

The **Update**

Spring 2005 - Volume 8, Issue 5

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President's Message



John Farmer

This year, SDDL celebrates its 20th year of existence and service to the civil defense industry. In reflecting on this, one can't help but notice the members of our ranks who have served as officers and directors of the organization over the years. You will find their names among those who are "named partners" in some of the most respected firms in the area, and in the list of sitting judges in San Diego County.

Having been a member of SDDL for quite some time, I enjoyed attending the quarterly seminars, both for their educational content and to connect with members of our industry outside of the four corners of a lawsuit. It was both entertaining and educational to take off the litigation hat and occasionally volunteer to serve as a mock trial judge for SDDL's annual competition.

Several years ago, when I first threw my hat in the ring as a candidate for the SDDL Board of Directors, my immediate objective was to try to give something back to the legal community that had supported me and helped foster the development of my legal career, although the notion of exactly how I might do that was rather vague at the time. I immediately came into contact with a committed group of dynamic individuals who shared this vision and a great deal more. Gradually, the commitment to providing continuing legal education to association members came to include monthly, noon-hour "brown bag" seminars featuring a broad array of topics and exposing the membership to up to 20 hours of CLE at no extra cost. The Mock Trial Competition has evolved from an essentially local or regional competition to one which is essentially national in scope, drawing schools from as far away as the east coast and mountain states. Our annual golf tournament, once benefiting only the organization in terms of revenue, now

provides in part a monetary benefit to a worthy charitable cause - the Juvenile Diabetes Research Foundation. SDDL has provided donations to several other worthwhile causes, including the VA Medical Center and the San Diego Police Foundation. Taking advantage in the developments in electronic communications, we currently have both a tremendous website and a confidential e-mail membership exchange which allows the membership to pick the collective brains of one another when it comes to locating an expert, dealing with opposing counsel and so forth. The Update continues to develop and mature, with the inclusion of regular informational columns crossing the spectrum of defense practice areas and in-depth reporting on both current legal issues and developments and trial results.

This is a hard act to follow. And you can help us do it:

Membership: If you are reading this, you are a member. But it may surprise you, as it does me, that many of our fellow civil defense litigators are not. Or were, but aren't any longer. This is rather surprising since the CLE return-on-investment, given our modest yearly dues, is worth the price of admission alone. So talk to your fellow defense attorneys and help get them involved.

Education: We plan to continue our CLE series as before, and continue to look for fresh speakers and new meaningful topics useful for the new admittee as well as the seasoned veteran.

Golf Benefit: Last year our benefit fell into conflict with the SDCBA tournament held on the same day. In fact, the fall seems flooded with golf tournaments, even for you fanatics of the sport. So we have moved the benefit to June 10 this year and hope to see you all out at the Auld Course in Chula Vista with your friends and clients.

Mock Trial: This event is likely to be held in October this year. We again expect competition from schools from around the nation. Consider participating

as a judge this year. Take off that "white hat" as a litigator and offer these students the benefit of your years of legal experience. You will be a better litigator for it.

Expert Witness Database: We are considering adding a feature to the SDDL website which will allow members to deposit and make available for other members information about experts to assist you in locating, selecting and designating experts in both common and unusual/specialized areas.

Charitable Efforts: Our organizations by-laws, which are under study for possible revision and updating this year, include charitable purposes within our "mission statement." We have made some inroads as discussed above, and are committed to looking at any charity efforts proposed by the membership or board. Under current consideration is a clothing drive for St. Vincent De Paul which would allow members to deposit items they no longer need at the time of our seminars and we will take it from there.

Installation Dinner: This year, the board will be considering ways to enhance the experience of our annual dinner, including additional awards beyond the traditional "honoree", and the possibility of including a "silent auction" during the cocktail hour.

SDDL is renowned as one of the most significant metropolitan trade oriented bar associations in the state. Let's work together to make this 20th year of its existence more than a milestone, and demonstrate the strength, commitment and cohesiveness of our group. I look forward to serving you for the next year and welcome your thoughts, comments and ideas.'

John Farmer

Getting Paid:

The Recovery of Attorney's Fees In Contractual Indemnity Suits

by F. Inge Johnstone and Christopher L. Yeilding of Balch & Bingham LLP

Contracts in today's society often contain indemnity clauses by which one party is asked to reimburse another party for costs associated with a group of claims defined by the indemnity agreement. This article discusses the situations in which courts will award an indemnitee attorney's fees pursuant to an express indemnity agreement.

Inevitably, the question arises as to what extent the indemnifying party need pay attorney's fees incurred in connection with the indemnity agreement. The answer depends on the context in which the request for attorney's fees arises. These four contexts are: (1) attorney's fees incurred in defending a suit brought by a third party; (2) attorney's fees incurred in prosecuting a suit against the indemnitor for indemnification; (3) attorney's fees incurred in prosecuting claims against third parties; and (4) attorney's fees incurred in non-indemnity claims between the contracting parties.

Attorney's Fees Incurred in Defending Third-Party Claims

The first and most often recovered species of attorney's fees are fees incurred by the indemnified party in defending claims brought by a third party that fall within the indemnity agreement. Courts repeatedly have held that an indemnitee "is entitled to recover, as part of the damages, reasonable attorney's fees which it is compelled to pay as a result of suits against it in reference to the matter against which it is indemnified." *Stone Building Co. v. Star Electrical Contractors, Inc.*, 796 So.2d 1076, 1091 (Ala. 2000) (quoting *Jack Smith Enterprises v. Northside Packing Co.*, 569 So.2d 745, 746 (Ala. Civ. App. 1990); see *Peter Fabrics, Inc. v. S.S. "Hermes"*, 765 F.2d 306, 315 (2nd Cir. 1985); *Natco, Ltd. Partnership v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1194 (11th Cir. 2001); *United States Fidelity & Guaranty Co. v. Love*, 538 S.W.2d 558, 559 (Ark. 1976); *Lavorato v. Bethlehem Steel Corp.*, 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983); *Insurance Co. of N. America v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990); *Tullos v. Cal Dive Int'l, Inc.*, 188 F.Supp.2d 709, 714 (S.D. Tex. 2002); *Burlington Northern R.R. Co. v. Farmers Union Oil Co.*, 207 F.3d 526, 534 (8th Cir.

2000). Accordingly, courts will interpret the language of an indemnity agreement broadly to include these expenses. Judge Friendly, writing for the Second Circuit, explained the rationale of this rule stating:

Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims. Legal fees and expenses incurred in defending an indemnified claim are one such cost and thus fall squarely within the obligation to indemnify. Consequently, attorney's fees incurred in defending against liability claims are included as part of an indemnity obligation implied by law and reimbursement of such fees is presumed to have been the intent of the draftsman unless the agreement explicitly says otherwise.

Peter Fabrics, Inc., 765 F.2d at 316.

Natco Ltd. Partnership v. Moran Towing of Florida, Inc. provides an illustration of this approach. See 267 F.3d 1190 (11th Cir. 2001). In *Natco Ltd. Partnership*, the Eleventh Circuit affirmed an award of attorney's fees incurred in the defense of an action brought by a third party. *Id.* at 1194. In reaching this result, the court noted that the indemnity clause provided indemnity for "any and all loss, damage or liability" and that similar language had been held to encompass attorney's fees. *Id.* The court stated that attorney's fees fell within the contract's language because the indemnitee was seeking "to recover its attorneys' fees 'not as attorneys' fees *qua* attorneys' fees, but as part of the reasonable expenses incurred in defending against the claim[s].'" *Id.* The court further noted that "'the rule with respect to the kinds of damages covered by an indemnity agreement is that general, broad words operate to encompass most legitimate expenses,' and it would be unrealistic not to regard the considerable sums Moran spent in attorneys' fees defending these claims . . . as a legitimate 'loss.'" *Id.* Similarly, in *Burlington Northern R.R. Co.*, the Eighth Circuit interpreted an indemnity agreement that provided:

Lessee . . . agrees to indemnify and hold harmless Lessor for loss, damage, injury or death from any act or omission of Lessee,

Lessee's invitees, licensees, employees, or agents, to the person or property of the parties hereto and their employees and to the person or property of any other corporation while on or near said premises. . . .

207 F.3d at 530. In finding that this clause supported the award of defense costs, the court stated that "an indemnity clause that does not specifically refer to attorney's fees provides a sufficient contractual basis for an award of attorney's fees, provided the terms of the clause are sufficiently broad to evidence an intent that the clause encompass a wide-range of losses." *Id.* at 534 (internal citations omitted). Finally, in *Lavorato v. Bethlehem Steel Corp.*, the Fourth Department of the New York Supreme Court, Appellate Division, interpreted an indemnity agreement which provided that the indemnitor would indemnify and hold harmless the indemnitee "from and against all loss or liability for or on account of any injury . . . or damages received or sustained by . . . any employee" of the indemnitor." 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983). The court stated, "We agree that the broad language of the indemnification provision spells out the intention of the parties that Bethlehem would be entitled to an award of counsel fees reasonably incurred in defense of the action brought by the plaintiffs." *Id.*

One issue that arises when seeking recovery of defense costs is whether an indemnitor is required to pay defense costs arising from a lawsuit alleging the indemnitee's own negligence. See generally George E. Powell, Jr., Annotation, *Indemnitor's Liability to Indemnitee for Attorney's Fees and Expenses Arising Out of Defense of Action Alleging Indemnitee's Negligence*, 59 ALR 5th 733. Since attorney's fees are merely one species of litigation costs indemnified against, the extent to which one can recover attorney's fees in defending allegations of his or her own negligence will depend upon the particular jurisdiction's stance on such indemnification. Several jurisdictions bar indemnification for an indemnitee's own negligence. See, e.g., *Reynolds v. County of Westchester*, 704 N.Y.S.2d 651, 652 (N.Y. App. Div. 2000) (noting that statute made any construction contract purporting to require indemnification for indemnitee's negligence void and

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Getting Paid:

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unenforceable); *Federated Dept. Stores v. Superior Drywall and Acoustical, Inc.*, 592 S.E.2d 485, 489 (Ga. App. 2003) (noting that under Georgia statute contract which purported to require subcontractor to indemnify contractor for contractor's sole negligence was void). In these jurisdictions, attorney's fees may not be recoverable when they arise out of a defense of allegations of the indemnitee's negligence. The majority of jurisdictions allow indemnification for one's own negligence as long as the indemnity agreement expressly so provides. *See* 41 Am.Jur.2d *Indemnity* §§8,9 (1995). In these jurisdictions, attorney's fees generally will be recoverable to the same extent as any other cost that is indemnified against. *See* Powell, *supra*, at §§2,3.

