suit against the attorney for malpractice in preparing the note is tolled so long as the attorney represents the client in the underlying action.

**EMPLOYMENT TORTS; REVERSE DISCRIMINATION**


**FACTS:** This is an action for reverse discrimination brought by white employees at a San Francisco municipal airport. A jury ultimately ruled for the plaintiff handing down a verdict of $30,000 in compensatory damages and finding that the City was engaged in purposeful reverse discrimination policies against white employees for the purpose of creating diversity. An attorney fee award of more than $1 million was also handed down.

**APPELLATE COURT DECISION:** The compensatory damage verdict is affirmed. Evidence supported the jury’s finding that the City was engaged in purposeful reverse discriminating policies against whites. The action is remanded to the trial court for further consideration concerning the attorney fee award, since the compensatory damage award was so limited.

**UNFAIR COMPETITION; CONSUMER ACTION; FRAUD**


**FACTS:** Consumers brought an action against DaimlerChrysler (DC) claiming that DC used tubular steel to construct its exhaust manifolds, instead of the more durable cast iron. The action was brought under the Consumer Legal Remedies Act (CLRA) and the Unfair Competition Law (UCL). The trial court sustained defendant’s demurrer.

**APPELLATE COURT DECISION:** Affirmed. Plaintiff stated no cause of action under either statute. There were no misrepresentations made. Even though tubular steel was not as durable as cast iron, no statutes or legislative policies were violated, and there was no threat to public safety and no personal injuries alleged.

**ARBITRATION; FEDERAL ARBITRATION ACT**


**APPELLATE COURT DECISION:** Court of appeal holds that when parties enter into an arbitration agreement pursuant to the Federal Arbitration Act (FAA), the parties agree to be bound by the substantive and procedural provisions of the FAA which preclude them from relying on California law permitting a stay of arbitration pending resolution of related litigation.
GOVERNMENT LIABILITY AND IMMUNITY; CLAIM STATUTE; EQUITABLE ESTOPPEL


**FACTS:** Plaintiff was a student at Bakersfield School District high school. He alleged that he was abused by a counselor and that the counselor threatened to expose him as being gay if he ever exposed the abuse to anyone. The abuse continued over a number of years and even continued when plaintiff went to a different high school and after plaintiff became an adult. Plaintiff did not comply with the claims statute and sought leave to file a late claim that was denied by the trial court. The allegations to support the filings of a late claim were based upon equitable estoppel.

**APPELLATE COURT DECISION:** Reversed. Plaintiff adequately set forth claims of equitable estoppel, particularly in light of the fact that the abuse continued and that he was threatened with exposure as being gay if he were to reveal the abuse to anyone.

INDEMNITY; CONSTRUCTION CONTRACT; DUTY TO DEFEND


**FACTS:** This is a very lengthy decision concerning construction defects and indemnity contracts between developers and subcontractors. Homeowners brought suit. The developer had arranged for subcontractors to do the window framing work, which turned out allegedly to be defective. The contracts with the developer provided that the window framers and the manufacturers would indemnify and defend the developers for problems “growing out of” the subcontractor’s work. The developer demanded a defense, which was refused by the subcontractors.

Ultimately, the subcontractors were found free from negligence.

**APPELLATE COURT DECISION:** Even though the subcontractors were found to be free from negligence, they still had a duty to indemnify the developer, which they breached. In indemnity contracts, the duty to defend (unlike insurance contracts) is construed narrowly, not broadly. But the duty to defend clearly existed in this case and was not excused simply because the subcontractors were found free from negligence. The duty to defend is also triggered at the time of the request to defend and does not await adjudication as to whether the subcontractor is negligent or not.

Furthermore, since the developer wins on the duty to defend, the developer is the prevailing party on its cross-complaint against the subcontractors, and on that cross-complaint, the developer is entitled to attorney fees as the prevailing party.

**NOTE:** Supreme Court has granted review.

SUCCESSOR LIABILITY; COLLATERAL ESTOPPEL


**APPELLATE COURT DECISION:** Court of appeal holds that just because a plaintiff’s attorney represents other claimants in an asbestos suit, plaintiff (not a party to that suit) is not collaterally estopped to re-litigate the subject of the successor liability.

NEGLIGENCE; SKIING; ASSUMPTION OF THE RISK


**FACTS:** Madigan was a ski instructor at Mammoth. He was standing still on the side of the hill when he was collided into by Graham, a 17-year-old snowboarder. Graham was chasing his brother at the time and was in the process of throwing a snowball at his brother. He was not paying attention and did not see Madigan. Madigan was hurt and could not complete a full season as a ski instructor. He sued Graham and Graham’s parents. The trial court granted summary judgment on grounds of assumption of the risk.

**APPELLATE COURT DECISION:** Reversed. Triable issues of fact existed as to whether assumption of the risk applied. Allegations were that Graham was so reckless and careless that the assumption of the risk defense would not apply. It is not an inherent risk of the snowboarding sport that one snowboards and throws snowballs at the same time without paying attention as to what is going on around that person. It will not have a chilling aspect on the sport if liability were to be imposed.

SETTLEMENT; RELEASE; NEGLIGENCE; GROSS NEGLIGENCE

*City of Santa Barbara v. Superior Court* (2006) 135 Cal.App.4th 1345, 38 Cal.Rptr.3d 434

**FACTS:** A child died by drowning after diving into a swimming pool. The child was developmentally disabled. There was a release (permitted by law) that the child’s parents had been required to sign to enable the child to participate in certain recreational programs offered by the city.

**APPELLATE COURT DECISION:** Court of appeal holds that the release did bar claims for ordinary negligence, but that there were triable issues of fact as to the parents’ claim of gross negligence, which the release would not cover.
INSURANCE COVERAGE; EXPENSES TO PROTECT PROPERTY; DIRECT PHYSICAL LOSS; AIRCRAFT

American Alternative Insurance Corp. v. Superior Court (2006) 135 Cal.App.4th 1239, 37 Cal.Rptr.3d 918

FACTS: The government seized the insured’s airplane. The insured resisted the seizure in court and ultimately won. There was some slight physical damage to the aircraft during all of these proceedings. The insured submitted the claim for the physical damage plus all the costs in resisting the government to the insurer for payment. The insurer paid the physical damage, but not the bulk of the claim for the costs and expenses of the insured in resisting the government’s claim. The policy did have an exclusion for confiscation, seizure or detention, but that exclusion had been eliminated in exchange for the insured’s paying a higher premium.

The trial court entered summary adjudication in favor of the insured on the coverage dispute.

APPELLATE COURT DECISION: Petition for writ denied. The deletion of the exclusion suggested that the coverage grant itself included protection for this type of claim. Secondly, the policy obligated the insured to take steps to protect the property and the insurer was obligated to reimburse the insured for these reasonable expenses. This would be a basis for covering the confiscation costs. Thirdly, there was direct physical loss, and the fight over confiscation would fall within the direct physical loss clause.

EMPLOYMENT TORTS; DISABILITY DISCRIMINATION

Raine v. City of Burbank (2006) 135 Cal.App.4th 1215, 37 Cal. Rptr.3d 899

FACTS: Raine was a police officer for Burbank. He suffered a torn meniscus in 1995 while on duty. This caused a substantial disability and difficulty in running, kneeling and sitting. Nonetheless, the city assigned him to a front desk job for temporary light duty and this position lasted until 2002, when his doctor reported that he was permanently disabled. The City informed Raine that it had no permanent re-assignment for him and Raine went on disability retirement. He then brought suit for disability discrimination in addition to other causes of action. The trial court granted summary judgment for the City.

APPELLATE COURT DECISION: Affirmed. The City accommodated Raine during his period of temporary disability (7 years). The City was not required to create a permanent position for Raine to accommodate him. The light duty front desk assignment had been a temporary measure, and the City is not required to convert that into a permanent position.

NEGLIGENCE; DUTY; ASSUMPTION OF THE RISK


FACTS: Lackner was skiing and was at the bottom of a slope in a rest area of Mammoth Mountain. North was part of a snow boarding team at Mammoth under the supervision of coaches and the school district. North was racing down the mountain and was not paying much attention and North collided with Lackner. Lackner sued North, the resort, the coach, and the school district.

APPELLATE COURT DECISION: Triable issues of fact existed with respect to Lackner’s claim against North since North was racing, was oblivious to Lackner’s presence, etc. Assumption of the risk barred the action versus the coach who had instructed the snow boarders to go slow. Assumption of the risk also barred the action against the school district. With respect to the cause of action against the resort, there was no duty on the part of the resort to control the skiers.

CIVIL RIGHTS; UNRUH ACT


FACTS: The theatre produced a play called “Boomers” and offered a discount ticket for people born between 1946 and 1964. Plaintiff filed suit under the Unruh Act claiming that this was age discrimination. The trial court dismissed the suit.

APPELLATE COURT DECISION: Affirmed. This kind of preferential treatment does not fall within the condemnation of the Unruh Act. Everyone within that age group was treated the same. Past decisions have upheld “discount” arrangements such as this for commercial events.

INSURANCE COVERAGE; NORTHRIDGE EARTHQUAKE; REVIVAL; WITHDRAWAL OF CLAIM


FACTS: The insured homeowners’ association (HOA) had minor damage in the 1994 Northridge earthquake. It submitted a claim. But it then in writing withdrew the claim when it made a decision that the damage was cosmetic only. The Northridge Earthquake Revival Statute C.C.P. § 340.9, was then passed allowing all Northridge claimants an additional one-year to file suit. The HOA did so, claiming that State Farm was in bad faith for not paying the suit.

The case was dismissed by the trial court.
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APPSELLATE COURT DECISION: Affirmed. Here, the insured had withdrawn the claim in writing before the Revival Statute was passed. This is the equivalent of never having a claim in the first place.

DAMAGES; FRAUD; SALE OF HOME; LOSS AND APPRECIATION


FACTS: Strebel owned a house in San Bruno. He wanted to buy a house in Sonoma. He was dealing with a broker. The broker found a customer in Sonoma (Steel) who had a house that Strebel liked. The broker was then representing both Strebel and Steel. Strebel agreed to buy the Steel house for $420,000. The broker knew that there was an IRS lien against the Steel house for unpaid taxes, but the broker told Strebel that this was okay and that arrangements had been made to pay this off. In fact, the broker knew that the Steels had made an offer to the IRS to pay off the lien but the IRS had rejected it. In the meanwhile, Strebel sold his own house in San Bruno for $424,950. The deal with Steel could not go through. Strebel sued the broker for fraud. Strebel recovered a verdict against the broker and the verdict was largely comprised of the loss of appreciation on Strebel’s San Bruno home between 1999 and 2003 (the day of the verdict). The theory was that Strebel had to sell his home in San Bruno and that if he not had to do this, the home would have risen substantially in value and that Strebel was not able to find a comparable purchase that he could consummate in Sonoma.

APPSELLATE COURT DECISION: The verdict was affirmed. In a suit against a fiduciary for fraud, the tort measure of damages, not the loss of the benefit of the bargain, was appropriate, and therefore the loss in appreciation in value of the San Bruno home during the period in question was an appropriate measure of damages.

BAD FAITH; MADE-WHOLE DOCTRINE; SUBROGATION


FACTS: An insured was involved in an accident with a tortfeasor and sued. The insured obtained a recovery. In the meanwhile, the insurer for the insured had paid med pay benefits to the insured. The insurer (Progressive) then sought reimbursement from the settlement proceeds that the insured had received from the tortfeasor. The insured brought a bad faith and breach of contract and a Business & Professions Code § 17200 claim against the insurer claiming that the insurer had followed a pattern of practice of not investigating whether the insured had been “made-whole” or whether the “common fund” theory applied.

The insured recovered in the trial court on claims for bad faith, breach of contract, and B&P § 17200.

APPSELLATE COURT DECISION: The B&P § 17200 cause of action was affirmed. The bad faith and breach of contract causes of action are without merit.

The case concerns the “made-whole” doctrine and the “common fund” doctrine. Under the made-whole doctrine, the insurer, after extending med pay benefits to the insured, may not subrogate against the third party tortfeasor until the insured has been “made-whole.” Under the common fund theory, when the insured proceeds against the tortfeasor, the insurer participating in the litigation may not get subrogation benefits unless the insurer pays part of the attorney fees incurred by the insured in prosecuting the claim against the tortfeasor.