Attorney's Fees and Expenses Incurred in Establishing Right to Indemnity

Separate and apart from the issue of an indemnitee's right to attorney's fees and expenses incurred in *defending* a third party claim is the issue of the indemnitee's right to indemnity for fees and expenses in *establishing* (i.e., prosecuting) its right to indemnity from the indemnitor. In this context, the presumption in favor of including fees as a category of the expenses indemnified against is reversed and the general rule is that, in the absence of express language giving the indemnitee such a right, an indemnitee cannot recover its attorney's fees incurred in establishing its right to indemnification. *See, e.g., Tullos v. Cal Dive International, Inc., et al.*, 188 F.Supp.2d 709 (S.D. Tex. 2002) (stating this general rule) (citing *Weathersby v. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984) and *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981); *Peter Fabrics, Inc. v. Hermes*, 765 F.2d 306 (2nd Cir. 1985); *Lee v. Scotia Prince Cruises Ltd.*, 843 A.2d 753 (Me. 2004); *Rosati v. Vaillancourt*, 848 So.2d 467 (Fla. Dist. Ct. App. 2003); *Astro Oil v. Gherlone*, 2001 WL 1004254, 2001 Conn. Super. LEXIS 1310 (Aug. 3, 2001); *Stone Bldg. Co. v. Star Elec. Contractors, Inc.*, 796 So.2d 1076 (Ala. 2000); *Pavoni v. Nielsen*, 999 P.2d 595 (Utah Ct. App. 2000); *Christiansen v. Riscomp Industries, Inc.*, 1999 WL 410355, 1999 Minn. App. LEXIS 699 (June 22, 1999).

Courts rely on a number of different rationales to deny requests for attorney's fees and expenses incurred in pursuing indemnity. In *Hermes*, cited *supra*, the Second Circuit stated:

[F]ees and expenses incurred in establishing the existence of an obligation to indemnify . . . are not by their nature a part of the claim indemnified against. Rather, they are costs incurred in suing for a breach of contract, to wit, the failure to indemnify. As such, fees and expenses incurred in establishing the indemnity obligation fall within the ordinary rule requiring a party to bear his own expenses of litigation.

Hermes, 765 F.2d at 316 (citations omitted). Most courts hold that standard indemnity provisions are only designed to indemnify one of the parties to the indemnity agreement with respect to claims brought by third parties, not to claims between the parties to the indemnity agreement. *See, e.g., Levin, et al. v. Septodont, Inc., et al.*, 2002 WL 654098, 2001 U.S. Dist. LEXIS 2475 (4th Cir. Apr. 22, 2002). Other principles cited in support of the general rule against the recovery of fees and expenses incurred in pursuing indemnity are that prevailing parties are not entitled to an award of attorney's fees or expenses, *in the absence of statutory or contractual language, see, e.g., National Minority Supplier Development Council Business Consortium Fund, Inc. v. First National Bank of Olathe*, 83 F.Supp.2d 1200, 1207 (D. Kansas 1999), as well as the general rule that indemnity agreements are to be interpreted narrowly. *E.g., Hooper Associates, Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989). Courts also cite other provisions contained in contracts containing indemnification provisions such as notice provisions whereby the indemnitee must give notice to the indemnitor of any claims covered by the provision as well as provisions whereby the indemnitor has the right to take over defense of the claims. Courts hold that allowing an indemnitee to recover its fees and expenses in prosecuting a claim against the indemnitor (i.e., the other party to the agreement) would "render these provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties [to the indemnity agreement]." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 548 N.E.2d

903, 905 (N.Y. 1989). Based on the above principles, most courts interpret indemnity provisions narrowly and will not allow an indemnitee to recover its fees and expenses in establishing its right to indemnity unless there is express contractual language giving the indemnitee such a right.

Those courts applying the general rule precluding an award of attorney's fees and expenses incurred in enforcing an indemnity provision still will allow such an award if the indemnity provision expressly so provides. For example, in *Continental Heller Corporation v. Amtech Mechanical Services, Inc.*, 53 Cal.App.4th 500 (1997), the indemnity section of the contract included the following separate provision immediately after the standard indemnity clause:

And the subcontractor shall indemnify the Contractor, and save it harmless from any and all loss, damage, costs, expenses, and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants [the indemnity obligations], and any other provision or covenant of this subcontract.

Id. at 508-09 (emphasis added). The court therefore held that it was proper to award the indemnitee its attorney's fees and expenses incurred in prosecuting the indemnity action. *Id.*; *see also City and County of Honolulu v. Churchill, et al.*, 167 F.Supp.2d 1143, 1159 (D. Hawaii 2000) (in addition to standard indemnity language, provision further provided that indemnitor would hold harmless indemnitee "from and against any loss, cost, damage or liability arising from any failure . . . to observe and perform this guaranty [the standard indemnity agreement].") Accordingly, regardless of the jurisdiction, it would be prudent for any indemnitee to include in its indemnity agreement a separate provision whereby the indemnitee is entitled to recover its fees and expenses resulting from any breach by the indemnitor of the indemnity agreement itself. This would entitle the indemnitee to recover its fees and expenses in prosecuting a claim for indemnity against the indemnitor, whether in a complaint, cross-claim, counter-claim, third-party claim, etc.

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CONTRIBUTING ARTICLES

We always welcome SDDL members to contribute articles regarding recent legal issues, cases and trends. These articles can be in regard to legal issues with broad potential impact or simply a matter that arose in your practice which you believe would be of interest to the other SDDL members. If you or someone at your firm would like to contribute an article for the June 2005 edition of The Update, please contact Jay Bulger at jay.bulger@knchlaw.com.

UPCOMING EVENTS

We are starting a new section in The Update which will highlight the charitable work and activities of SDDL members. We know that many of you spend considerable time and energy to benefit local charities. If you would like to publicize an upcoming charity event, please contact Sandee Rugg at S.Rugg@LBHLawFirm.com and provide a brief description of the charity, event, date and contact information.

Joseph T. Kutyla

*is pleased to announce the formation
of his new law corporation*

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*The Law Offices of Joseph T. Kutyla APC
specializes in insurance defense litigation in the
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*Our attorneys and staff are fully experienced
in the defense of all types of civil actions for our
self-insured and insured clients including negligence,
products liability, medical, dental
and professional negligence, premises liability
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TIMOTHY S. NOON

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Ladies and Gentlemen,

We will be collecting work clothing to donate to the guests of St. Vincent de Paul Village who are seeking work. There is need of suits, ties, scarves, trousers, jackets, shirts, blouses and shoes. If you will kindly bring your contributions to the monthly brown bag luncheons or the evening seminars we will be sure they are taken to the Village for distribution. Thanks!



The Bottom Line

Case Title: Thomas R. Bernitt v. Bre N. Cameron-Smith and Jared A. Smith

Case Number: GIC 813678

Judge: Honorable Thomas O. LaVoy

Counsel for Plaintiff(s): Darryl J. Mostowtt, Esq.

Counsel for Defendant(s): Merris A. Welch, Esq., Farmer & Case

Type of Incident/Causes of Action: Rear-end auto accident

Settlement Demand/Offer: Plaintiff issued a CCP 998 in the amount of \$15,000.00, with several subsequent demands, the last being \$300,000.00. Defendant's CCP 998 offer to settle was \$3,500.00

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense (11-1)

Case Title: Lauren Scott v. Robert Mansueto, DDS

Case Number: GIC 819911

Judge: Honorable Fredrick L. Link

Counsel for Plaintiff(s): Debbie Wolfe

Counsel for Defendant(s): Joseph Kutyla, Esq.

Type of Incident/Causes of Action: Dental Malpractice

Settlement Demand/Offer: \$275,000 demand - no offer

Trial Type: Jury

Trial Length: 8

Verdict: Defense

Case Title: Brown v. Nyack Towing, et al.

Court Case No: CV00-01590 (Reno, NV)

Judge: Honorable Janet Berry

Type of Incident/Causes of Action: Plaintiffs alleged orthopedic and brain/vestibular injuries resulting from being thrown about the inside of a Jeep Cherokee which was being towed on Defendants' flat bed. Plaintiffs alleged that tow truck company was negligent in allowing the Plaintiffs to ride in their vehicle on top of the flat bed and in driving over speed bumps at an unsafe speed in an alleyway.