In the present case, the allegation against Progressive by the insured was that Progressive engaged in a pattern and practice of not investigating whether the insured had been made-whole before seeking reimbursement from the insured’s settlement proceeds. The made-whole doctrine applies regardless of whether the insurer is suing under subrogation theory the third party tortfeasor himself or whether the insurer (as in this case) is simply seeking reimbursement of its med pay claim from settlement proceeds received by the insured from the third party tortfeasor.

The present claim states a cause of action under B&P § 17200. But it does not state a claim for breach of contract or bad faith, since the insurer did not withhold any benefits from the insured but, indeed, paid benefits (med pay) to the insured.

INSURANCE BROKER; DUTY OF CARE; NEGLIGENCE


FACTS: Business to Business (B2B) entered into a contractual relationship with Tricon, which was an Indian software company located in India. B2B wanted Tricon to develop a software program for it. The contract arrangement required Tricon to obtain insurance, which would protect B2B in the event that Tricon was unable to deliver the software pursuant to the contract. B2B first contacted Hoyla, which was a local insurance broker about the insurance needs. Hoyla in turn contacted PLUS, a surplus lines insurance broker to arrange for this. PLUS arranged for insurance through Zurich, but the policy contained an exclusion for claims relating to work performed in India. Tricon failed to deliver; B2B sued Tricon and obtained a judgment but was unable to collect it because of the lack of insurance. B2B then sued PLUS. The trial court sustained a demurrer based upon lack of privity and no duty.

APPSELLATE COURT DECISION: Reversed. The relationships among the parties was sufficient to impose a duty of care; the negligence and the moral blame was high, given the circumstances. Under the authority of Biakanja v. Irving 49 Cal.2d 647, lack of privity is not always a defense.
DAMAGES; PUNITIVE DAMAGES; REPREHENSIBILITY

Johnson v Ford Motor Company (2005) 135 Cal.App.4th 137, 37 Cal.Rptr.3d 283

FACTS: This case is decided by the court of appeal following remand from the Supreme Court after its decision in Johnson v. Ford. The original court of appeal decision revolved around the California “lemon law.” Plaintiff had recovered a verdict of compensatory damages of approximately $17,000 in the trial court. The appellate court had first ruled that punitive damages in the area of three times compensatory were appropriate. When the case went to the Supreme Court, the Supreme Court remanded it to the court of appeal, saying that the appellate court had not sufficiently considered the reprehensibility of Ford in connection with its conduct with the plaintiff and with other customers.

APPELLATE COURT DECISION: On remand, the court of appeal approved a punitive damage award of approximately nine times the compensatory damages (resulting in a total award of $178,000). The appellate court stuck to its guns that plaintiff’s evidence that all its transactions with other were insufficient to show fraud, but that “potential” harm was present and that what happened to plaintiff was probably typical of what happened to some other customers.

ANTI-SLAPP STATUTE; PRIVILEGE

Lee v. Fick (2005) 135 Cal.App.4th 89, 37 Cal.Rptr.3d 375

FACTS: Parents wrote a letter to a school district complaining of conduct of the baseball coach including verbal abuse and mental instability. The coach ultimately lost his job. He sued the parents for libel and other causes of action. The parents moved for dismissal under the Anti-SLAPP statute. The trial court granted the motion with respect to the libel cause of action but not with respect to the remaining causes of action.

APPELLATE COURT DECISION: The entire complaint was subject to the Anti-SLAPP motion, and should have been granted in full. The communication related to a matter of public interest and was made to an official body under Civil Code § 47(b). Hence it was privileged, and plaintiff had no probability of prevailing. The complaint should have been dismissed.

ANTI-SLAPP LAW; POLITICS


APPELLATE COURT DECISION: Court of appeal holds that Anti-SLAPP law applied and justified dismissal of the complaint by a private individual complaining of campaign finance violation in connection with city council election in Malibu.

DEFAMATION; ANTI-SLAPP STATUTE


FACTS: Ruiz was a homeowner in the Harbor View Community Association development. He wanted to do some remodeling which was denied by Harbor. Ruiz sued Harbor for liable in connection with communications made by Harbor in connection with plaintiff’s request to remodel. The trial court denied Harbor’s motion to strike under the Anti-SLAPP statute.

APPELLATE COURT DECISION: Reversed. The communications by Harbor related to a matter of public interest and the right of all the other members of Harbor Community Association to participate in such a matter. The motion to strike should have been granted.

EMPLOYMENT TORTS; RETALIATION

Patten v. Grant Joint Union High School District (2005) 134 Cal. App.4th 1378, 37 Cal.Rptr.3d 113

FACTS: Patten was a principal at a junior high school. Patten reported various violations to state authorities, including some financial transfer of funds violations. Patten claimed that she was retaliated against by being transferred to a different school, which was a smaller school, with fewer challenges and responsibilities. She brought a lawsuit under California’s whistleblower statute (Labor Code § 1102.5(b)). The trial court granted summary judgment for the District.

APPELLATE COURT DECISION: Concerning the transfer of funds issue, a triable issue of fact existed and summary judgment is reversed. Patten had adequately established a triable issue on the adverse employment effect as well.

PRODUCTS LIABILITY; EXPERTS


FACTS: Plaintiff was driving a Ford, which had the original tires on it, and the car had been driven for almost 70,000 miles. The tire blew out and plaintiff lost control. A lawsuit was filed against Ford for strict liability and negligence. The trial court restricted the testimony of plaintiff’s two experts and ultimately granted a non-suit in favor of defendant.

APPELLATE COURT DECISION: Affirmed. The trial court correctly restricted the testimony and correctly granted non-suit. Plaintiff’s expert on tire tread had not actually looked at this particular tire and had no forensic photographs to guide him. Plaintiff’s other expert on vehicular control had relied upon a report, which was discredited.
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**ARBITRATION; CLASS ACTION; APPLICABLE LAW**


**FACTS:** Plaintiffs were California residents and they sued Cross Country Bank (bank) in a credit card dispute having to do with late fees. The action was brought on behalf of California residents and alleged dunning over credit card bills. Bank was a Delaware corporation. The contract between plaintiffs and the bank provided that Delaware law and federal law would govern; there was also a class-wide arbitration waiver in the contract. This was not actually in the body of the agreement, but referred to in arbitration organization (the National Arbitration Forum) and its rules as governing, and the rules of that organization prohibited class-wide arbitration. The lawsuit was for damages and injunctive relief and also proceeded under the California Legal Remedies Act (CLRA) and the Unfair Competition Law. There was also a cause of action under Delaware law. The trial court first held that the claims under the CLRA and UCL were not subject to arbitration; the trial court then held that California, not Delaware law, would govern and that even if Delaware law were applicable, the class-wide waiver violated fundamental California public policy.

**APPPELLATE COURT DECISION:** Affirmed. The causes of action under the CLRA and UCL are not subject to arbitration. The waiver clause did violate fundamental California public policy (Discover Bank). California’s interest was also superior to Delaware’s. The action was not a nationwide class action but brought for California residents only, and California residents had been affected by the harassing conduct of the defendant.

**JURISDICTION; REPRESENTATIVE SERVICE DOCTRINE**


**FACTS:** A child was severely injured because of a defective car seat. A lawsuit was filed against Dorel and its “grandparent” corporation, a Canadian company (DI). The Canadian company moved to quash for lack of jurisdiction; there was also a class-wide arbitration waiver in the contract. This was not actually in the body of the agreement, but referred to in arbitration organization (the National Arbitration Forum) and its rules as governing, and the rules of that organization prohibited class-wide arbitration. The lawsuit was for damages and injunctive relief and also proceeded under the California Legal Remedies Act (CLRA) and the Unfair Competition Law. There was also a cause of action under Delaware law. The trial court first held that the claims under the CLRA and UCL were not subject to arbitration; the trial court then held that California, not Delaware law, would govern and that even if Delaware law were applicable, the class-wide waiver violated fundamental California public policy.

**APPPELLATE COURT DECISION:** Writ denied. There was jurisdiction under the “representative service” doctrine. Dorel manufactured and distributed the car seat. DI used them for this purpose. A foreign corporation does business in California when it acts through its representative providing service beyond solicitation, and those services are sufficiently important to the corporation that if it did not have a representative performing them, the corporation would have to use its own officials to perform the activities.

**NEGLIGENCE; SCHOOL DISTRICT**


**FACTS:** A female student was killed while on a basketball trip. Decedent fell off the back of a van being driven by the high school basketball coach. The accident happened off school premises and after school hours. The suit was filed against the district alleging negligent hiring and supervision.

Trial court entered judgment for the district.

**APPPELLATE COURT DECISION:** Education Code § 44808 states that a district is not liable for injuries off campus and after school unless they result from the district’s negligence occurring on school premises. It is not enough to claim negligent hiring or negligent supervision.

**DAMAGES; EMOTIONAL DISTRESS; BREACH OF CONTRACT**


**FACTS:** Plaintiff leased premises from defendant for plaintiff’s fashion business. Plaintiff’s business expanded and plaintiff leased more space from defendant. There was a written lease. The defendant failed to properly repair and keep up-to-date the premises by plaintiff’s complaints. Plaintiff lost business as a result. Defendant then hired a property manager who harassed plaintiff. Defendant also raised the rent in violation of the lease. Plaintiff sued defendant for breach of contract and also various tort causes of action (including defamation, interference, negligent misrepresentation). Plaintiff recovered a breach of contract verdict plus a tort verdict for emotional distress.

**APPPELLATE COURT DECISION:** The tort verdict for emotional distress is reversed. Plaintiff had a lease, and the duties of the parties was set by the lease. Plaintiff’s primary damage was economic, for which plaintiff recovered. To allow tort recovery would improperly blur the distinction between contract and tort.

**INSURANCE; DISABILITY INSURANCE; ACCIDENT**


**FACTS:** The insurer worked at an office where she sat in front of a computer for 40 hours a week typing and entering data. A disability policy was purchased. A short time later, she began to experience difficulty, which developed into carpal tunnel syndrome. She made a claim for disability benefits, which were paid for a while, but then were discontinued, resulting in a suit.

**APPPELLATE COURT DECISION:** The court of appeal rules in favor of the insurer: the problem was not caused by an
“accident,” a necessary pre-requisite for coverage. There was no sudden trauma; the problem was caused by normal work activities, which does not constitute an accident. The insurer properly denied coverage.

**ARBITRATION; CLASS ACTION; WAIVER OF CLASS ACTION ARBITRATION; APPLICABLE LAW**


**FACTS:** Plaintiff Boehr was a cardholder of Discover Bank’s credit card program. Boehr filed a nationwide class action against Bank having to do with late fees. The credit card contract contained a waiver of any class-wide arbitration; in addition it provided that in any dispute, arbitration would be the remedy, and that Delaware and federal law would be applicable. Plaintiff’s complaint was brought under Delaware’s legal theories. Bank moved to compel arbitration.

The trial court held that the class-wide waiver provision was unenforceable. The court of appeal granted a writ in favor of Discover Bank holding that the Federal Arbitration Act preempted California law on the class-wide waiver issue and that the waiver would be enforced. The California Supreme Court granted Boehr’s petition for review holding that under certain circumstances, California would refuse to enforce a prohibition against class-wide arbitration, and that the arbitration contract would not be preempted by federal law. The Supreme Court remanded the case to the court of appeal for further decision.

**APPELLATE COURT DECISION:** When the case again reached the court of appeal, the court held that the class-wide waiver under the circumstances of this case would be enforced. The contract set forth that Delaware law would govern, and the plaintiff’s complaint was brought under Delaware law. Delaware law allows enforceability of class action waivers in arbitration clauses.

**COMMENT:** The big unanswered question in this field is whether the U.S. Supreme Court will intervene in these cases to hold that federal law (the Federal Arbitration Act) preempts state law and permits class-wide waivers of arbitration. If so, this would apply to all private contracts throughout the country.

**BUSINESS AND PROFESSIONS CODE § 17200; PROPOSITION 64; STANDING; RETROACTIVITY**


**FACTS:** Plaintiff sued a mattress company for misleading and false advertising. The complaint was brought under various statutes including § 17200. The trial court sustained defendant’s demurrer on grounds there was no false advertising.

**APPELLATE COURT DECISION:** Affirmed. The plaintiff did not have proper standing to bring suit under Proposition 64. Plaintiff suffered no loss of money or property.