Plaintiff's Counsel: Del Hardy, Esq., Hardy and Associates

Defense Counsel: Anthony T. Case, Esq., Farmer & Case

Type of Incident: Personal Injury

Settlement Demand: \$1 million

Settlement Offer: \$35,000

Verdict: Defense verdict

Trial Length: 5 days

Jury Out: 3 1/2 hours

Stutz, Artiano presents Employment Law for Lawyers Seminar

By: Kelly Angell of Stutz Artiano, Shinoff & Holtz

Just in the nick of time, Stutz, Artiano, Shinoff & Holtz shareholders Lesa Wilson and Jack Sleeth put on an entertaining and educational MCLE program on the practicalities of employment law within law firms. As promised, Sleeth and Wilson delivered answers to questions about critical do's and don'ts in the interview process, how to avoid creating contractual employment by oral statements, how to deal with complaints of discrimination and harassment in the workplace and employee privacy rights, among other issues. Highlights of the presentation follow:

Legal Requirements Apply to Smaller Firms, Too

Thought your law firm was exempt from employment laws due to its small size? Big liability can result from ignorance that certain laws apply to your firm. Regardless of the size of your law firm, state law concerning child labor, disability insurance, employee safety, posters and notices, paid family leave, privacy, sexual harassment, unemployment insurance, wages and hours, workers' compensation, and others, do apply to your California law firm. Of course, that is the tip of the iceberg.

State anti-discrimination laws and pregnancy disability leave laws also apply to you if you have five or more employees. With 15 or more employees, the federal anti-discrimination laws and Americans with Disabilities Act apply. Insurance continuation requirements, i.e., COBRA, applies if you have 20 or more employees, but Cal-COBRA applies even if you only employ 2 people. Federal and state statutes (FMLA and CFRA) apply if you have 50 or more employees, but firms employing 25 or more persons must also be in compliance with legal requirements related to drug/alcohol rehabilitation domestic violence issues.

Tricks of the Trade in Interviewing and Hiring

A little forethought in advertising and formulating interview questions can go a long way. Permissible questions are job-related, non-discriminatory, and do not

invade the applicant's privacy. Things that normally would be courteous and acceptable in regular conversation are off limits during the interview process, including the seemingly innocuous, "where are you from," and inquiries about spouses and children. Examples of other impermissible questions on applications / during interviews: maiden name, requesting photograph, health inquiries, language spoken at home, birthplace of applicant's spouse or parents, and specific years of attendance of school. An interviewer or application should not inquire into applicant's general medical condition, state of health or illness, physical or mental disabilities, status of workers' compensation. Instead, the question should be whether applicant is able to perform the essential functions of the job with or without a reasonable accommodation. Regarding hours of work, employers should address any concerns they have about the applicant's non-work life interfering with the work schedule by framing the question as: the work schedule for this position is "x"; can you work meet that requirement?

Actually checking all references and prior employment will assist in defending against negligent hiring claims, and securing the applicant's written authorization for the former employers and references to speak with you will encourage a more frank dialogue, and would be helpful in defending potential invasion of privacy or defamation claims.

Another key is requiring applicants to sign a statement that all of the information provided on the application and all documents submitted therewith are true and correct and that omissions or false information may be cause for immediate dismissal from employment. All prospective employees should be required to fill out your employment application, regardless of position and pay scale.

Avoid destroying the "at will" nature of employment by restraining yourself from commenting about expecting or looking forward to a long employment relationship. The application should specifically state that any future employment with your firm is "at will," and that any agreement to the contrary must be in writing and signed by both parties.

Handbooks

Although there is no law requiring employee handbooks, it is wise to use them because they provide employees and supervisors with clear expectations and reduce the opportunity for conflict. The type of policies which may appropriate to include in the employer's handbook depend upon the employment setting and type of employer, but some potential topics include:

Clearly stating the "at will" nature of employment; establishing the method of calculating time for FMLA and Pregnancy Disability Leave purposes; descriptions of the seven-day work week and 24-hour work day (critical for calculating overtime pay); benefits eligibility requirements and conditions, including information on all holidays, leaves, and other benefits; workplace safety rules; job abandonment (no-call / no-show results in dismissal); Internet and email policy; whether vacation and sick leave has a maximum for accrual; equal employment / non-discrimination; workplace harassment policy and complaint procedure; and various other issues such as dress code, confidentiality requirements, trade secrets, employment classifications, drugs/alcohol use, conflicts of interest, attendance and punctuality, and performance evaluations.

For Discipline, establish the expectation of certain work performance standards and conduct in the workplace as a condition of employment. Specific and more general examples of conduct which will not be tolerated should be included as well as clear language outlining that discipline or termination could result from infractions of such roles. Avoid including progressive discipline if possible.

Discrimination and Harassment Issues

Discrimination only covers actions taken against people because of their being in certain protected classes. The protective classes include: race/color; national origin; ancestry; sex; religion; age (40 and older); mental or physical disability; medical condition; veteran status; marital status; sexual orientation; and pregnancy. Employers also must provide a workplace that is free from harassment on the basis of: race or color; religious creed; national origin or ancestry; mental or physical disability; medical condition;

pregnancy; marital status; sexual orientation; age; and veteran status.

Note that under the ADA, having a "disability" includes "being regarded as having" a substantially limiting impairment, even though no such impairment exists. (*Sutton*, supra., 527 U.S. at 487.) The "disability" is based on the employer's misperceptions about the individual. The FEHA has adopted that concept and provides coverage where an employee is "erroneously or mistakenly believed" to have a physical or mental condition that limits a major life activity. (Govt. Code § 12926.1(d)(3).)

Failure to timely engage in a good faith Interactive Process is a separate violation of statute that exposes employers to potential liability. This duty arises once the accommodation has been requested, or the employer becomes aware of the need for accommodation. (29 C.F.R. § 1630.2(o)(3).) If the issue of accommodation or disability arises, do not be the one to drop the ball. Participate actively in discussion with the employee, and do not let a phone call or letter regarding accommodation go unanswered. Document your participation in this process.

Employers must have information about the illegality of harassment posted in a prominent and accessible locations in the workplace. (California Government Code section 12950(a)) Employers must prepare an information sheet on sexual harassment and assure distribution of this information to all employees. Employers should have a handbook or posted policy regarding the illegality of harassment, the definition of harassment, a description of harassment, the internal complaint process available to employees, the legal remedies and complaint process available through administrative channels such as DFEH or EEOC, and protection against retaliation for opposing harassment. Employers should provide training to all employees on these same topics and document the training.

Employers of 50 or more employees are required to provide supervisors with two hours of sexual harassment training every two years as of July 1, 2005. The training must be interactive. Supervisors hired after July 1, 2005 must receive the training within six months. (California Government Code § 12950.1.)

If employers comply with the above-recommended actions, they will be able to utilize the doctrine of avoidable consequences in hostile environment cases to reduce or limit potential damages. (*State Department of Health Services v. Superior Court*, 31 Cal.4th 1026 (2003).

When a complaint of sexual harassment or discrimination is received, it should be investigated "promptly and thoroughly," and appropriate corrective action should be taken. (See EEOC Policy Guidance on Current Issues of Sexual Harassment, 8 FEP Cas.(BNA), note 11, at 405:6700.) "The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct." (Id.)

Care should be paid regarding who will conduct the interview. If an attorney does it, it may become necessary at some later point to waive attorney-client privilege on some matters.

Detailed notes should be taken during interviews of witnesses. The notes should be specific including quotes from the witness (indicated with quotations marks). The investigator should not include his or her own interpretations or assumptions regarding the facts stated during the interview.

After the facts have been analyzed and a conclusion drawn, the results of the investigation should be communicated to the complaining party and to the alleged offender. A summary of the investigation should be included, as well as the decision made regarding factual determinations. Some explanation or analysis as to the basis of the factual findings should be provided. The report should be disseminated only to individuals that "need to know" in order to protect the confidential nature of the investigation. The issue of retaliation should again be discussed with all individuals involved. If necessary, policies should be revised or additional training provided.

The Bottom Line

Case Title: Thomsen Construction Co & Donald L. Thomsen v. Mila Denton and Bernard Lafer

Case Number: IC824985

Judge: Frederic L. Link

Counsel for Plaintiffs: Fort A. Zackary, Jr., of Koeller, Nebeker, Carlson & Haluck, LLP

Counsel for Defendants: Paul A. Dulin for Mila Denton; Bernard R. Lafer, Esq. in pro per

Causes of Action: Malicious Prosecution and Abuse of Process based upon lawsuit filed by Lafer on Denton's behalf against Thomsen Construction Co.

Settlement Offer: Denton issued CCP 998 for \$4,000; Lafer informal offer of \$500 to \$1,000

Trial Type: Bench Trial

Trial Length: 2 days

Verdict: Plaintiff \$10,000 economic; \$15,000 non-economic; \$25,000 punitive (Lafer)

Case Title: Natalie Aechiga v. El Centro Regional Medical Center, Elias Moukarzel, M.D. and Lawrence Arguilez, M.D.

Case Number: L-01218

Judge: Honorable Donald B. Donnelly

Counsel for Plaintiffs: Eduardo A. Rivera, Esq. and Bennett Goodman, Esq.

Counsel for Defendants: Daniel S. Belsky, Esq. of Belsky & Associates

Causes of Action: Medical Malpractice - Retained surgical sponge during hysterectomy

Settlement Offer: Dr. Arguilez and Dr. Moukarzel each individually served plaintiff with CCP §998 offers to compromise in consideration of a waiver of cost. Plaintiff served Dr. Moukarzel with a CCP §998 offer for \$10,000. Plaintiff served Dr. Arguilez with a CCP §998 offer for \$100,000.

Trial Type: Jury

Trial Length: 9 days - 45 minute deliberation

Verdict: Defense

DISCOVERY LAW



*Edith J. Kaufman,
The Roth Law Firm*

DISCOVERY DUTIES DEFINED:

Two New Cases Explore the Duties imposed by the Discovery Statutes and Clarify When it's

Gonna Cost You and When its Not.

It seems that no part of litigation is more crucial than discovery, and yet even after the courts burdened us with the responsibility to meet and confer with those “unreasonable” counsel opposing our position, we still often struggle with the enforcement of discovery statutes. The two latest cases to address the various duties imposed by the discovery statutes operate as both a blessing and a curse, and only add some new dimensions to the strategic aspects of discovery.

To Supplement or Not to Supplement?

In Biles v. Exxon Mobil Corporation, 2004 WL 2861379, the First Appellate District held that a party has no duty to supplement their discovery responses, even when they expressly state that they will do so upon receiving additional information. Instead, the Court held that evidence will only be excluded when there has been “willfully false discovery response” at the time the response is made. The Biles case involved a worker, Ronald Biles, who was hired to work as an insulator for a subcontractor engaged to assist in the construction of an oil refinery. The predecessor in interest and Defendant, Exxon Mobil Corporation, allegedly exposed Plaintiff intentionally to asbestos.

In discovery, Plaintiff responded to a special interrogatory that asked him to identify “each and every person who has knowledge specifically of the work at [the oil refinery] that you contend created your exposure to asbestos fibers.” Plaintiff responded that after a good faith inquiry, “plaintiff currently has no further information responsive to this Interrogatory” but added, “Plaintiff expressly reserves the right to amend or supplement this Response based on the outcome of such investigation. Plaintiff’s investigation and

discovery are continuing.” In his deposition, Plaintiff testified he did not recall seeing or having direct contact with anyone employed by the refinery.

Exxon filed its summary judgment motion. Plaintiff countered with the declaration of another employee, Bellamy, who had not been previously identified. The strange part of this case is that Bellamy was deposed in another asbestos case against Exxon, but the same counsel was involved in both cases, despite there being different plaintiffs. After the summary judgment motion had been filed and prior to obtaining the declaration, Bellamy had testified in the other case that he had worked with plaintiff Biles and had observed all sorts of activities, which included Exxon personnel “utilizing compressed air hoses to blow the asbestos dust throughout the worksite...”

Exxon objected to the admission of the Bellamy declaration in opposition to its summary judgment on the grounds that Bellamy had not been previously identified as a witness. On December 22, 2003, the trial court agreed, opining that when Plaintiff found out about Bellamy, had an affirmative obligation to pass on that information, ruling Plaintiff had said he would supplement his responses, but did not, and instead “sprung Bellamy on in connection with a summary judgment motion.”

The Appellate Court held the trial court abused its discretion by imposing an affirmative obligation on Plaintiff to supplement his discovery responses. On appeal, Exxon relied on a case, Thoren v. Johnston & Washer (1972) 29 Cal.App.3d 270, where plaintiff failed to disclose a known witness until opening statement and thus the witness was excluded. However, the Appellate Court distinguished that the Thoren case involved counsel who clearly knew about the witness at the time they answered discovery, and involved trial as opposed to summary judgment. Also, the Thoren court had a hearing and determined plaintiff’s counsel had either actual knowledge of the witness’s role in the case, or deliberately refrained from finding it out before answering.

Thus, the Biles trial court could not exclude Bellamy without a hearing first to

determine when Biles or his counsel first learned that Bellamy had relevant facts to prove Biles' exposure to asbestos. The Court opined that excluding a witness without proving willful concealment would "permit the use of interrogatories as a trap, pinning a party for all time to an answer intended to reflect only that party's knowledge as of the date of answer." The Court also noted several statutory provisions, such as Code of Civil Procedure section 2030 (k) and (l), only authorize evidentiary sanctions generally when there is a failure to comply with a court order and the failure is willful. Lastly, the Court held that there is "no duty to update or amend the answers, either to correct errors or to include new information discovered later."

In determining that an evidentiary sanction for discovery violations, in general, is only proper when there is a willful violation, and holding there is no obligation to supplement responses, the Court is in some ways making it easier for counsel to hide information. This ruling also adds another barrier to obtaining sanctions against counsel for nondisclosure of information, unless there is proof that the responding counsel knew of the information at the time the discovery was answered. Counsel should thus be especially diligent about following up with unanswered discovery responses and always serve a formal request for supplemental responses to opposing counsel.

Be Careful What You Wish For

In Toshiba America Electronic Components, Inc. v. Superior Court, 2004 WL 2757873, the Sixth Appellate District potentially stuck the Plaintiff in the underlying case with a huge bill. Plaintiff Lexar Media, Inc. sued Toshiba and its parent company for misappropriation of trade secrets, breach of fiduciary duty, and unfair competition. Lexar served Toshiba with a request for production of documents, by which Lexar sought 60 categories of documents, and which defined documents to include e-mail and "other forms of electronically or magnetically maintained information."

Toshiba responded, subject to objections, and produced more than 20,000 pages of documents. In addition, Toshiba had more than 800 backup tapes. In order

to retrieve information from the backup tapes, Toshiba hired an electronic discovery specialist. The estimated cost for the discovery response retrieval was between \$1.5 and \$1.9 million, or, alternatively, a very specific search of 130 tapes would cost at least \$211,250. Toshiba asked Plaintiff to pay for some or all of the retrieval cost, depending on how many tapes it wanted. Plaintiff refused and filed a Motion to Compel, which was granted without comment or explanation by the trial court.

Toshiba filed an extraordinary writ, which the Appellate Court noted it would rarely review, except it found this to be a question "of first impression of general importance to the trial courts and the legal profession", especially given the potentially "exorbitant" cost of translating such material.

The Appellate Court held the trial court abused its discretion by ordering Toshiba to retrieve the information without Plaintiff footing at least part of the bill. The Court noted that finding relevant data on a large number of backup tapes can be expensive and time consuming because of the large amount of data contained therein. While acknowledging that the general rule is that the responding party bears the expense involved in responding to discovery, the Court noted in some circumstances, equity requires the demanding party to pay for significant special costs above and beyond those typically involved in responding to routine discovery.

The Court noted that C.C.P. section 2034(i), which requires a deposing party to pay expert witness fees, and section 2025(p), which requires the party noticing a deposition to pay the costs of transcribing it, both place the burden of expense on the demanding party. The Court then reviewed section 2031(g)(1), which provides, "[i]f necessary, the responding party at the reasonable expense of the demanding party shall, ... translate any data compilations", and found it similarly shifts costs to the demanding party.

The Appellate Court further rejected Plaintiff's argument that costs could only be shifted to it upon a showing that there was undue burden or expense on Defendant Toshiba, finding that argument

"ignores the plain language of the statute." Notably, the Court agreed with Plaintiff that their interpretation of section 2031 as cost-shifting statute would conflict with settled federal law, but stated "it appears to us that the Legislature intended it to be that way."

The Court also analyzed the public policy issues, recognizing that while an unlimited demand could easily result in astronomical costs, even a narrowly drawn demand could be cost-prohibitive in meritorious cases. Plaintiff also pointed out that such a ruling could encourage companies to use such formats for the purpose of burying data. Providing some balance, the Court noted the Discovery Act authorizes the trial court to manage discovery and prevent misuse, and thus costs would only be shifted when they are "reasonable and necessary". Thus, if one party disputes the reasonableness or necessity of the expenses, the trial court could make whatever order justice requires under C.C.P. section 2031(f)(n). The holding clarified that the demanding party would thus not always be required to pay all costs of retrieving data from backup tapes.

However, Section 2031(g)(1) does not contain a specific procedure for challenging the burden. The Court offered that litigants could seek relief when necessary under section 2031(f), which allows a protective order when a discovery demand presents undue burden and expense. The matter was vacated and remanded to the trial court to "exercise its discretion and authority to manage the discovery dispute."

This case should really frustrate trial judges, who will now have to determine the factual issues of what is "reasonable and necessary" on technical data retrieval and who should bear the costs of retrieval and to what extent. But, the attorneys may be more frustrated, as asking for what you need from discovery may now result in a very large bill for your client, depending on how the responding company stored their data. Parties involved in cases where such stored data is potentially sought should now be extra careful to draft extremely narrow and specific discovery requests.

EMPLOYMENT LAW



*Kirk Hanson, Esq.,
Grace Brandon Hollis
LLP*

Employers Beware of The Private Attorneys General Act of 2004

Effective January 1, 2004, the California workforce became deputized as private attorneys general for purposes of enforcing the provisions of the Labor Code. Prior to the enactment of the Labor Code Private Attorneys General Act of 2004 (L.C. §§2698 *et seq.*), an employee with a Labor Code claim (i.e. failure to pay overtime, vacation pay, commissions, missed meal/lunch breaks, misclassification of employee as exempt, etc.) had to seek redress administratively before the California Division of Labor Standards Enforcement ("DLSE"). Now, under the Private Attorneys General Act, also known as the "Sue Your Boss" law, employees can sue their employers directly in the Superior Court on behalf of themselves and all other current and former employees for almost any violation of the Labor Code. If successful, the employee recovers his or her wages, attorney's fees and 25 percent of the penalties that previously went exclusively to the State. Penalties are imposed under the Act in the amount of \$100.00 per employee, per pay period, for each initial Labor Code violation and \$200.00 for each subsequent violation. Thus, an employer with only a few employees can pay significant penalties where several Labor Code violations continue over the course of a year or more.