**ANTI-SLAPP STATUTE; LITIGATION PRIVILEGE**


**FACTS:** A franchise dispute arose between Navarro and IHOP. Navarro filed suit. Preliminary to the suit there had been various settlement negotiations between Navarro and IHOP, and they were conducted before a judge. Part of Navarro’s present suit was based upon statements and representations that had taken place in the settlement negotiations. IHOP moved to dismiss the present complaint under the Anti-SLAPP statute, but this was denied.

**APPELLATE COURT DECISION:** Motion to dismiss should have been granted. The basis of the Navarro suit was founded on statements made during settlement proceedings before a court. This was protected by the litigation privilege and therefore the complaint was subject to a motion to strike under the Anti-SLAPP statute. Furthermore, Navarro would have no probability of prevailing because of the litigation privilege.

**EMPLOYMENT Torts; HARASSMENT**


**FACTS:** Hope was a cook at a California Youth Authority facility. Hope was gay. His supervisor and a security guard assigned to the kitchen harassed Hope and made derogatory comments. His employer did little to discipline these individuals for doing so. Hope developed physical problems and stress even though Hope was granted a pay raise, it was revoked a few days later in violation of regulations. Plaintiff sued for FEHA violations and tort claims. A jury awarded $900,000 in economic damages and $1 million in non-economic damages.

**APPELLATE COURT DECISION:** Affirmed. The evidence was sufficient to establish a pattern of harassment and a pattern of non-action on the part of the employer in doing something about it to prevent it from continuing.

**CLASS ACTIONS; ARBITRATION; CONFLICT OF LAW**


**FACTS:** Aral lived in California. He wanted DSL from Earthlink and ordered it. It was five weeks before it was delivered and Earthlink billed Aral immediately on the date of the order, rather than on the date of installation. Aral brought a class action lawsuit in California. The contract with Earthlink provided that Georgia law would apply (Earthlink was
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located in Atlanta) and that any claim had to be litigated in Georgia. The contract also provided that there would be no class-wide arbitration. The lawsuit filed by Aral was a class action. Aral made claims under 17200 for injunctive relief and also sought restitution, disgorgement, and unjust enrichment (damages claim). Earthlink moved to compel arbitration. This was denied by the trial court. The trial court in essence held that the entire action was for injunctive relief, which was within the jurisdiction of the trial court.

APPELLATE COURT DECISION: Affirmed in most part. The trial court erred in saying the action was mainly for injunction. The action was for injunctive relief and for damages. Under Supreme Court precedent, the procedure is to sever the damages part of the case, try that, and then the injunctive part of the case is to be handled thereafter. On the merits, the trial court properly denied the motion to compel arbitration. The class-wide arbitration prohibition was invalid under the Supreme Court Discover Bank case. The provision requiring that the trial be conducted in Georgia and that Georgia law be applicable, is unconscionable, since the claim was small, and it is unreasonable to expect the consumer to travel all the way to Georgia to litigate the claim.

INSURANCE COVERAGE; NORTHRIDGE EARTHQUAKE; REVIVAL; NOTICE TO BROKER AS NOTICE TO INSURER


FACTS: The insured was damaged by the Northridge earthquake and promptly submitted a claim to his broker. The broker dissuaded the insured from filing a claim. When the Northridge Earthquake Revival Claims Statute (C.C.P. § 340.9) was passed, it allowed a one-year window for the filing of claims by policyholders and stated that the claim must be presented to the insurer or “its representative.” The insured within the year submitted a claim to the insured’s broker. The insurer took the position that this was a broker, not an agent of the insurer, and therefore this did not constitute adequate notice to the insurer. The trial court agreed.

APPELLATE COURT DECISION: Reversed. Notice to the broker constituted notice to the insurer insofar as the statute is concerned.

EMPLOYMENT TORTS; DISABILITY DISCRIMINATION

Claudio v. Regents of University of California (2005) 134 Cal.App.4th 224, 35 Cal.Rptr.3d 837

FACTS: Employee Claudio worked in the U.C. veterinary department. He came down with a disease called lepotriosis, which meant that it was impossible for him to work around animals. He went on leave of absence and went to Florida. He thought that he had been fired. A university employment specialist contacted him and Claudio told the specialist to contact his attorney. The specialist did call the attorney’s office but found out that the firm was a workers’ compensation firm and the specialist determined that this was not the type of case involved. The specialist then went on to determine that there was nothing else that could be offered Claudio and did arrange for termination.

In a lawsuit, the trial court granted summary judgment for U.C.

APPELLATE COURT DECISION: Reversed. Triable issues of fact exist. The allegations are that this was disability discrimination under the FEHA. The university had not done a reasonable job as far as trying to find alternative accommodations for plaintiff. He could perhaps have worked in a clerical job. U.C. had also not followed through adequately with contact with plaintiff’s lawyer. Triable issues of fact existed as to whether the university had exercised good faith in trying to accommodate plaintiff’s disability.

NEGILIGENCE; DUTY; RAILROADS


FACTS: Christoff was trespassing on a railroad bridge; he was on a walkway which was only three feet, ten inches wide and which was right next to the tracks. A train came by and the suction and pressure knocked Christoff down, and he was injured. He sued the railroad. The trial court granted summary judgment in favor of the railroad.

APPELLATE COURT DECISION: Affirmed. Plaintiff was a trespasser; the railroad had no duty to warn; the risk was open and obvious. Summary judgment was proper.

INDEMNITY; GENERAL CONTRACTOR; SUBCONTRACTORS; ACTIVE NEGLIGENCE

McCrary Construction Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal.App.4th 1528, 35 Cal.Rptr.3d 624

FACTS: McCrary was the general contractor. The job called for a metal roof and a subcontractor (Metal Deck) was to install that. Metal Deck cut a hole in the roof but left it uncovered. Metal Deck then left the job. McCrary, the general, noticed the hole and told another contractor (Horizon) to cover it. Horizon did so, but did so negligently, failing to secure it, and plaintiff worker fell through the hole.

A jury determined that everyone was negligent (including plaintiff) and handed down a verdict. There was then an indemnity claim between McCrary and Metal Deck and McCrary and Horizon. The subcontract between McCrary and Metal Deck allowed for indemnity to McCrary in the event that the injury resulted from the subcontractor’s (Metal Deck) work. The trial court held that there was indemnity as between McCrary and Metal Deck.

APPELLATE COURT DECISION: Reversed. Both Metal Deck and McCrary were actively negligent. The subcontract
agreement, containing the indemnity agreement between McCrary and Metal Deck, did not say that McCrary was entitled to indemnity even if McCrary were negligent. In the absence of such a provision, the general gets no indemnity if the general is actively negligent, which is true here.

**INSURANCE COVERAGE; INTERVENTION BY INSURER; SUSPENDED CORPORATION**

*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2006) 133 Cal.App.4th 26, 34 Cal.Rptr.3d 520*

**FACTS:** A construction defects case was filed against Kaufman & Broad. K&B cross-complained against Performance. It turned out that Performance had been suspended. Cal Farm was the insurer for Performance. The present case answers the question as to how an insurer who desires to defend its insured does so when the insured has been suspended (in this case for tax liability).

The appellate court answers the question by saying that the insurer can defend by intervening in the action. By intervening and seeking permission to defend, the insurer will not waive its coverage positions so long as it indicates that its defense will be under a reservation of rights. This is the proper procedure for the insurer to follow.

**COMMENT:** This could be useful for insurers. Insurers often feel in a dilemma if they sit back to do nothing in the case of an insured who has been suspended. The suspended corporation cannot defend itself and a large default judgment (or other kind of judgment) can result, increasing the insurer’s exposure. The insurer may want to intervene to show that the action is without merit or that the damages involved are much lower. If the insurer can do so while still maintaining its coverage position, insurers will be more comfortable in doing so.

**INSURANCE COVERAGE; ERISA; STANDARD OF REVIEW**


**FACTS:** Claimant was a financial advisor who was under severe mental stress. There was evidence that he also had multiple sclerosis (MS). He submitted a claim for total disability and was awarded it. But the plan administrator after two years determined that the disability was the result of a mental disorder, which only allowed benefits to be paid for 24 months and cut off the benefits. The plan administrator was also the insurer. The administrator had used a doctor to do an IME, and the doctor had been found by another court to be biased. The IME doctor had determined that 99% of plaintiff’s problems were caused by mental disorder, and not multiple sclerosis. The diagnosis of MS was in fact determined by a doctor.

**DISTRICT COURT DECISION:** The district court held that because the plan administrator was also the insurer there was a conflict and that the abuse of discretion standard of review would not apply and that the *de novo* standard of review would apply. The court then held that the policy terms were ambiguous and resolved the ambiguity in favor of the claimant, restoring the full benefits.

**INSURANCE COVERAGE; MENTAL HEALTH INSURANCE; ERISA PREEMPTION**

*Tompkins v. BC Life and Health Insurance Co. 2006 U.S. District LEXIS 25214 (Ninth Circuit)*

**NINTH CIRCUIT DECISION:** This case involves California’s mandatory mental health coverage law and whether ERISA preempts that. The plaintiff was receiving mental health treatments and sought coverage under her husband’s health insurance plan through the employer. California has a law requiring that mental health benefits as far as insurance is concerned be on a parity with coverage for other medical problems. The carrier took the position that the California law was preempted by ERISA since the husband’s plan was a group medical arrangement. The court disagreed saying that the California law constituted a “regulation of insurance” and therefore triggered ERISA’s “savings clause,” constituted a “regulation of insurance,” and therefore ERISA preemption would not apply.

**INSURANCE; CLASS ACTIONS; WILLFUL ACTS; PUNITIVE DAMAGES; EFFECT OF CREDIT REPORTS ON PREMIUMS**


**NINTH CIRCUIT DECISION:** This is an important Ninth Circuit case brought under the Fair Credit Reporting Act (FCRA) a federal statute. This statute basically provides that when an insurer relies upon credit reports in assessing its policyholders, and if a credit report is going to have an “adverse effect” on the insured’s premium, the insurer is obliged to notify the insured of that fact. In the present case, the insurer did not do so. The Ninth Circuit gives a very broad interpretation to the FCRA stating that whenever an insured, because of his/her credit report, is going to have to pay a higher premium than a theoretical policyholder with the highest possible credit report, the credit report has an adverse effect on the policyholder, and the policyholder must be notified. This same rule applies when the insurer cannot obtain any information (no hits) on a credit report and assesses a policyholder a rate higher than the rate that
would be assessed to the policyholder with the highest possible credit rating. The federal statute in question, 15 U.S.C. § 1681, provides that if the insurer acts willfully in setting these premiums in violation of the statute, it can be liable for punitive damages and attorney fees. The case was remanded to the trial court to determine whether the insurer acted willfully in knowing violation of the statute when it acted.

COMMENT: The case poses important risks of class action exposure for insurers. Many insurers use credit reports; the use of the credit reports (though opposed by Insurance Commissioner John Garamendi) is legal, but the decision obviously demonstrates the risks associated with the use of the report. Heavy administrative burdens associated with giving “notice” to the policyholder will also be involved.

EMPLOYMENT TORTS; DISABILITY; DISCRIMINATION; MISREPRESENTATIONS ON APPLICATION

Josephs v. Pacific Bell (2005) 432 F.3d 1006 (Ninth Circuit)

FACTS: Josephs applied to be a service technician with Pacific Bell. On the employment application Josephs answered “no” when asked whether he had ever been convicted of a felony or a misdemeanor. In fact, Josephs had been found not guilty by reason of insanity in an attempted murder prosecution and had further been involved in a misdemeanor battery on a police officer. Josephs filed a grievance procedure after being terminated by Pac Bell. The misdemeanor conviction was expunged before the grievance hearing, but Pac Bell still refused to reinstate plaintiff. Josephs had also been confined in a mental ward, and this was an important reason for Pac Bell’s decision. Suit was filed for disability discrimination and for failure to reinstate.

The district court ruled in favor of Josephs on the failure to reinstate and disability discrimination issues (under the ADA).

NINTH CIRCUIT DECISION: Affirmed. Josephs claim for reinstatement was supported by sufficient evidence of discrimination in violation of the ADA. The evidence indicated that Josephs was qualified for the position of service technician, and the evidence supported that.

COMMENT: Pretty extreme case when the employee had been found insane by a criminal jury in a murder trial, confined to a mental hospital, made misrepresentations on the résumé, and still had to be “reinstated” by Pac Bell! No wonder the burden on the employer is so tough!