The legislative policy behind the Act was to achieve maximum compliance with State labor laws in the face of declining funding and staffing levels for the DLSE, the State agency charged with enforcing the Labor Code. The response from the business community was swift with an unsuccessful attempt to repeal the Act in its entirety in April of 2004 and successful amendments to the Act in August of 2004. The amendments include requiring an employee to send a claim letter to the State and employer as a pre-

requisite to filing a civil action. The State then has 30 days in which to decide whether to take over investigation of the claim, which could result in a citation being issued to the employer. If the State takes the claim, then the employee cannot commence a civil action. However, it is a rare case where the State will take over a claim from the employee as the DLSE lacks the resources to handle these claims. Moreover, there is no real incentive now for the State to prosecute these claims because, under the Act, it can sit back and let private attorneys do the work and yet still recover 75 percent of the penalties. Other amendments include the prohibition of civil actions merely for the failure to post signs or give notices required by the Labor Code. The amendments also give the court the power to award a lesser amount than the maximum civil penalty if the court determines that the maximum penalty would be unjust, arbitrary, or oppressive to the employer.

Although employers were successful in getting amendments to the Act in August 2004, these amendments were a hollow victory and will likely not reduce the number of claims, but instead will merely delay civil actions on these claims for the 30-day waiting period. In fact, the Act opened the flood gates for Labor Code claims as it gives employees an incentive to sue by offering them a 25 percent cut of the penalties and the ability to file a direct civil action. Likewise, the Act gives plaintiffs' attorneys an incentive to file Labor Code actions by awarding attorney's fees to a prevailing employee and expressly authorizing an employee to bring an action on behalf of himself or herself and all other current or former employees. As such, the incentive for bringing representative or class actions is built into the Act.

Employers Beware. Now is the time to audit your firm's compliance with wage/hour laws and make sure that your payroll practices and employee classifications (i.e. exempt versus non-exempt) are correct. What may seem like a trivial Labor Code violation can turn into a major liability for an employer when multiplied by the number of current and former employees, plus attorney's fees and penalties.

INSURANCE LAW



*James M. Roth,
The Roth Law Firm*

In this issue we review the last cases to have been published during 2004 and the first to be published during 2005. Overall, the decisions were favorable to the insurance industries. See, there is a Santa Clause.

General Contractor's Insurer Not Liable for Equitable Contribution to Subcontractor's Insurer When Underlying Indemnity Provision in Subcontract Negated Indemnity For Type of Conduct at Issue in Underlying Case. In *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co.* (2004) 123 Cal.App.4th 278, the California Court of Appeal for the Second Appellate District reversed a trial court ruling in favor of a subcontractor's insurer and concluded that a general contractor's insurer was not liable to the subcontractor's insurer where there existed an indemnity provision in the subcontract between the general contractor and subcontractor which negated liability by the general contractor to the subcontractor. PCS was a general contractor insured under a CGL policy issued by Mt. Hawley. PCS entered into a subcontract with Valley Metal. The subcontract required Valley Metal to obtain a CGL policy for itself and to include coverage for PCS as an additional insured. Valley Metal fulfilled that obligation by purchasing a CGL policy from Hartford. During construction, an employee of Valley Metal (Cortez) was injured. Cortez eventually sued PCS. PCS contacted Mt. Hawley which, in turn, tendered PCS' defense to Hartford. Hartford accepted the defense and informed PCS that it would indemnify PCS per the indemnity provision in the subcontract, except for PCS' sole negligence or willful misconduct. Hartford settled Cortez's complaint and filed a reimbursement action against Mt. Hawley. The court of appeal reversed the trial court which had awarded Hartford one-half of the underlying defense and

indemnity expenses. The court rejected Hartford's argument that the indemnity provision in the subcontract agreement between PCS and Valley Metal was irrelevant to the insurers' coverage obligations. It interpreted the indemnity provision to mean that Valley Metal agreed to indemnify and hold PCS harmless absent PCS's sole negligence or willful misconduct. The court relied on evidence that PCS was not solely negligent to conclude that Hartford (as the insurer for Valley Metal) could not recover from Mt. Hawley (as the insurer for PCS).

Insured Was "Upon" Vehicle Pursuant to Auto Liability Insurance When Insured Was Injured Rendering Aid to Passenger in Another Vehicle. In Atlantic Mutual Ins. Co. v. Ruiz (2004) 123 Cal.App.4th 1197, the California Court of Appeal for the Sixth Appellate District affirmed the decision of the Santa Clara County Superior Court holding that a person in proximity to a vehicle need not have occupied it in order to be deemed "upon" the vehicle for purposes of qualifying as insured under an automobile liability policy. After a motor vehicle accident, Ruiz (who was in the course and scope of his employment) went to check on the status of an injured passenger in another vehicle owned by Group Manufacturing. When approaching the Group Manufacturing vehicle, Ruiz was struck by an underinsured motorist. American States issued a commercial auto policy to Ruiz's employer. Atlantic Mutual insured Group Manufacturing under a business auto policy. Both policies provided \$1 million in underinsured motorist coverage and included the following endorsement:

We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.' The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle.'

The policies defined "insured" to include "anyone else 'occupying' a covered 'auto'." "Occupying" was defined to mean "in, upon, getting in, on, out or off." The trial court determined that Ruiz was an insured under the Atlantic Mutual policy but not the American States policy. Ruiz and Atlantic Mutual appeal. The appellate court affirmed. The court of appeal determined that Ruiz was "upon" the Group Manufacturing van when he was struck by the underinsured motorist. It reasoned that Ruiz was positioned immediately adjacent to the van for reasons related to the vehicle's use on the highway. As such, the court found that Ruiz was an insured within the meaning of Atlantic Mutual's underinsured motorist coverage. The court found that Ruiz was not an insured under the American States policy issued to his employer relying, in part, on the fact that he was approximately 200 feet away from the employer's vehicle when he was struck.

Insureds Not Entitled to Prejudgment Interest on Malicious Prosecution Damage Awards Against Insurers. In Hillenbrand, Inc. v. Ins. Co. of North America (2004) 20 Cal.Rptr.3d 380, the California Court of Appeal for the Third Appellate District affirmed a decision from the Sacramento County Superior Court, holding that insureds are not entitled to prejudgment interest on malicious prosecution damage awards against insurers. The court concluded that because malicious prosecution claims against insurers are analogous to bad faith actions, any related damage award does not constitute "damages for personal injury" for which prejudgment interest might be recoverable under California Civil Code section 3291.

Insured Cannot Compel Arbitration in Uninsured Motorist Context When Insurer Pays Policy Limited to Insured. In State Farm Mutual Automobile Ins. Co. v. Superior Court (2004) 123 Cal.App.4th 1424, the Second District Court of Appeal vacated the trial court's order compelling State Farm to arbitration on an uninsured motorist claim. State Farm's insured was injured in a rear-end collision. She tendered an uninsured motorist claim to State Farm, seeking the

policy limits less a credit for the uninsured driver's contribution. State Farm initially rejected the tender, and the insured demanded arbitration. State Farm subsequently paid the policy limits, but the insured nevertheless sought an order compelling arbitration. She contended her damages exceeded the policy limits, and sought to use the arbitration proceedings to evaluate a possible bad faith suit. The court of appeal concluded the maximum award available in an uninsured motorist arbitration is the policy limits. However, the arbitrator could not consider whether State Farm paid in an untimely manner or engaged in other claims handling misconduct. Since State Farm had paid the policy limits, there was thus no controversy left to be arbitrated.

Insurance Broker Who Knowingly Makes False Statements on an Insurance Application May Be Held Liable to an Insurer That Reasonably Relies on the Statements. In Century Surety Company v. Crosby Insurance, Inc. (2004) 124 Cal.App.4th 116, the Fourth District Court of Appeal in San Bernardino reversed in part and affirmed in part a judgment of dismissal after a demurrer was entered in favor of an insurance broker on a complaint brought by an insurer for fraud, negligence and negligent misrepresentation. The court of appeal held an insurance broker who knowingly makes false statements on an insurance application may be held liable to an insurer that reasonably relies on the statements. The court of appeal rejected the broker's contentions that only the insured could be held liable for the misrepresentations and that the insurer's remedy was limited to rescission of the policy. The court also concluded that, although no California court had considered whether an insurance broker owes a duty of care to an insurer, public policy supports imposing such a duty.

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Law Articles

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No Duty to Defend in Advertising Injury Claim Where the Underlying Suit Included No Allegations of a Causal Connection Between Some Form of Advertising and Plaintiff's Alleged Injuries. In We Do Graphics, Inc. v. Mercury Cas. Co. (2004) 124 Cal.App.4th 131, the Fourth District Court of Appeal in Orange County affirmed a summary judgment in favor of an insurer. The Court concluded the insurer had no duty to defend where the underlying suit included no allegations of a causal connection between some form of advertising and plaintiff's alleged injuries. The underlying plaintiff alleged its former employee stole trade secrets, joined We Do Graphics, Inc., and attempted to solicit plaintiff's customers. Plaintiff then sued We Do Graphics. We Do Graphics tendered the suit to Mercury Casualty Co., and Mercury denied coverage. We Do Graphics sued Mercury, alleging the underlying suit triggered advertising injury coverage. The trial court and the court of appeal disagreed, concluding there were no allegations in the underlying suit relating to the insured's advertising activities. The court of appeal concluded the alleged trade secrets were customer information, not advertising ideas. Moreover, the only reference to advertising was in a declaration filed by the insured in opposition to Mercury's motion for summary judgment. The Court concluded this speculation, about extraneous facts regarding potential liability or ways in which the plaintiff might amend its complaint, could not trigger a duty to defend.