ARBITRATION; BREACH OF CONTRACT; WAIVER

Brown v. Dillard’s, Inc. (2005) 430 F.3d 1004 (Ninth Circuit)

FACTS: Brown was employed by Dillard’s. Dillard’s suspected Brown of turning in fraudulent time sheets and fired Brown. There was a company practice manual that required arbitration of employment disputes. Brown filed a request for arbitration. Dillard’s delayed two months in responding and ultimately rejected the claim. Brown filed a lawsuit with numerous causes of action. Dillard’s changed its mind and asserted the right to arbitrate and removed the action to federal court. Dillard’s then sought to compel arbitration, but the district court denied the motion.

NINTH CIRCUIT DECISION: Affirmed. California law states that one who seeks to enforce the contract must show that he has complied with the conditions and agreements of the contract. Dillard’s violated this concept; furthermore, Dillard’s can be held to have waived the right to arbitrate by its conduct.

INSURANCE COVERAGE; ADVERTISING INJURY


FACTS: Hayward was employed by a company called In Sync Media. He left that company and joined a competitor, Andresen. Hayward then started soliciting customers to come over to Andresen’s. In Sync Media sued Hayward. Hayward sought coverage under the CGL policy issued to Andresen (advertising injury coverage). The insurer refused. Hayward sued.

The trial court granted summary judgment in favor of the insurer.

NINTH CIRCUIT DECISION: Under the authority of Hameid v. National Fire Ins. of Hartford 31 Cal.4th 16 (2003), there is no advertising injury coverage unless there is a widespread promotion to the public. In this case, you had one on one customer solicitation. Furthermore, the case of Rombe Corp. v. Allied Ins. Co. 128 Cal.App.4th 482 (2005) holds that advertising and solicitation are mutually exclusive. In the present case, solicitation existed. No coverage.
Recent Cases

Summary of Selected Nevada Supreme Court Cases

By Justin Pfrehm, Georgeson, Thompson & Angaran – Reno, NV

OFFERS OF JUDGEMENT; CONSIDERATION OF PRE-OFFER, PRE-JUDGMENT INTEREST ON PAYMENTS MADE DURING LITIGATION


State Drywall, a subcontractor, filed a breach of contract suit against Rhodes, a general contractor, seeking collection of moneys due under the contract. While the lawsuit was pending, Rhodes paid State Drywall two payments on the contract. After making payment, but before trial, Rhodes made an offer of judgment to State Drywall (pursuant to NRCP 68 and NRS 17.115), inclusive of costs. State Drywall did not accept the offer. The case proceeded to trial where the court found that Rhodes had breached the contract, but awarded State Drywall less than the offer of judgment. The court did not award State Drywall prejudgment interest on the two payments made to State Drywall during the lawsuit. The court awarded Rhodes attorney’s fees and costs, finding that State Drywall did not obtain a more favorable judgment than Rhodes’s offer.

State Drywall appealed contending that the trial court should have awarded it prejudgment interest on the two payments made by Rhodes during the lawsuit. Rhodes further argued that adding this interest to the amount of the judgment would have exceeded Rhodes’s offer of judgment; thus an award of fees/costs to Rhodes was error.

SUPREME COURT OPINION: Reversed and remanded. For purposes of determining cost-shifting under NRCP 68(g) and NRS 17.115(5), pre-offer prejudgment interest must be computed on payments made during the pendency of the lawsuit and added to the actual judgment when it is compared to the offer of judgment despite the offer’s silence on the inclusion of interest.

ATTORNEY’S FEES UNDER SUBSTANTIAL BENEFIT DOCTRINE; DE NOVO STANDARD OF REVIEW OF ARBITRATION AWARDS FOR EVIDENT PARTIALITY

Thomas v. City of North Las Vegas, 127 P.3d 1057 (Feb. 9, 2006)

Thomas and Armstrong (collectively “Thomas”) were terminated from their positions as Las Vegas police officers. Per a clause in Thomas’s collective bargaining agreement, he was entitled to arbitrate his grievances with the City of North Las Vegas. The City denied Thomas’s request for arbitration. Thomas filed suit against the City and the trial court compelled arbitration. Thomas then filed a motion for attorney’s fees and costs contending he was entitled to attorney’s fees under the substantial benefit doctrine. The trial court denied the motion. Thomas arbitrated his grievance. The arbitrator found that the City had grounds for discharge and upheld the terminations. Thomas filed a motion to vacate the arbitration awards for evident partiality of the arbitrator. The trial court vacated the arbitration award. The City appealed.

SUPREME COURT OPINION: Affirmed in part, reversed in part, remanded. To qualify for the substantial benefit exception to the American rule that parties generally must bear their own litigation fees and costs, the prevailing party must show that the losing party has received a benefit from the litigation. The elements of this doctrine require a showing that (1) the class of beneficiaries is small in number and easily identifiable, (2) the benefit can be traced with some accuracy, and (3) the costs can be shifted with some exactitude to those benefiting. Thomas has not shown that the City received a benefit from the litigation. Additionally, a money judgment is a prerequisite to recovery of attorney’s fees.
The arbitration awards should not have been vacated. A de novo standard of review applies to a trial court's order vacating or confirming an arbitration award for evident partiality or manifest disregard of the law. The standard applicable to determine whether an arbitrator is partial, thus must disclose a relationship, is whether there is "a reasonable impression of partiality." Under this standard, the arbitrator in this case did not have a duty to disclose his membership on a police officer union neutral panel of arbitrators.

OFFERS OF JUDGMENT; NO CONSIDERATION OF PRE-OFFER COSTS/FEES IN COMPARING AN OFFER TO JUDGMENT


McCrary contracted with Bianco to repair water damage to his residence. McCrary was unhappy with the work performed so he sued Bianco for negligence and breach of contract. During the litigation, Bianco served McCrary with an offer of judgment in the amount of $23,999, providing a separate award of statutory costs in the event of acceptance. However, the offer made no reference to prejudgment interest. McCrary rejected the offer.

The jury awarded McCrary a total of $15,800. Both Bianco and McCrary moved for attorney's fees. The court awarded Bianco attorneys' fees pursuant to NRCP 68 and NRS 17.115. McCrary appealed the award of attorney's fees to Bianco.

SUPREME COURT OPINION: Affirmed in part, reversed in part, and remanded. Although NRS Chapter 40 allows construction defect plaintiffs to recover attorney fees and costs as damages, it does not preclude application of the penalty provisions of Nevada's offer of judgment rules contained at NRCP 68 and NRS 17.115. Under NRS 40.655 an award of attorney's fees is not mandatory, but discretionary. When a party is foreclosed from recovering costs and fees under NRCP 68 and NRS 17.115, it is likewise foreclosed from recovering costs and fees under NRS 40.655.

With respect to Horizon's multiple, successive offers of judgment, the Court concluded that the most recent offer of judgment extinguished all prior offers of judgment.

CHOICE OF LAW; TORTS; ADOPTION OF SUBSTANTIAL RELATIONSHIP TEST

General Motors Corp. v. Simmons, 134 P.3d 111 (Nev., May 11, 2006)

Simmons, an Arizona resident, was driving his Chevy car in Nevada. Another vehicle struck Simmons car, causing it to roll over. The accident left Simmons with severe injuries. General Motors ("GM") manufactured the car. GM was a Delaware corporation with its principal place of business in Michigan. Chapman, an Arizona business, sold Simmons the car in Arizona. Simmons sued GM and Chapman in Nevada state court alleging claims for negligence, breach of implied warranty, strict liability and emotional distress.

GM moved to dismiss the case for forum non conveniens, or in the alternative, asked the trial court to apply Arizona law. The trial court denied GM's motion finding that Nevada law should apply. GM sought a writ of mandamus from the Nevada Supreme Court seeking to compel the trial court to dismiss for non conveniens or apply Arizona law. Chapman joined in the petition.

SUPREME COURT OPINION: Petition denied in part and granted in part. The choice of law analysis previously used by Nevada courts as set forth in Motenko v. MGM Dist., Inc., 921 P.2d 933 (Nev.1996)("overwhelming interest test") will no longer be used.

Instead, the most significant relationship test, as provided in Restatement (Second) of Conflict of Laws, sec. 145, should govern the choice-of-law analysis in tort actions unless a more specific section of the Second Restatement applies to the particular tort claim. Applying the substantial relationship test, the trial court should find Nevada law applies to Simmons' causes of action against GM. However, under the same test, Arizona law should apply to Simmons' claims against Chapman.

The Alboses sued Horizon for construction defects in their single-family residence. Prior to trial, Horizon served Albos with three successive offers of judgment pursuant to NRCP 68 and NRS 17.115. The last offer was the amount of $100,000, exclusive of attorney's fees and costs. None of the offers were apportioned between Mr. and Ms. Albois. The Alboses rejected all three offers. The case went to trial where the jury awarded the Alboses $100,000, which was reduced by 5% for comparative negligence.
NEGLIGENT LOSS OF EVIDENCE; NEGATIVE INFERENCE INSTRUCTION


Bass-Davis slipped and fell on a wet floor inside a 7-11, operated by the Davises, franchisees. Within a week after the incident, Bass-Davis’s sister requested copies of the store’s incident report and surveillance tapes. The request went unanswered. Bass-Davis sued the Davises under a negligence theory, contending that her fall was caused by an employee who had mopped the floor but failed to post warning signs. During discovery, it was discovered that the surveillance tape was lost at sometime after the incident when it was sent to the Davises’ liability insurer. At trial, the Davises’ defense was that warning signs had been posted when Bass-Davis fell.

Bass-Davis offered a jury instruction on evidence spoliation and stating was entitled to an inference that, had the evidence been produced, it would have been unfavorable to the Davises. The trial court refused the instruction. The jury returned a verdict in favor of the Davises against Bass-Davis. Bass-Davis appealed arguing that the trial court erred by failing to instruct the jury on the loss of evidence.

A panel of the Nevada Supreme Court issued an opinion that Bass-Davis was entitled to an inference that the lost evidence would have been unfavorable to the Davises. On petition for en banc reconsideration, the opinion was withdrawn.

SUPREME COURT OPINION: Petition granted; reversed and remanded. A permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed. This is different from the rebuttable presumption when evidence is willfully destroyed in that it does not shift the burden of proof. The trial court abused its discretion by refusing to issue an adverse inference instruction or consider other appropriate sanctions for the lost surveillance tape, which was the result of negligence, not willful conduct.

NO FIDUCIARY DUTY OR OTHER SPECIAL RELATIONSHIP BETWEEN SURETY AND PRINCIPAL; NO CLAIM FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALINGS


Gibson was a subcontractor on the Las Vegas Int’l Airport construction project. Insurance Company of the West (“ICW”) entered into a surety contract with Gibson, which contained a general indemnity agreement, to provide performance bonds on the project. Gibson failed to pay its suppliers on the basis they had provided faulty materials and because it was waiting for the general contractor, Perini, to release funds due Gibson. Gibson and ICW were sued by two material providers who made claims against the bond. Gibson hired an attorney to represent it and ICW. Gibson reached settlements with the suppliers.

Pursuant to a provision in the surety contract, ICW brought an indemnity action against Gibson contending that it had incurred costs in enforcing the terms of the contract and that is was entitled to recover certain funds paid to Gibson by Perini, which were used to satisfy the suppliers’ claims. Gibson counter-claimed asserting various claims for breach of oral contract. Prior to trial, the trial court entered an order effectively denying ICW an opportunity to pursue an indemnity claim under the terms of the contract between it and Gibson.

At trial, one of the instructions given to the jury, over ICW’s objection, was that a surety owes its principal a fiduciary duty. The jury found in favor of Gibson on its counter-claims awarding it both compensatory and punitive damages for breach of the good faith covenant. ICW appealed.

SUPREME COURT OPINION: Reversed and remanded. The trial court erred when it signed the order denying ICW the right to pursue an indemnity claim, which was expressly permitted under the terms of the contract. It also erred by giving a fiduciary duty instruction to the jury. As a matter of law, there is no special relationship between a surety and its principal. We have declined to extend tort liability to a surety for the breach of the good faith covenant. Without a fiduciary or other special relationship, there was no basis for the jury to award bad faith or punitive damages.