Attorney Barred as Expert When Personally Involved in Providing Legal Advice and Services to Insurer in Matters Substantially Related to the Instant Litigation. In Brand v. 20th Century Insurance Company (2004) 124 Cal.App.4th 594, the Second District Court of Appeal reversed the trial court's denial of an insurer's motion to exclude expert testimony of its former attorney. Plaintiff designated the attorney to provide

expert testimony on claims handling issues. 20th Century Insurance Company moved for a protective order barring the attorney from testifying against it as an expert. The trial court denied the application, but the court of appeal reversed. 20th Century had not engaged the attorney for over twelve years. Nevertheless, the court of appeal concluded the attorney should be barred from testifying as an expert because he was personally involved in providing legal advice and services to 20th Century in matters substantially related to the instant litigation.

Carrier's Receipt of an Initial Premium Check and Subsequent Approval of the Policy Application Rendered the Life Insurance Policy Effective from the Date of the Application. In Hodgson v. Banner Life Ins. Co., (2004) 124 Cal.App.4th 1358, the California Court of Appeal, Third Appellate District, reversed the judgment of the trial court and granted summary judgment in favor of an insured, holding that a carrier's receipt of an initial premium check and subsequent approval of the policy application rendered the life insurance policy effective from the date of the application. Hodgson completed an application for a \$500,000 life insurance policy with defendant Banner Life Insurance Company ("Banner") and paid an initial premium. Hodgson's application included a "conditional receipt," which provided interim coverage while the application for permanent coverage was being considered. When Hodgson applied, Banner limited interim insurance to applicants who applied for face amounts of life insurance of \$250,000 or less. However, the broker used an old application form indicating that the conditional receipt was effective for limits up to \$500,000. Within days, Banner returned the check for the initial premium to Hodgson and declared the conditional receipt ineffective. The company eventually approved coverage for Hodgson only to find that he had died five days earlier. Oops! Banner considered the policy terminated prior to Hodgson's death and was sued by his survivors. The court found that Hodgson and his survivors

could not have a reasonable expectation that interim coverage was in place because Banner had returned the premium payment and advised that any coverage under the conditional receipt was terminated. However, with respect to the permanent insurance policy ultimately approved by Banner, the court held that coverage was effective from the date of the application pursuant to Insurance Code section 10115. That section provides that when an applicant makes a premium payment concurrently with the submittal of a life insurance application and either receives a form receipt for the premium or the carrier receives the payment at its home office, and the carrier later approves the application, if the applicant dies on or after the date of the application, the "insurer shall pay such amount as would have been due under the terms of the policy . . . as if such policy had been issued and delivered on the date the application was signed by the applicant." The court found the requirements of section 10115 met because Hodgson submitted an application with a premium check, the same was received at Banner's home office, and Banner ultimately approved the application. While many of you are not in the life insurance industry, the case is noteworthy, and more importantly, fills space for the column.

Carriers' Settlement Without Consent or Participation of Insureds Enforceable with Plaintiff When No ROR Issued. In Fiege v. Cooke (2004) 125 Cal.App.4th 1350, the California Court of Appeal, Second Appellate District, concluded that notwithstanding the express requirement by CCP section 664.6 that to be enforceable a settlement must be either stipulated in writing by the parties or placed upon the record before the court, a settlement between a personal injury plaintiff and defendants' carriers, which had the right under the policies to settle without the defendants' consent, was enforceable even though defendants did not stipulate in writing to the settlement or place the settlement upon the court's record, since the settlement by the carriers did not prejudice the rights of the defendants as no reservations of rights

were issued by the carriers. A long sentence; but you get the idea. Fiege sued several defendants, including individuals Norman Cooke and Robert Ellis, over a traffic accident. Michael Wooldridge, the driver of the car in which Fiege was a passenger, also sued Cooke and Ellis. After a complaint in intervention by one of the insurance companies, a consolidation, and a cross-complaint by Cooke and Ellis, the matter went to a mandatory settlement conference. By this time, Fiege was on one side; Cooke, Ellis and Wooldridge were on the other, in that Fiege was seeking compensation from all three. The defendants were all insured under policies that gave the carriers the right to settle without the defendants' consent and to bind the defendants to the settlement. One carrier agreed to settle for \$135,000 (including payment on two liens) on behalf of Cooke and Ellis. The other agreed to pay \$25,000 on behalf of Wooldridge. The trial court secured Fiege's oral consent to the settlement. The defendants were not present at the settlement conference nor did they stipulate in writing to the settlement. Fiege later sought to escape from the settlement. In response, the defendants successfully moved under CCP section 664.6 to enforce the settlement. That section provides, in part, that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The trial court entered a judgment consistent with the settlement terms, reasoning that not only are the insureds rights not prejudiced but the consent of the carriers was superfluous because the policies provided the carriers the rights to settle without the consent of the insureds. Moving from facts and law to reality, the court explained that:

it is common practice for insurance counsel and an adjuster to handle the negotiation of insurance-funded settlements without the superfluous involvement of a fully protected insured. If Levy [the

case law relied upon by Fiege] were nevertheless interpreted to require the superfluous signature of an insured to an insurance-funded settlement in order for section 664.6 to apply, it is predictable that the insured would henceforth be ordered to attend all [mandatory settlement conferences]. Present practice often allows an insured to avoid such expense and inconvenience by permitting counsel and the adjuster to appear. Indeed, many people regard the ability to let the insurance carrier handle insured incidents without inconvenience to the insured as one of the benefits gained by purchasing insurance.

The Levy court was not faced with an insured situation in which a literal party-signature requirement would more likely impair the insureds interests than protect them. Since Levy did not involve an insurance-funded settlement, we do not read Levy as precluding enforcement pursuant to section 664.6 of an insurance-funded settlement reached by an authorized insurance defense counsel or adjuster when the carrier has the contractual right to settle.

The question surviving this decision is what would have happened if any of the carriers had issued ROR's and sought reimbursement from the insured rather than waive the ROR? Can you say "bad faith" litigation?

Cal-OSHA Standards Can Be Used as Evidence. In an important withdraw from historically disallowing administrative findings into court, the California Supreme Court has recently decided in Elsner v. Uveges, (2004) 34 Cal.4th 915, that for injuries occurring after January 1, 2000, courts may consider Cal/OSHA safety standards as evidence of acceptable safety practices in lawsuits brought by workers against companies other than their own employer. The ruling reverses a law that had been in place since 1971 (Labor Code section 6304.5), which specified use of industry custom as the safe workplace guideline in third-party

lawsuits. The reversal upholds a key provision of Assembly Bill 1127, a controversial 2000 law aimed at increasing penalties against employers for serious safety violations. In the case, Rowdy Elsner, an employee of Hoffman Roofing, injured his ankle when a scaffold collapsed beneath him at a construction site. Carl Uveges, the general contractor, was directly responsible for supervising work and for enforcing safety compliance. When Elsner sued Uveges for negligence, Uveges asked the court to exclude any references to alleged violation of Cal-OSHA safety standards. The trial judge disagreed, and ruled Cal-OSHA provisions admissible, a change permitted by the 2000 amendment. The judge also refused to admit evidence that the scaffold was built according to accepted industry standards. As a result, the jury found the company 100 percent at fault and awarded Elsner substantial damages. The California Supreme Court agreed with the trial judge's conclusion, but reversed the decision in this case because the injury occurred prior to the effective date of the amended law. The court said that until January 1, 2000, an industry could rely on a custom or practice as a reasonable standard of care, even though it did not meet Cal-OSHA safety orders. Applying the new rules would make the company potentially responsible for conduct that might have satisfied the prior legal standard, but not specific Cal-OSHA standards.

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Law Articles

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A “User” of a Truck May Not Be a “Borrower” to Qualify for Coverage under a Motor Vehicle Liability Insurance. In *City of Los Angeles v. Allianz Ins. Co.*, (2004) 125 Cal.App.4th 287, the California Court of Appeal, Second Appellate District, considered whether a shipper, who directs the loading of a truck on its premises and is to that extent a “user” of the truck, is also a “borrower” of the truck, and therefore an “insured” under the provisions of a trucking company’s insurance policy. The court concluded the shipper did not exercise the requisite dominion and control over the truck to qualify as a borrower under the terms of the policy. A truck driver employed by MSM Trucking was injured when he fell during the weighing of his truck after it had been loaded with treated sewage at a City of Los Angeles treatment facility. After the driver sued the City, the City sought a defense from MSM’s motor vehicle liability carriers. The City sued the carriers after they refused to defend on the ground that the City did not qualify as an insured. The policies covered MSM’s “employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered auto.” The court found that the City was a “user” of the truck. The City argued that the same facts establishing the City was a user of the truck — its control over the loading process — also establish it was a borrower of the truck. The court disagreed, finding “[o]ne can load or unload — and therefore ‘use’ — a truck one does not own and has not borrowed or hired.” According to the court, “the pertinent question, in determining whether the City borrowed MSM’s truck, is whether the City had ‘the requisite dominion and control over the truck[,] not whether it directed or controlled the loading process.’” The court found that the requisite dominion and control was not present under the facts as the City was not in possession or custody of the truck and did not have the use of the

truck for its own purposes, to the exclusion of its owner.