INSURANCE; NO CAUSAL CONNECTION REQUIRED TO APPLY UNAMBIGUOUS EXCLUSION


Griffin was injured when a plane piloted by Jensen crashed into Griffin’s backyard. The plane was insured through Old Republic. The policy excluded coverage when “the airworthiness certificate of the aircraft is not in full force or effect” or “when the aircraft has not been subjected to appropriate airworthiness inspections as required under FAA regulations for operations involved.” Additionally, Jensen initialed a provision in the policy which stated there would be no coverage for the aircraft “unless a standard airworthiness certificate is in full force and effect.”

Griffin sued Jensen in state court. Old Republic filed a declaratory relief action in federal court seeking a declaration it had no obligation to pay damages to Griffin or Jensen because of the exclusionary language in the policy. The federal court granted summary judgment to Old Republic, finding that Nevada law did not require a causal connection between the exclusion and the loss in order for an insurer to avoid liability. A certified question was submitted to the Nevada Supreme Court: may an insurer deny coverage under an aviation policy for failure to comply with an unambiguous requirement of the policy or is a causal relationship between the insured’s non-compliance and the accident required?
SUPREME COURT OPINION: Question answered. Insurers need not establish a causal connection between an aviation policy exclusion and the loss in order to avoid liability so long as the exclusion is unambiguous, narrowly tailored, and essential to the risk undertaken by the insurer. The Old Republic policy’s exclusionary language is unambiguous. A causality requirement in Old Republic’s airworthiness exclusion will not be implied when no causality language is present.
CACI 530 Misstates the Law of Medical Battery

By Joseph H. Fagundes – Cassel Malm Fagundes, Stockton

Many of the new Judicial Council of California Civil Jury Instructions, or CACI as we know them, have been found to be incorrect or incomplete. CACI 530 defining medical battery is one of those inaccurate instructions that is being used by enterprising plaintiff’s attorneys in the continuing effort to circumvent the MICRA protections. By pleading hybrid actions involving both the intentional tort of battery and professional negligence, plaintiffs seek to invoke insurance coverage while at the same time trying to avoid the $250,000 cap on noneconomic damages found in Civil Code section 3333.2.

Battery theories typically do not apply in medical negligence cases and defense counsel need to know the applicable cases to cite in correcting CACI 530. The law of medical battery has not changed since the seminal decision of the California Supreme Court in Cobbs v. Grant. While the concept of medical battery has been clarified, the courts have been consistent in applying it only where there is a “deliberate intent to deviate from the consent given.”

Despite the clarity in the case law, CACI 530 is confusing some trial courts in situations in which medical battery is legitimately an issue that should go to the jury. The real problem is that CACI 530 does not refer to the “deliberate intent to deviate from the consent,” but rather uses the language that the surgeon “performs a substantially different medical procedure.” The intent element has been left out.

This has led to arguments that a mere complication in a procedure, or an injury to a part of the body not intended to be included in a procedure, constitutes a battery. Under Cobbs v. Grant and its progeny, those situations constitute medical negligence only, and should not subject the physician to a battery claim. In contrast, plaintiffs are making the argument that CACI 530 applies to any complication or risk where some unplanned surgical mishap occurs.

MEDICAL BATTERY REQUIRES DELIBERATE INTENT, NOT INADVERTENT MISHAP

Two recent examples demonstrate how cases involving surgical complications have led to allegations of battery. In one, the surgeon mistakenly operated on the patient’s right knee rather than the planned surgery on the left. Although a serious and embarrassing blunder, there certainly was no evidence of any intent to operate on the wrong knee, nor was there a lack of consent for the planned surgery. Clearly, the consent was for a right knee surgery rather than a left knee surgery, but it is the type of mistake that does occur without any intentional deviation from the consent, and there was no evidence of any intent on the part of the surgeon to operate on the wrong knee.

Another recent example involved a spinal fusion surgery at the L5-S1 level. The surgeon inadvertently did the fusion at L4-5 instead, and allegedly committed a battery.

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The trial courts have struggled with these issues because of the language of CACI 530. In both instances, the trial judges initially thought that the procedures performed were "substantially different" than those consented to. Upon further briefing by defense counsel, both courts came to understand the problems with the present wording of CACI 530.

*Cobbs v. Grant* does not support the contentions of the plaintiffs in those cases or the language in CACI 530. In *Cobbs*, the patient's spleen was injured during surgery for a duodenal ulcer and a second surgery was required to remove the spleen. The patient developed a gastric ulcer and in a third operation, half of his stomach was removed. The patient brought a malpractice action against the surgeon, and included a claim of battery based upon an alleged insufficient disclosure of the risks involved resulting in a lack of informed consent. The Supreme Court determined that these facts presented the classic illustration of a negligence cause of action. The spleen and other resulting injuries “were all links in a chain of low probability events inherent in the initial operation.”* Cobbs* made the distinction between battery and medical negligence claims as follows:

The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation, the action should be pleaded in negligence.5

**SUBSEQUENT DECISIONS SUPPORT AND CLARIFY COBBS**

Two subsequent intermediate appellate decisions clarify this distinction and further bolster why the current CACI 530 instruction is incomplete and misleading. In *Perry v. Shaw*, the court found a clear case of battery where the patient consented to the surgical removal of excess skin following substantial weight loss, but the surgeon additionally performed a breast augmentation during the procedure without the patient's consent. The plaintiff in *Perry* had repeatedly informed the defendant surgeon that she did not want any breast procedure done and refused to sign the consent form on two different occasions. She only changed her mind after she was medicated, taken to the operating room and assured by the defendant that he...
would not perform breast surgery.\textsuperscript{7} The 
Perry\ court cited Cobbs in finding that the surgeon performed an operation to which the patient did not consent, thereby committing a battery. The Perry court reiterated that, “[t]he battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented.”\textsuperscript{8} The court went on to decide that the intentional act committed by the physician fell outside the protection of Civil Code section 3333.2, capping noneconomic damages at $250,000. In reaching this conclusion, the court noted that “there’s nothing in the legislative history of MICRA or section 3333.2 to suggest the Legislature intended to exempt intentional wrongdoers from liability by treating such conduct as though it had been nothing more than mere negligence.”\textsuperscript{9} The authors of the Perry decision made it clear that the holding was “limited to the type of battery that occurred in this case.”\textsuperscript{10}

In contrast, the decision in Piedra v. Dugan,\textsuperscript{11} supports the idea that unintentional wrongdoing does not support a battery even when the actual treatment rendered was not consented to. In that case, the plaintiff child suffered a cardiac arrest resulting in severe brain damage, allegedly from the substantial amounts of medications in his system.\textsuperscript{12} However, the court granted the defendant’s motion for nonsuit on the battery claim on the grounds that “the record does not have evidence from which a reasonable jury could find that [defendant doctor] intentionally rendered treatment that had not been consented to or intentionally deviated from treatment that had been consented to.”\textsuperscript{13}

As these cases point out, the medical battery instruction in CACI 530 is misleading and incomplete where it indicates that a physician commits battery if the patient consents to one medical procedure but “performs a substantially different medical procedure.” If there was no intent to deviate from the initial consent, and it was merely a mistake or complication of low probability, it is not a medical battery and only the theory of negligence applies. Therefore, the MICRA protections would still apply and such a battery theory should not go to the jury.

If defense counsel does not prevail on a pretrial motion eliminating the battery theory, then a trial brief clarifying the law should be used to prevent the misapplication of CACI 530.

Joseph Fagundes is a senior partner in Cassel Malm Fagundes, Stockton, who specializes in the defense of medical malpractice claims. He is also a former ADC Board member.

1 MICRA is the Medical Injury Compensation Reform Act of 1975 enacted to curb the rising cost of medical malpractice insurance, thereby improving the availability of medical services.
2 (1972) 8 Cal.3d 229.
3 Id. at p. 240.
4 Id. at p. 241.
5 Id. at pp. 240-241.
7 Id. at p. 662.
8 Id. at p. 664.
9 Id. at p. 669; emphasis added.
10 Id. at p. 668, fn. 4. In fact, the entire theory of the plaintiff in Perry was based on her claim of battery and there was nothing to suggest that the surgery was negligently performed. (Id. at p. 670.)
12 Id. at p. 1488.
13 Id. at p. 1494.
Santa Cruz Attorney
Compassionate About Critters

By Brent L. Ryman, Esq. and John A. Aberasturi, Esq. – Erickson, Thorpe & Swainston, Ltd., Reno

With Hurricane Katrina bearing down on the Gulf Coast, the Nation braced itself for a great deal of human suffering. Then came the order. Residents were directed to evacuate immediately – without their pets.

That was when we learned the disaster would devastate the lives of the Gulf Coast’s animal population as well.

In the days that followed, many animals were surrendered to shelters by evacuees struggling to care for themselves. Others were left to their fate as the hurricane approached and their owners evacuated. Across the country, defense attorney Kate Moore didn’t hesitate to join the crusade for the abandoned animals of the Gulf Coast. In addition to being a partner in the Watsonville law firm Grunsky, Ebey, Farrar & Howell and serving on the ADC Board of Directors, Moore is also the President of the Board of Directors for her local SPCA (Society for the Prevention of Cruelty to Animals).

As a result, Moore was in a position to help. That help came when Moore and numerous other Santa Cruz SPCA volunteers operated an animal airlift funded by movie star Doris Day and her Animal Foundation. The airlift, appropriately dubbed Operation: Just Paws, swooped into the Gulf Coast just in time to rescue a group of surrendered and abandoned animals about to be euthanized due to the disaster.

While Just Paws couldn’t save all of the devastated Gulf Coast’s abandoned animals, many were taken on a remarkable ride. Approximately 130 dogs and cats were picked up from shelters in New Iberia, Louisiana and flown to the California coast by chartered plane. Once there, the animals were taken by volunteers from the Monterey airport to the Santa Cruz SPCA facility, where they were evaluated and treated by veterinarians. They were then either reunited with their evacuated families or adopted into new homes.

“We have adopted out every one of the abandoned animals except one,” said Moore. Before leaving the SPCA, however, each of the animals was personally introduced to – and acquainted with – Doris Day herself.

As the excitement of the airlift and the furor of the hurricane subsided, stories of survival began to emerge for animals and humans who lived through the disaster.

There was the story of Superman, whose owner tied a T-shirt labeled with contact information around the dog’s neck before the evacuation. And then there was Bailey, the adorable beagle puppy who survived by treading water inside a flooded cage for days. Superman starred on CNN’s Inside Edition and was eventually returned to his owner. Bailey was adopted by a California

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family. Both were rescued by Doris Day and the Santa Cruz SPCA.

While *Just Paws* proved to be a successful and gratifying project, it is not the only one in which Moore has participated. Her love of animals leads her to work as a volunteer with the SPCA and other organizations, to make a difference in the lives of animals. She says her compassion for animals began as a child growing up in Illinois, and has continued throughout her life.

“My family would always adopt dogs at the shelter, so I wanted to do something in my professional life in the same fashion,” Moore explained.

For example, before being admitted to law school, Moore took a job as a receptionist at a Fremont veterinary clinic so she could work with animals. During her first week on the job, she adopted a kitten that had been brought to the clinic to be euthanized. That kitten – now a 10-year-old cat named Abby – still lives with Moore and her husband in Santa Cruz.

Since that time, Moore finished law school and began her legal career. She now works for animals through her service on the Santa Cruz SPCA Board, which provides many services to surrounding communities. Moore explained that the SPCA is a no-kill shelter that often takes in animals from other, more crowded shelters as far away as Marin County. The SPCA also provides programs such as Kids’ Camp, foster animal families for animals in need of care, a pet food bank, grief counseling and other community outreach programs.

As Moore explained, much of the work done by the SPCA involves education about the proper care for pets, which end up overcrowding community shelters when abandoned or surrendered.

“Operation: Just Paws” – continued from page 24

Kate Moore (L), on-board vet, Laurie Morgan, and Doris Day’s assistant, Betsy.

“It’s not just about spays and neuters,” she said. “It’s about education, and it’s about compassion.”

“We have humane education programs that go into the schools, and we even have a bilingual instructor to reach those cultures that haven’t been exposed to the need to spay and neuter. When you take a look at one female cat and realize how many kittens she could have over her lifetime, you see the need. Education is so important for young people.”

Moore explained that the lifeblood of the SPCA is volunteers, and more are always welcome. “The SPCA is a private organization operated entirely on private donations. Our shelter runs on volunteers. The best way to get involved is to ask around. If you’re compassionate about animals then call your local shelter and ask to get involved.”

Those who know Moore feel that both the humans and animals she works with are lucky to have her.