The “Sole Negligence” of an Additional Insured Party under a Liability Policy Will Not, in the Absence of Contrary Policy Language, Preclude That Party from Enforcing the Insurer’s Coverage Commitment. In *American Cas. Co. of Reading, PA v. General Star Indem. Co.* (2005) 125 Cal.App.4th 1510, the California Court of Appeal for the Second Appellate District considered the impact of Civil Code § 2782(a) on the scope of an insurers’ obligations under additional insured endorsements. Section 2782 limits the scope of indemnity promises in construction contracts. It declares unenforceable, as contrary to public policy, any provision purporting to indemnify a promisee for any injury or loss “arising from the sole negligence or willful misconduct” of the promisee. After pointing out that Section 2782 expressly states that its “sole negligence” limitation “shall not affect the validity of any insurance contract,” the appellate court held that “[a] provision in a liability policy providing coverage to an additional insured will not be deemed contrary to public policy or unenforceable merely because that additional insured party may have incurred claim liability due to its ‘sole negligence.’ Stated another way, absent contrary language in the policy or in the additional insured endorsement, an indemnitee under a construction contract may enforce the commitment made by such endorsement to provide coverage for a claim arising from the indemnitee’s negligence even though: (1) Section 2782 would preclude enforcement of the contractual indemnity promise made by the indemnitor; or (2) under the facts of the case and the terms of the contract of indemnity, the indemnitor had no obligation to provide indemnity to the indemnitee.” The court concluded that while Section 2782 may preclude enforcement of a promise of indemnity in a construction contract, it does not limit the enforcement of an “additional insured” endorsement provided to the indemnitee by the indemnitor’s liability insurer. In addition, the court held that the provisions

of the contract of indemnity did not preclude enforcement by the indemnitee of its claim of coverage under the additional insured endorsement.

Insured May Assign its Right to Brandt Fees Claim. In *Essex Ins. Co. v. Five Star Dye House, Inc.* (2004) 125 Cal.App.4th 1569, the California Court of Appeal for the Second Appellate District reversed the trial court’s order denying attorney fees and held that an insured may assign its right, established in *Brandt v. Superior Court* (1995) 37 Cal.3d 813, to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurer’s bad faith. The court disagreed with dictum in *Xebec Development Partners, Ltd. V. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, which suggested that although an insured may assign its claims against an insurer for bad faith, the insured cannot assign the right to recover Brandt fees. The court noted that the policy in California is to favor assignability of claims and that, as a general proposition, the only claims which are not assignable are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, seduction, breach of marriage promise, malicious prosecution, and others of like nature. The court concluded that the right to recover policy benefits in full, which Brandt fees are designed to accomplish, is not the kind of personal right that is not assignable.

In an Action in Which Excess Insurer Was Added as a Defendant by Insured after Primary Insurers Had Settled, Excess Insurer Could Not Raise Peremptorily Challenge to Trial Judge Because Primary Insurers Had Previously Exercised the One Challenge per Side Permitted by Statute. In *Home Ins. Co. V. Superior Court (Montrose Chemical)* (2005) 34 Cal.4th 1025, the California Supreme Court considered the question of whether, in a single action brought by the insured against both its primary and excess insurers, the interests of the two types of insurers must be deemed “substantially

adverse,” relegating them to different “sides” in the litigation and entitling an after-named excess insurer to the exercise of a separate peremptory challenge to a trial judge pursuant to C.C.P. § 170.6. Only one such challenge is available “per side.” The Court held that a party seeking a subsequent disqualification of the trial judge has the burden of demonstrating that its interests are substantially adverse to those of a co-party that previously exercised a peremptory challenge. The Court found that the excess insurer had not made such a showing and noted that the interests of primary and excess insurers are not necessarily adverse so as to place them on different “sides” of an action for purposes of a peremptory challenge under Section 170.6.

Loss Suffered by Insured Property Owner When Clogged Sewer Line Underneath Property Caused Water and Sewage to Flow into Basement of Property Was Excluded from Coverage under Policy Exclusion for “[W]ater That Backs up from a Sewer or Drain.” In Penn-America Ins. Co. v. Mike’s Tailoring (2005) 05 C.D.O.S. 354, the California Court of Appeal for the Third Appellate District reversed the trial court and held that an exclusion for damage caused by “[w]ater that backs up from a sewer or drain” applied to preclude coverage for damage caused by sewage carried by water because the common sense interpretation of the exclusion includes “sewage that inevitably accompanies the water in the sewer.” A sewer line erupted in the insured’s basement and the sewage, water, and accompanying fumes caused damage. Penn-American filed a declaratory relief action to determine application of its water back-up exclusion which the trial court found did not apply because it only encompassed damage caused by water, not damage caused by the pollutants carried by the water. The appellate court reversed. It rejected the trial court’s distinction between water damage and sewage damage from a broken sewer pipe. According to the court of appeal, the plain meaning of “[w]ater back[ed] up from a sewer or drain” included water and contaminants; “No

reasonable person would assume that water backing up from a sewer would be pure water.”

Provision in Statute Extending Limitations Period for Insurance Claims for Damages Suffered in Northridge Earthquake of 1994, Excluding Application of Statute Where Case Was Settled by Insured When Represented by Counsel, Operated to Bar Property Owner’s Second Northridge Earthquake-related Action Against Insurer, Even Though Statute Was Enacted after Owner’s Settlement of First Suit, and Even Though First Case Was Limited to Issue of Insurance Deductibles. In Israel-Curley vs. California FAIR Plan (2005) 126 Cal.App.4th 123, the California Court of Appeal for the Second Appellate District affirmed a trial court’s order granting summary judgment to an earthquake loss insurer on the ground that Code of Civil Procedure 340.9, which extended the limitations period for lawsuits against insurers arising out of the Northridge Earthquake, did not apply to a plaintiff’s lawsuit due to her prior participation in a settlement of earthquake claims. The court held that Section 340.9 did not extend the limitation period for plaintiff’s otherwise time-barred suit because, pursuant to Section 340.9(d)(2), plaintiff had entered into a prior settlement and general release of her earthquake claims while represented by counsel.

Case Depublication. On January 19, 2005, the California Supreme Court heroically denied review and withdrew from publication the decision in Permanent General Assurance Corp. v. Superior Court (Hernandez), (2004) 19 Cal.Rptr.3d 597. The Hernandez decision had ruled that, as part of an unpleaded discrimination theory, plaintiff could compel discovery of other vehicle theft claims after obtaining authorizations from all insureds whose claim files were to be produced. Having been depublished, the case is no longer available for use as legal authority. This determined inaction by the Supremes results in a very slightly more constricted application of the *Colonial Life* discovery rule of other similar claims.



2005 INSTALLATION DINNER PHOTOS



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On January 22, 2005, San Diego Defense Lawyers held its annual installation dinner at the Hyatt Regency honoring Federal Judge Marilyn L. Huff and defense attorney Robert W. Harrison. Outgoing president Billie Jaroszek and board members Michelle Van Dyke, Constantine Buzunis, Sean Cahill and Ken Greenfield were recognized for their contributions to the association. Incoming President John Farmer introduced the new Board members Jay Bulger, Tony Case, Alan Greenberg, Jack Sleeth and Shari Weintraub. Everyone enjoyed an evening of good food and good fellowship.

1. Jennifer Wade, Victoria Villanueva & Christen Tedrow
2. Joe Zeyala, Mary Zeyala & Dr. Benito Villanueva
3. Mike Cutri, Don Rowe, Jason Gallegos & Katrina Gallegos
4. Jan Neil, Michael Gless & Debbie Harrison
5. Dawn DuCharme, Stephanie Noon & Jennifer Grebing

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- 6. Dan & Mary White and SDDL Lawyer of the Year Bob Harrison
- 7. Graham & Jasmina Hollis
- 8. Bob Titus, Denise & Steve Polito
- 9. Jack Sleeth, Johni VanWinkle, Jeff & Patty Morris
- 10. Billie Jaroszek, Judge Marilyn Huff (2004 Honoree), Heidi & Kelly Boruszewski
- 11. Charlie Grebing and Mike Neil
- 12. Tye Barber, Sean & Tracee Cahill



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13. Sam Sherman, Natasha Korman and Jim Boley

14. Dan & Solveig Deuprey

15. Dan White, Dino Buzunis and Pete Doody

16. Judge John Rhoades and Bob Harrison

17. Billie Jaroszek and Judge Marilyn Huff (2004 Honoree)

18. Scott Barber and Coleen Lowe

19. Bob & Maureen Frank, Mike Cutri, Mike Mason, Tracey Moss, Harper Van Steenhouse

20. Diane & Mark Vranjes and Pat Grimm



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21. Alan Greenberg and Steve Grebing

22. Anna Amundson, Fort Zackary, Martha Dorsey and Wendy Bulger

23. Steve Amundson, Judy & Judge Kevin Enright, Judge Amalia Meza and Gary Helson

24. Cyndy & Dennis Aiken and John & Linda Farmer

25. Debbie & Clark Hudson, Shari Weintraub, Billie Jaroszek, Coleen Lowe, Joe Jaroszek

26. Karen & Bob Titus, Karen Holmes and Andra Donovan

27. Mike Neil and Dan White

28. Tim Noon, Ben & Sandy Llaneta

29. Roxanna Verbick, David & Lydia Roper, Diana & Andrew Verne, Sylvia Reyes & Ken Greenfield

30. Gabe & Kine Benrubi, Maria & Vince Iuliano.

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Getting Paid:

Continued from page 4

Recovery Allowed Despite Absence of Express Provision

Where there is no separate provision expressly addressing the issue, courts in some jurisdictions have been more liberal than others in interpreting standard indemnity contractual language to allow an indemnitee to recover its fees and expenses in prosecuting an indemnity claim, despite the general rule discussed above. For example, in *Laboratory Corporation of America Holdings, Inc. v. Clinical Laboratory Consultants, Inc. et al.*, 121 F.3d 699 (4th Cir. Sept. 5, 1997), the indemnity provision merely provided that the indemnitor agreed to indemnify the indemnitee "from any and all liability...arising directly or indirectly from the negligence of wrongful acts of [the indemnitor's] employees." The Fourth Circuit held that this language was "broad enough to include the recovery of legal fees incurred in enforcing the indemnification agreement;" therefore, the court allowed the indemnitee to recover its fees and expenses incurred in prosecuting an indemnity claim against the indemnitor. *Id.* at *2.