“Kate is very committed to the SPCA and has been for years,” said Dennis Howell, Ms. Moore’s partner at the Grunsky Law Firm. “Kate came on board when the SPCA was in a bit of a downturn, and was instrumental in turning that organization around.”

“She is one of those people who, if they set their mind on something, then look out. Kate works very hard, and is very dedicated.”

Lisa Carter, executive director of the Santa Cruz SPCA, agrees.

The Operation: Just Paws pilots.

“It’s amazing that even though she’s a partner in one of the largest law firms in Santa Cruz County, you can just pick up the phone and count on Kate to be there to help when you need her,” said Carter.

“Kate devotes hours and hours of her time for animal care and anything else we need. She’s really selfless. She has no ego to get in the day, and in this day and age that’s really wonderful.”

Kate Moore is a full-time, busy defense attorney who is actively involved in the ADC, yet still manages to have time for her community and animals in desperate need of adoption.
A suspicion developed into a discovery plan, which led to the disclosure of a key fact, which helped secure a defense victory in a wrongful death claim filed by the heirs of a dentist who died of mesothelioma.

The dentist’s family claimed that the decedent was exposed to asbestos contained in dental tape he used while learning how to make crowns at a University of California dental school. Sued by the family were the U.C. San Francisco School of Dentistry and Kerr Corporation, the supplier of the dental tape. Patrick Moore of McNamara, Dodge, Ney, Beaty, Slattery, Pfalzer & Borges, of Walnut Creek, represented UCSF, and ADC member Keith Reyen, Oium Reyen & Pryor, San Francisco, along with Frank Petrek, Bollinger Buberry & Garvey, Chicago, Illinois, represented Kerr.

Plaintiffs claimed that the dental tape was defectively designed because it contained chrysotile (produced from Canadian mines), that Kerr negligently sold the tape, and that Kerr had a duty to warn students about the dangers of asbestos exposure. Plaintiffs also asserted that UCSF, who resold the dental tape to dental students, had a duty to warn students about the chrysotile in the tape.

As defense attorney Moore describes it, once a plaintiff alleges that a defendant’s product caused mesothelioma, it is the defense burden to prove that the injured person was exposed to some product containing asbestos other than the defendant’s product in order to allocate non-economic damages, if any.

The decedent’s family contended that while attending dental school between 1958 and 1962, the decedent used the dental tape as part of a wax cast to take an impression of a patient’s tooth. Once the cast is made and partially encased in plaster, the wax is melted and gold poured into the cast void to make the crown. The sample of the tape used while decedent was a student was obtained by a plaintiff’s expert from a former student, now a teacher at UCSF. The tape sample contained chrysotile.

After reviewing plaintiffs’ interrogatory answers (which can be served after a complaint is filed pursuant to General Orders issued in asbestos cases), defense attorneys learned that the decedent’s father was a Long Beach shipyard worker during World War II and that decedent’s 90-year old sister was still living. Mr. Moore said that as soon as defense attorneys discovered these facts, a deposition subpoena was served on the decedent’s sister. Also during the early stages of litigation, the defense obtained a court order permitting defendants to obtain lung tissue harvested during decedent’s autopsy.

At the deposition of decedent’s sister, defense counsel elicited testimony that when decedent’s father came home from working at the Long Beach shipyard, he would hug his five-year old son while still dressed in his work clothes. The sister also provided information about the father’s pre-war employment history and about

Continued on page 27
the two-year period he spent working at the shipyard.

Armed with the information about decedent’s father’s employment, defense attorneys retained an expert in U.S. naval history. Researching Navy archives in Washington, D.C., the expert was able to locate shipyard records that identified the type of vessel built in Long Beach, the vessel plans, lists of approved products to be installed and the manufacturers of the products. He also located photographs of the shipyard upholstery shop.

Decedent’s father worked in the shipyard upholstery shop. In his pre-war, civilian employment, the father had worked as an upholsterer. While working at the shipyard upholstery shop, the father sewed removal pads designed to cover turbines on the ship. The covering fabric was woven with chrysotile fibers. The pads were stuffed with amosite (which was mined in South Africa).

When another defense forensic medical expert (microscopist) analyzed the decedent’s lung tissue taken during autopsy, he determined that the largest number of asbestos fibers were amosite and other asbestos fibers, not chrysotile. Another defense medical expert (epidemiologist) opined that it was the secondary exposure to amosite which caused the decedent’s mesothelioma.

Both defense and plaintiffs’ experts agreed that amosite is more toxic than chrysotile. Both sides’ experts agreed that exposure to toxins as a child is more likely to cause mesothelioma than exposure as an adult.

Even while the defense continued its efforts to identify other products that exposed decedent to asbestos fibers in order to bolster their argument for allocation of damages under Proposition 51 (Civ. Code §§1431.1, et seq.), they continued to evaluate their clients’ defenses to the duty to warn contention.

Plaintiffs’ attorney argued that during the late 1950s and early 1960s, UCSF and Kerr knew or should have known that the dental tape contained chrysotile. A plaintiffs’ expert testified that articles about asbestos were published as early as 1898, and lung cancer was first linked to asbestos by the 1930s.

Defense attorneys responded that the first study that linked mesothelioma to asbestos was done in the early 1960s. This study was based on an analysis of South African amosite miners. This study was not sufficient to inform defendants of any hazard of chrysotile in dental tape or to require warnings about using the tape.

Defense counsel also developed expert testimony that the tape was the state-of-the-art during the late 1950s and early 1960s. The same expert also testified that during the late 1950s and early 1960s, the technology had not yet been developed to detect asbestos in air at levels generated by the product. Thirdly, the expert testified that students only received unharmful, background levels of asbestos exposure naturally occurring in the air of San Francisco where deposits of chrysotile exist.

Another defense expert testified that the exposure to asbestos from using the tape was not harmful based on the quantity of fibers released in the air and the limited amount of time decedent used the tape. Plaintiffs contended that the decedent used the tape between 20 and 40 times for 5 to 15 seconds each time, over a four-year period. Defendants developed evidence that the decedent cut the one-inch wide tape into lengths of four- to six-inch lengths with scissors before wetting it to use in the cast fewer than twenty times.

Following the close of plaintiffs’ case, the court granted a partial non-suit as to the negligence claim. In argument to the jury, defense attorneys asserted that plaintiffs had not offered sufficient evidence to show that defendants owed a duty to warn about chrysotile in the tape, or that the tape legally caused death of the decedent. The jury decided that the tape was not defective and that defendants did not have a duty to warn students about any risk of using the tape.

In retrospect, Mr. Moore said that learning about U.S. naval history was one of the more interesting aspects of the case for him, as an experienced asbestos defense attorney. He also said that before handling this case, he thought that he had learned over the years about every product that may contain asbestos fibers, but this case presented a product allegation that he had not previously considered.
PUBLIC ENTITY LAW COMMITTEE

Martin Ambacher, Chair

The Public Entity Law Committee held its first brown bag lunch seminar on May 18, 2006, on “Tips and Tactics for Limiting and Avoiding Attorneys’ Fees in Section 1983 and Public Employment Cases.” The seminar was well-attended, including by some local city attorneys. Jim Fitzgerald of McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer & Borges provided an excellent and helpful discussion on this always-difficult issue.

The Committee is planning to put on at least one more brown bag seminar before the end of the year and would like to hear from members about possible topics. We regularly send out reviews of important and/or interesting case decisions to all of our members so make sure we have your e-mail address. Please feel free to contact Committee Chair, Martin Ambacher at martin.ambacher@mcnamaralaw.com with any ideas, comments, questions or interesting cases you have.

CONSTRUCTION LITIGATION COMMITTEE REPORT

Don Sullivan, Chair

The Construction Litigation Committee put on a seminar on June 23, 2006, at the San Ramon Marriott entitled: “Building Your Construction Practice.” An excellent list of panelists discussed topics such as “Nailing Down Client Relations,” “Legislative Review and Defending the SB-800 Case,” “Insurance Coverage in Construction Defect Cases” and “Putting it All Together.” The program was well-attended and well-received. For more information about the Construction Litigation Committee and future events, please contact Chair Don Sullivan at dsullivan@clappmoroney.com.

HEALTHCARE LAW COMMITTEE REPORT

Michael R. Mordaunt, Chair

The Healthcare Law (Medical Malpractice) Committee held a brown bag lunch seminar on June 23, 2006, at the Law Offices of Galloway, Lucchese, Everson & Picchi in Walnut Creek. The topic was “Representation of Physicians Before the Medical Board of California.” David Lucchese presented strategies for dealing with the Medical Board and representing physicians in malpractice cases while a Medical Board accusation is pending. He offered tips and strategies for handling malpractice cases to avoid Medical Board problems after settlement. The program had a good turn-out and was well-received.

Another brown bag lunch seminar will be scheduled in September, to be hosted by Dominque Pollara at Schuering, Zimmerman, Scully & Doyle in Sacramento. The seminar presenters will include Ms. Pollara and Robert Sullivan, who will discuss representing physicians and other health care professionals before medical and other administrative boards. Details for the September seminar will be sent out in the near future. For any questions about the Healthcare Law (Medical Malpractice) Committee, contact Mike Mordaunt at mnordaunt@riggiolaw.com.

TOXIC TORT COMMITTEE REPORT

Chris Wood, Chair

The Toxic Tort Subcommittee arranged to have the ADC file an amicus brief in the California Supreme Court to either overturn or de-publish the ruling in Frances Boyle, et. al. v. CertainTeed Corporation (First Dist., 4th Div., #A108301, 3/10/06). The First District held in that case that the San Francisco Superior Court managing the asbestos cases could not make local rules contradicting statutory procedures. While this is ordinarily a position with which the ADC would agree for the sake of consistency, as would many litigators, the ADC took a contrary view in this unique situation because of the complexity and volume of asbestos cases being managed by that court.

The trial court issued a case management order in “complex cases” allowing defendants to bring motions for “expedited summary judgment,” allowing a defendant to file a document showing intent to request expedited summary judgment, without the need for a separate statement of facts or a points and authorities. Plaintiffs then had 15 days to file an objection before the hearing, citing evidence that raised a triable issue. Over 1,000 claims against defendants were dismissed in 2005 alone under this procedure, which has been in effect since 1996.

While other appellate decisions have upheld the right of the San Francisco Superior Court to issue General Orders to control its complex litigation docket, the Boyle decision, if it stands, will require strict adherence to CCP §437c for motions for summary judgment. Given that there are often up to 50 or more defendants in each case, and, on average, 400-500 asbestos cases pending in that court at any given time, a more streamlined summary judgment procedure makes sense. The ADC brief supports preserving the trial court’s right to manage its docket in complex litigation matters. [See, Cottle v. Superior Court (1992) 3 Cal.App.4th 1367.]

Preparations are underway to post cases and other news of interest to members of the Toxic Tort Committee Forum on the ADC Web site. Committee meetings and brown bag events are also being planned. For more information about the Toxic Tort Committee or any of its activities, please write to Chris Wood at cwood@mckennalong.com.
We recognize and salute the efforts of our members in the arena of litigation—win, lose, or draw.

Compiled by Andrew R. Weiss

David R. Lucchese (Galloway, Lucchese & Everson, Walnut Creek) obtained a unanimous defense verdict in a medical malpractice case tried in the U.S. District Court in Fresno. Plaintiff, a 33 year-old school teacher from Alaska, alleged that a midwife failed to recognize the signs and symptoms of infection resulting in a delay in diagnosis and treatment of a Streptococcus group A necrotizing faciitis. Plaintiff alleged that as a result, she had to undergo extensive surgeries to debride dead tissue from her right arm, right thigh and left flank, and was left disabled and disfigured.

In Marin County, Thomas Packer (Gordon & Rees, San Francisco) represented a sports trainer who was asked to treat a 15 year-old high school student after she hit her head on an unpadded pole of a basketball hoop at school. The trainer had the young woman sit on a counter and then went off to obtain some bandages. As he left, the young woman lost consciousness and fell to the floor, a distance of about 4 feet, suffering a concussion, the loss of one tooth and damage to two others. The young woman sued the school who in turn cross-complained against the trainer. The school was found to be 60% responsible and the trainer to be 60% responsible. The jury concluded that there was no liability.

In another case, Joseph D. Cooper (Cooper & Hoppe, Fresno) was successful in defending the owners of an apartment complex in Santa Cruz County. The tenant, a manual laborer, injured his wrist when he lost his balance and fell from a step near a curb on the premises. It was alleged that the step was not in compliance with building codes, but the jury concluded that there was no liability. In another case in Merced County, a jury found against Cooper's client, a woman driving a van who rear-ended plaintiff, a U.S. Postal Service heavy truck mechanic, at a stop light. The driver admitted hitting plaintiff, but blamed the accident on her "spongy" brakes. After defendant rejected plaintiff's demand to settle for $75,000, the jury awarded plaintiff $356,000, mostly for the loss of future earnings caused by his neck and back injuries.

In another case, Joseph D. Cooper teamed up with another Fresno attorney to represent the plaintiffs in a medical malpractice case arising out of the death of an 86 year-old, retired mechanic. Plaintiffs alleged that the defendant physician improperly placed a PEG tube resulting in an intra-abdominal infection and death. The case was successfully defended by Suzanne D. McGuire (Baker, Manock & Jensen, Fresno).

A jury in San Joaquin County found in favor of a driver of an SUV who was struck in an intersection by the driver of a school bus. The collision caused the SUV driver to strike a van and then a gas pump at a filling station on the corner. Both drivers claimed they had the green light. The SUV driver, represented by Rando A. Rodriguez (Matheny, Sears, Linkert & Long, Sacramento), recovered a verdict of $29,659 against the school bus driver.

Only the attorneys appeared to benefit from a hollow victory achieved by eight protesters who yoked themselves together with 30 lb. metal sleeves at three nonviolent demonstrations to protest against logging in Humboldt County. At each of the...
demonstrations, the police ordered the protesters to disperse as they were on private property. When the protesters refused, the police gave warnings and eventually had to resort to pepper spray and mechanical grinders to separate the protesters and make the arrests. The protesters sued the City of Eureka and Humboldt County, represented by Nancy E. Delaney (Mitchell, Brisso, Delaney & Vrieze, Eureka) in the U.S. District Court in San Francisco, claiming that the police used excessive force. Although the jury found for the protesters on liability, they awarded the eight protesters only $1 apiece in damages. Post-trial, plaintiffs moved for $2 million in attorneys fees for the three trials that the case spawned, and the case eventually settled for $750,000.

In Alameda County, Richard S. Linkert (Matheny, Linkert, Long & Sears, Sacramento) represented the City of Oakland in a motorcycle vs. car collision in which the motorcycle driver claimed that improperly maintained bushes and a large redwood tree obstructed visibility and contributed to the accident. The jury agreed, finding the City 49% at fault and awarding a total of $5,720,000 in damages, netting plaintiff $2,742,460 against the City after apportioning fault among the parties and deducting a settlement with a co-defendant.

Paul A. Cardinale and Robert H. Zimmerman (Schuering, Zimmerman, Scully & Doyle, Sacramento) successfully defended a medical malpractice claim in Yuba County brought by a quadriplegic bypass patient who claimed that the surgery was unnecessary and failed to improve his condition. The jury sided with the cardiac surgeon and found that the procedure was warranted.

Kristine E. Balogh and Robert H. Zimmerman (Schuering, Zimmerman, Scully & Doyle, Sacramento) obtained a defense verdict in Sacramento County on behalf of an orthopedic surgeon sued because a long-leg cast placed following a surgery for a knee fracture resulted in an open wound from abrasion on the ankle. Treatment of the wound required an additional hospitalization and skin grafting.

Constance McNeil (Lewis, Brisbois, Bisgaard & Smith, San Francisco) was part of the defense team that successfully defended a claim in Los Angeles County brought by a semi-retired repairman and former U.S. Navy machinist who, at the age of 69, developed mesothelioma. Plaintiff claimed that he got the disease from exposure while in the Navy from 1956 to 1958, and thereafter from using various construction, refrigeration and automotive products as a civilian.

In Placer County, Stephen J. Mackey (Donahue, Bates, Blakemore & Mackey, Sacramento) was able to keep damages down to only $30,300 in a case where plaintiff was rear-ended by defendant’s tractor-trailer. Plaintiff asked for damages well over $1 million, but the jury agreed with the defense contention that plaintiff was either malingering or was effected by a somatization disorder.

In a case of admitted liability in San Francisco County, a jury awarded $301,500 against an automobile driver, represented by John S. Krug (Winters, Krug & Herman, Burlingame), who struck a motorcyclist. The motorcyclist suffered an open-grade fracture of the lower third of his right tibia and fibula, requiring three surgical procedures, with possibly one more needed in the future.

A jury in Fresno County found that hospital emergency room personnel in Madera, represented by Mario Beltramo (McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno), were negligent in the way they managed a psychiatric patient who was brought by paramedics to their emergency room. The paramedics called ahead to warn hospital personnel that the patient said he was hearing voices telling him he was “not going to make it through the night.” Upon arrival in the E.R., the triage nurse interviewed the patient and, apparently unaware of the warning by the paramedics, assessed the patient as being non-urgent and had him wait. The patient then left the waiting area, climbed a tree to the roof of a single-story administration building and jumped off. He was rendered quadriplegic from his injuries. Although the jury found negligence, they also found that the negligence was not the cause of the patient’s injuries, and awarded plaintiff nothing.

Frank D. Maul (Stammer, McKnight, Barnum & Bailey, Fresno) was able to keep damages below the level of his $5,000 pre-trial, C.C.P. §998 offer in an admitted-liability, rear-end collision tried in Tulare County, where both sides agreed the impact speed was less than 10 mph. As part of her injuries, plaintiff claimed that one of her twelve year-old breast implants was ruptured. The jury awarded plaintiff only $2,491, paving the way for the defense to attempt to recover attorneys fees and costs.

Robert H. Zimmerman (Schuering, Zimmerman, Scully & Doyle, Sacramento) successfully defended an orthopedic surgeon who performed an arthroscopic repair of a torn labrum. Plaintiff claimed the surgery was performed through a portal that was too far down the arm, resulting in injury to an axillary nerve. The defense contended that the portal was properly placed and there was no nerve injury, and that the post-operative pain was due to the formation of scar tissue, a known risk inherent in the procedure.

In Santa Cruz County, Mark A. Cameron (Fenton & Keller, Monterey) obtained a defense verdict on behalf of his school district client who was sued for negligent supervision by a fourth-grader injured in a school fight with a fifth-grader. Plaintiff suffered a fractured femur in the fight, requiring a surgery to place a metal plate, and another surgery to remove it. In post-trial interviews, many jurors said they voted in favor of the school district because they were impressed by the school principal’s testimony about the safety plan that was in effect at the school.

A jury in the U.S. District Court in Sacramento concluded that a physician, represented by William D. Johnson (Law Offices of William D. Johnson, Stockton), and others were indifferent to the medical and psychiatric needs of a 19 year-old man who was incarcerated in the San Joaquin County Jail while awaiting trial for possession of crack cocaine.
Inmate, who had been diagnosed as a paranoid schizophrenic at age 13, began acting unpredictably and hallucinating immediately after he was jailed, saying he would soon kill himself. In response, he was placed in solitary confinement, where he later committed suicide by hanging himself with a bed sheet. The jury awarded $858,200.

In a medical malpractice case, David Walker (Craddick, Candland & Conti, Danville) successfully defended a radiologist accused of misreading an x-ray. The plaintiff, a 45-year-old man suffering from an infection from intravenous heroin use, claimed that the radiologist failed to confirm the proper placement in the jugular vein of a triple lumen catheter placed by another physician, resulting in a stroke. Plaintiff argued that the catheter was placed in the right carotid artery, causing a thrombus to form, but defense counsel argued, successfully, that the x-ray was not misread and that the thrombus originated in a lower extremity and traveled upstream to the brain.

In Fresno County, Leslie M. Dillahunt and James D. Weakley (both of Weakley, Ratliff, Arendt & McGuire, Fresno) obtained a defense verdict on behalf of the County of Fresno in a claim filed by the heirs of a motorcycle rider killed when his motorcycle veered off a county road and into a culvert. Plaintiffs claimed a curve in the road was a dangerous condition because it was sloped toward the outer edge of the curve, and because the land around the culvert had eroded, leaving a 12 inch drop-off. Plaintiff also argued that there should have been a warning sign. The defense argued successfully that the road was not dangerous and that a warning sign would not have prevented the crash because the rider was traveling too fast. Plaintiff asked the jury for over $2.6 million in economic damages (the decedent earned over $900,000 per year) and $3 million for noneconomic damages.

Steven H. Gurnee (Gurnee, Wilden & Daniels, Roseville) defended a mortuary in Los Angeles County Superior Court in a case brought by two adult daughters who had arranged to have their mother’s ashes scattered off the coast of Redondo Beach. The mortuary mislabeled the ashes and gave them to mistake to another family, who scattered them off the coast of Malibu. The mortuary admitted liability, refunded the daughters $1,750 for the loss and offered to charter a boat to take them to where the ashes had been scattered, which offer was declined. The jury concluded that the daughters were not entitled to any damages for emotional distress.

In Santa Clara County, Mark S. Lee (Nelson, Perlov & Lee, Los Altos) obtained a non-suit for lack of evidence on behalf of a manufacturer of a rug in a claim brought by a woman who claimed she tripped when the rug bunched up in the lobby of a Hilton Hotel in Santa Clara. When the plaintiff did not appear for trial, her counsel claimed it was because she could not travel on account of her injuries. The court granted the non-suit before the defense could show the video they obtained from a private investigator showing a normal-appearing plaintiff walking around, raking leaves and putting away garbage cans in front of her house.

John Ranucci (Lombardi, Loper & Conant, Oakland) prevailed in a jury trial in Fresno County on behalf of a commercial equipment leasing company being sued for breach of contract.

In Ventura County, Peter C. Labrador (Leach, McGreevy & Bautista, San Francisco) defended a claim brought by two off-duty sheriff’s deputies who were riding together on a motorcycle when they were struck from behind by a Kenworth tractor-trailer while stopped at an intersection. The defense was based on the theory that the driver of the truck was an independent contractor, not an employee, of the defendant. The jury found that the driver was an employee of defendant and awarded plaintiffs a total of $3,170,084.

Wayne M. Collins (Toschi, Sidran, Collins & Doyle, Oakland) defended an admitted liability, rear-end auto collision against a pro se plaintiff. Although the jury awarded plaintiff $25,018, the entire verdict was offset by plaintiff’s worker’s compensation lien of $55,745 that had been purchased by defendant’s insurer before trial.

In Reno, Nevada, Dominique Pollara (Schuering, Zimmerman, Scully & Doyle, Sacramento) successfully defended an orthopedic surgeon against a claim of malpractice brought by an overweight woman who self-dislocated her knee causing structural damage to the knee. The orthopedist performed a multi-ligamentous repair, but it failed, requiring a second surgery. During the second surgery, she sustained a peroneal nerve injury with a foot drop and then developed reflex sympathetic dystrophy. The defense verdict in only forty minutes was unanimous.

A Sacramento County jury rejected the claim of a man who said he was disabled for life by chronic pain syndrome as a result of a rear-end auto collision on Highway 50. Although liability for the accident was clear, Pat Tweedy and Grant Lien (both of Tweedy & Holley, Sacramento) were successful in persuading the jury in a four week trial that the plaintiff was not honest and that his injuries were being grossly exaggerated; the unanimous jury awarded plaintiff nothing.

In a breast implant case in Contra Costa County, a jury awarded $51,600 to a 31-year-old, former model who had her breast implants replaced by the defendant plastic surgeon. The surgery was complicated and protracted and the surgeon was unable to place the new High Profile implants the patient wanted, so he replaced them with traditional implants and closed the patient. The next day, the patient met with the surgeon and they agreed that he would try again, at no cost, to place the implants she wanted. Using a different incision this time, the surgery was a success. The patient then sued the surgeon and his medical partnership, represented by J. Randall Andrada (Andrada & Associates, Oakland), for malpractice and battery. The patient also sued an implant sales representative for invasion of privacy because the surgeon called him in during the first surgery for advice when he was unable to place the intended implants. The breach of privacy claim was rejected by the jury.

In another case from Contra Costa County, a jury awarded a 48-year-old, male, HVAC
 Trials & Tribulations – continued from page 31

engineer for injuries suffered when he stepped on a plywood board that was covering a 3x5 foot hole on a roof. The board gave way and he fell ten feet to the floor below, suffering a comminuted fracture of the right distal tibia resulting in a fusion of his ankle. He also developed a bilateral pulmonary embolism. The award was only 3% at fault, and the other 97% of fault was attributed to parties who settled before trial for a total of $861,000.

In San Joaquin County, Ron A. Northup (formerly of Kroloff, Belcher, Smart, Perry & Christopherson, Stockton) was recently appointed to the Superior Court bench.

The San Joaquin Valley Chapter of ABOTA is pleased to announce that ADC members Rosemary T. McGuire and James J. Arendt (both of Weakley, Ratliff, Arendt & McGuire, Fresno) and Joseph D. Cooper (Cooper & Hoppe, Fresno) were accepted as new members.

The ADC submitted comments on approximately 20 proposed new or modified CACI jury instructions to the Judicial Council in March. A special thanks to the following members who examined the proposed instructions and submitted comments: John A. Aberasturi (Erickson, Thorpe, Swainston, Ltd., Reno), Mark G. Bonino (Ropers, Majeski, Kohn & Bentley, San Jose), Stephen L. Dahm (Cesari, Werner & Moriarty, San Francisco), John M. Drath (Drath, Clifford, Murphy & Hagen, Oakland), Robert J. Frassetto (Severson & Werson, San Francisco), Bruce P. Loper (Lombardi, Loper & Conant, Oakland), Michael T. Lucey (Gordon & Rees, San Francisco), Thomas E. Mulvihill (Boornazian, Jensen & Garthe, Oakland), Joseph Salazar (Mayall, Hurley, Knutsen, Smith & Green, Stockton), Patricia Tweedy (Tweedy & Holley, Sacramento), Tamara L. Wood (Maire & Beasley, Redding), and Jon B. Zimmerman (Robinson & Wood, San Jose). A copy of the ADC’s letter to the Judicial Council can be found on the ADC’s website (www.adenc.org).

In Butte County, Julie D. McElroy (Jacobsen & McElroy, Sacramento) obtained a defense verdict in a claim by a low-voltage electrician who allegedly received an electrical shock while standing on a ladder, causing him to fall to the ground. The defense successfully argued that the shock was the result of plaintiff’s own negligence, that he likely did not fall in the manner that he claimed, and that his injuries were being exaggerated, if not feigned. A sub rosa film shown to the jury backed this up. The pre-trial demand was $1 million and the trial lasted 7 weeks.

Been in trial lately? Let us know. Send a brief synopsis to arw@bmj-law.com.

Tip of the Cap

The ADC notes the accomplishments of some of its members:

Randolph S. Hicks (Coddington, Hicks & Danforth, Redwood City) submitted an amicus brief in the published opinion of American Alternative Insurance Corp. v. Aero Falcons, LLC, 135 Cal.App.4th 1239.


Arthur A. Wick (Santa Rosa) was recently appointed by Governor Schwarzenegger as a judge of the Superior Court of Sonoma County.

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A recent national survey has me thinking kinder thoughts about my colleagues of the plaintiffs’ bar. And the survey was not even about the legal system or the law. It was about the law of averages or – more accurately – the perception of the law of averages.

I confess that I have long experienced a low tolerance level and frustration threshold for plaintiffs’ attorneys who grossly over-value their cases. I feel I waste a lot of time doing discovery on cases that should settle for a nominal amount, or should never have been filed at all.

Maybe I am going to date myself, but when I was a journalism major in college they at least still performed lip-service to the concept that a journalist should be objective and closely examine both sides of an issue. I carried that idea into the practice of law.

Giving the weak points of your own case and the strengths of the opposing case just as close – if not closer – scrutiny as the evaluation of your strong points is a key factor in case evaluation. I stress to young lawyers in our office that the worst thing they can do in evaluating a case is to believe their own “stuff.” (Okay. “Stuff” is not the word starting with “s” that I usually use in this discussion, but you get the concept.)

In dealing with a plaintiff’s counsel who has over-valued the case, one of three things occurs. You try the case and get a defense verdict (or a verdict far below the demand). Your claim representative or risk manager decides they don’t want to spend the money to take the case to trial, and you settle it for far more than the case is worth. Or worse, you try the case, the jury goes south, and people ask you, “How in the world did you lose that case?” (A question that is difficult to answer since you are still asking the question yourself.)

The first scenario is acceptable and helps the trial win-loss ratio, but is not particularly satisfying. Scenarios two and three are – well – ugly and uglier.

I think that most defense counsel, and most claims representatives and risk managers, generally formulate a more realistic evaluation of cases – whether the case is good or bad – than many plaintiffs’ counsel.

However, there are always exceptions. There have been times I am frustrated when counsel for a co-defendant fails to appreciate the problems in the case and is an impediment to reaching a reasonable settlement.

And I dread the telephone conversations with claims representatives (who are usually either inexperienced and/or particularly bullheaded) who begin a discussion with “can’t we argue that...?” I then try to patiently explain, sure, there may be some shred of fact to “argue that,” but there is not a snowball’s chance in hell that we are going to get a jury that is not comatose to actually buy the argument. Why risk losing credibility arguing about issues we are almost sure to lose rather than focusing on the key strong points in the case?

I used to think that plaintiffs’ counsel tended to over-evaluate cases for a number of factors. Law school tests that reward the spotting of any potential issue in an exam question, no matter how tenuous. Large egos. The fact that their paycheck is usually determined by the size of the case. And the list could go on and on.

Based on the recent survey, however, now I think that maybe plaintiffs’ counsel are just being “average” Americans, if the term “average” has any real meaning in light of the survey results.

Humorist Garrison Keillor used to end his Prairie Home Companion monologue about the happenings in Lake Woebegone by describing that mythical community as one in which “all the men are strong, all the women are good-looking, and all the children are above average.” At least as it pertains to Americans’ self-image, that description appears to carry a large grain of truth in addition to the comedic value.

According to a Washington Post poll, 94 percent of Americans said they are “above average” in honesty; 89 percent rated themselves “above average” in common sense; 86 percent said they were “above average” in intelligence; and 79 percent claimed to be “above average” in looks. Its probably a good thing the poll did not request opinions about the intelligence of the respondent’s children or the appearance of their grandchildren, or the numbers really would have been inflated.

This survey is corroborated by the unscientific observations of my wife, a high school Spanish teacher, who has noted that about 95 percent of her students think they deserve “A’s,” and the parents of about 90 percent of the students agree.

So now, when a plaintiff’s counsel is mucking things up by over-evaluating a case, I simply write it off to the fact that the attorney is just being “average.” I’m very proud to be a member of the ADC, where all of our members are above-average.

Lights out.

The Northern Lights
By Paul Brisso
President’s Message – continued from page 4

So what judicial acts would be subject to challenge? Just about anything that goes on in a courtroom. According to the Web site (www.jail4judges.com), judges could be prosecuted for "any deliberate violation of law; fraud or conspiracy; intentional violation of due process; deliberate disregard of material facts; judicial acts without jurisdiction; blocking of a lawful conclusion of a case; and deliberate violation of the state or federal constitutions." Or, as the Web site further clarifies, "Some of the examples of the above misconduct JAIL addresses are ignored laws, ignored evidence, eminent domain abuse, confiscation of property without due process, probate fraud, secret docketings, falsification of court records, misapplication of law, and other abuses."

The South Dakota initiative proposes the formation of special grand juries drawn by lottery for limited terms. Excluded would be lawyers or officers of any other branch of government. Complaints will come before them for "criminal acts, and to investigate, indict and initiate criminal prosecution of wayward judges."

In short, if Amendment E passes in South Dakota, the unhappy loser in a lawsuit (after exhausting all appeal rights), simply petitions the special grand jury to prosecute the judge for ignoring the facts, law or other so-called "abuses" (i.e., adverse rulings).

Ignored in all of this rhetoric is the fact that judges are already held accountable for their decisions through several mechanisms: all trial courts decisions in South Dakota are subject to a right of appeal, including the review of trial court decisions to assure they are based on the correct application of law and evidence. Judges in South Dakota are further held accountable because they must stand for re-election/re-confirmation. Judges in South Dakota are also held accountable through a judicial performance commission.

The current President of the State Bar of Montana, Bernie McCarthy, recently wrote about this dangerous initiative as follows:

“Somewhere along the way, we as a society have forgotten our civics lessons and our history. Every society needs some form of government to survive. Our founding fathers saw that the control of three essential; elements of good government – passing laws, enforcing them, judging matters related to both – was best accomplished by three separate but equal branches of government. No longer would the king be the judge, jury and executioner.

For emerging democracies around the world, the aspect of the American government that they most want us to copy is our independent judiciary. And through all of this, the vast majority of us sit on our hands and do nothing about that which threatens the very essence of what makes out democracy so great.

We – as lawyers, but more so as citizens of this nation whose very professional lives are dedicated to seeing justice done – can ill afford to sit idly during misguided attacks on the Judicial Branch. I have heard that it said that if we argue with these people it will give them some credibility, and if we ignore them they will go away. Tell that to the voters of South Dakota. This is not a local movement isolated in its application, but a nationwide attempt to limit the powers of a branch of government that is the only one looking out for your personal liberties.

I disagree that we should say nothing, because when it comes time to speak up, there may be no one left to agree with you.”

I could not say it any better. Amendment E has already qualified for the ballot in South Dakota. It is time to speak up – and to assist those opposing Amendment E in South Dakota, financially and otherwise, so that we preserve the independence of the judicial branch of government. To sit idly by, as responsible lawyers and citizens, is not an option.

Peter Olgren

Evidence in summary judgment motions, jury procedures (including the ability of jurors to ask questions), coordination of complex cases, and rules relating to court-ordered arbitration and mediation. Additionally, the package includes a proposal for Judicial Council-sponsored legislation relating to civil discovery objections and responses.

While rules of court may not expressly contradict the provisions of the Code of Civil Procedure or other bases of statutory law, there are innumerable gray areas in the statutes on which the Judicial Council may promulgate rules. Further, the rules carry the force of law to exactly the same degree as statutes or case law. This makes it imperative that the California Defense Counsel maintain our ongoing liaison with the Judicial Council, and be prepared to represent defense interests in the rulemaking process.

Some of the rules proposals, particularly those relating to discovery of electronic information, arbitration and mediation, and discovery objections, are so important that they will be discussed in our once-yearly meeting with Chief Justice George.

Taken together, our active liaison with the Judicial Council and annual meeting with the Chief Justice are critical given the central role of the Judicial Council in writing the rules under which ADC members practice law.

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The Association of Defense Counsel of Northern California and Nevada has a wealth of valuable information available to you at www.adcnc.org, including Discussion Forums, links to the Judicial Council, an Attorney Locator, an up-to-date Calendar of Events, archives of important and timely articles and legislative updates including back issues of Defense Comment magazine, and a Members Only section.

Log on today.
Truth Stranger Than Fiction:
Court Orders New Form of Dispute Resolution

United States District Court
Middle District of Florida
Orlando Division

Avista Management, Inc.,
d/b/a Avista Flex, Inc.,

Plaintiff

v.

Wausau Underwriters Insurance Company,

Defendant

Case No. 6:05-cv-1436-Orl13JGG
(Consolidated)

ORDER

This matter comes before the Court on Plaintiff’s Motion to designate location of a Rule 30(b)(6) deposition (Doc. 165). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to-wit at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Avenue, Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of “rock, paper, scissors.” The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held sometime in Hernando County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hugh Avenue, Orlando, Florida 32801.

DONE and ORDERED in Chambers, Orlando, Florida on June 6, 2006.

Counsel furnished to:
Counsel of Record
Unrepresented Party

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE
Top Row, Left to Right: John Aberasturi, Margo Piscevich, David Lucchese, Andy Weiss, Jon Zimmerman, Michael Mordaunt, Joseph Salazar, Robert Frassetto, Chris Wood

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Bottom Row, Left to Right: Jennifer Blevins (Executive Director), Doug Sears, Jon Bacon, Peter Glaessner, Pat Tweedy, Melissa Aliotti, Karen Jacobsen, Dan Crawford

Defense Comment wants to hear from you. Please send letters to the editor by e-mail to Andrew Weiss at arw@bmj-law.com.

We reserve the right to edit letters chosen for publication.
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**Save The Dates!**

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<td>Law Firm Management Seminar</td>
<td>Monterey Plaza Hotel</td>
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<td>September 6, 2006</td>
<td>Basic Training Series (8 weeks)</td>
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<td>Golf Tournament</td>
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