In *Rappold v. Indiana Lumbermens Mutual Insurance Company*, 431 S.E.2d 302, 304-05 (Va. 1993), the Virginia Supreme Court applied a similarly broad interpretation to an indemnity agreement. The agreement provided that the indemnitor [a subcontractor] was to "indemnify and save [indemnitee (a construction surety)] harmless from and against every claim, demand, liability, loss, cost, charge, counsel fee, ...expense, suit, order, judgment, and adjudication whatsoever and any and all liability therefor, sustained or incurred by [indemnitee] by reason of having executed...said bonds or obligations..." *Id.* at 303. The court found that "it was just as much 'by reason of' its having executed the bond that [the indemnitee] was required to incur counsel fees and costs in maintaining this action to enforce the indemnity agreement against the [indemnitor]." *Id.* at 305. The court also observed that the language "by reason of" had the same effect as the words "resulting from" and established "causation as the test for determining

whether a particular loss or expense is recoverable..." *Id.* at 304. Under this test, the typical "arising out of or resulting from" language found in many agreements would be broad enough to recover fees expended in pursuit of indemnity.

Problems with the General Rule

The general rule that an indemnitee cannot recover attorney's fees incurred in establishing its right to indemnity against the indemnitor can lead to illogical and unfair results. For example, A Corp. is the owner on a construction project and B Corp. is the general contractor. The contract between A and B contains a standard indemnification provision whereby B must indemnify A for all losses, damages, attorney's fees, etc. arising out of the project. B Corp. then subcontracts with C Corp. to perform work on the project. The subcontract also contains a standard indemnification provision whereby C Corp. must indemnify B Corp. for all losses, damages, attorney's fees, etc. arising out of C Corp.'s work on the project. During the course of the project, the negligence of an employee of C Corp. causes significant damages to the owner's property. A Corp. is thus entitled to indemnity from B Corp. under the indemnity provision in their contract, and B Corp. is entitled to indemnity from C Corp. pursuant to the indemnity provision in the subcontract. Instead of litigating the issue of whether it owes A Corp. indemnity, B Corp. accepts its responsibility and indemnifies A Corp. for A Corp.'s damages. Unfortunately for B Corp., C Corp. chooses not to fulfill its obligation of indemnifying B Corp. Therefore, B Corp. is forced to file a lawsuit against C Corp. seeking to enforce its right to indemnity. The general rule described above precludes B Corp. for recovering any attorney's fees or expenses incurred in establishing its right to indemnity from C Corp. However, if B Corp. had acted like C Corp. and not fulfilled its indemnity obligation to A Corp., then A Corp. would have been forced to file suit against B Corp. A Corp. also would have sued C Corp. for its negligence, and B Corp. could have filed a cross-claim for indemnity against C Corp. or, if A Corp. did not also sue C Corp., B Corp. could have filed a third-party claim against C Corp. to enforce the indemnity

agreement between B and C. Either way, under the general rule, B Corp. would have been entitled to recover from C Corp. its attorney's fees incurred in *defending* the lawsuit filed by A Corp. Also, B Corp. possibly could have recovered its attorney's fees incurred in *prosecuting* the cross-claim for indemnity in certain jurisdictions or the third-party claim for indemnity in some jurisdictions or at the very least, even under the general rule in most jurisdictions, there would have been substantial overlap in the attorney's fees incurred by B Corp. in both *defending* the claims by A Corp. and *prosecuting* the indemnity claims against C Corp. The end result is that, when strictly looking at the situation from an attorney's fees perspective, B Corp. is much better off (*i.e.*, likely to be reimbursed for significantly more attorney's fees) if B Corp. chooses not to live up to its agreement to indemnify A Corp. (thereby forcing A Corp. to file suit). Such a result obviously does not promote fulfillment of contractual obligations nor does it promote judicial economy.

At least one court has addressed a similar situation, and its holding avoided this result. In *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322 (9th Cir. 1981), the Ninth Circuit held that the indemnitee was entitled to indemnification for attorney's fees necessary to establish its right to indemnity where the indemnitee conceded its liability and paid the injured party, but the indemnitor refused to concede its indemnity liability to the indemnitee, thereby forcing the indemnitee to file suit to establish its right to indemnity.

Fees Incurred in Prosecuting Claims against Third Parties

In general, an indemnitee may not recover attorney's fees expended in pursuing a claim against a third-party. *Lavorato v. Bethlehem Steel Corp.*, 459 N.Y.S.2d 170, 171 (N.Y. App. Div. 1983) (rejecting claim for fees incurred in prosecuting third-party claim and stating, "It is well settled that a litigant may not recover damages for the amounts expended in the successful prosecution of its rights."). However, at least one court has held that indemnity clauses cover fees incurred in prosecuting certain claims against third parties. In *Perchinsky v.*

State of New York, et al., 660 N.Y.S.2d 177 (N.Y. App. Div. 1997), the court did not allow the indemnitee to recover its fees and expenses from its cross-claim for indemnity but did allow the indemnitee to recover its fees incurred in prosecuting “defensive” third party claims against entities other than the indemnitor. In that case, the court interpreted indemnity language providing indemnification “against all claims, actions, damages, and costs” to allow the indemnitee/contractor to recover its costs in prosecuting third-party actions that it filed against subcontractors on the grounds that the third-party claims were “defensive” third-party claims that were an “essential component of the [indemnitee’s] defense of the main action.” *Id.* at 181. The court distinguished this situation from the general rule precluding an award of fees and expenses in prosecuting an indemnity claim by noting that the award of fees was “not an award of counsel fees in an action between the indemnitor and the indemnitee.” *Id.* Thus, it also is worth keeping in mind that the general rule discussed in this section does not necessarily mean that (in the absence of express language) an indemnitee can only recover those fees and expenses incurred in *defense* of a claim; there is some authority that suggests that an indemnitee may also be able to recover fees and expenses incurred in prosecuting third party claims (or counterclaims or cross-claims) that a court considers to be in defense of the underlying claim against the indemnitee.

Fees Incurred in Non-Indemnity Claims between the Parties

Courts also have addressed the ability of an indemnitee to recover fees incurred in relation to non-indemnity claims between the indemnitee and indemnitor. Courts rarely award fees in this situation. For instance, in *Hooper Assoc., Ltd. v. AGS Computers, Inc.* 549 N.Y.S.2d 365, 366–67 (N.Y. 1989), the New York Court of Appeals interpreted an indemnity clause that provided for the recovery of “reasonable counsel fees.” The plaintiffs sought to recover attorney’s fees in connection with breach of contract claims they asserted against the defendant. In rejecting the claim, the court observed, “Inasmuch as a promise by one party to a contract to indemnify the other for attorney’s fees incurred in litigation

between them is contrary to the well-understood rule that parties are responsible for their own attorney’s fees, the court should not infer a party’s intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.” *Id.* at 367.

Similarly, in *Levin v. Septodent, Inc.*, Nos. 00-2234, 00-2462, 01-1852, 2002 WL 654098 (4th Cir. April 22, 2002), the court found that an indemnity clause which purported to indemnify a party “against any and all lapses, fees, costs, claims, expenses and/or litigation, including reasonable attorneys’ fees and expenses, incurred...as a result of the transactions contemplated by this Agreement” did not cover attorney’s fees in litigation between the indemnitor and indemnitee reasoning that the indemnity agreement “is a garden variety indemnity clause and ... a reasonable person in the position of the [indemnitee] would have understood that the clause was not intended to cover the expenses of litigation between the contracting parties.” *Id.* at **9; see also *Kellers Systems, Inc. v. Transport International Pool, Inc.*, 172 F.Supp.2d 992, 998–99 (N.D. Ill. 2001) (rejecting claim for attorney’s fees in suit between parties to indemnity agreement); *Fleetboston Robertson Stephens, Inc v. Innovex, Inc.*, 172 F.Supp.2d 1190, 1199 (D. Minn. 2001) (rejecting claim for attorney’s fees saying “A contract’s language must make the intent to provide for attorney’s fee indemnification between the parties ‘unmistakably clear.’”)

However, at least one court has found that an indemnity clause covered fees incurred in litigation between the indemnitor and indemnitee. In *Natco Ltd. Partnership v. Moran Towing of Florida*, 267 F.3d 1190, 1193 (11th Cir. 2001), the Eleventh Circuit interpreted a clause that provided that the indemnitor “shall indemnify [the indemnitee] for any and all loss, damage or liability arising out of, or in any way contributed by, unseaworthiness of the tow, or by any deficiency in, or failure of, its equipment or the personnel on board.” The court found that “[g]iving the broad terms of the indemnity provision their commonly understood meaning” it was evident that the clause allowed the indemnitee to recover attorney’s fees spent in defending claims

brought against it by the indemnitor and other parties as well as *attorney’s fees incurred in prosecuting its counterclaim against the indemnitor.* *Natco Ltd.*

Partnership provides good support for those seeking to construe the language of an indemnity agreement broadly.

Conclusion

The vast majority of courts interpret indemnity provisions broadly to allow an indemnitee to recover from the indemnitor its attorney’s fees and expenses incurred in *defending* claims that are brought by *third parties*, even if the indemnity provision does not specifically mention attorney’s fees or defense costs. However, when it comes to an indemnitee recovering its attorney’s fees and expenses incurred in other types of actions, such as prosecuting its right to indemnity against the indemnitor or prosecuting claims against third parties, courts are less willing to allow an indemnitee to recover its attorney’s fees and expenses unless the indemnity agreement expressly provides for such a recovery. Accordingly, an indemnitee should insist on the inclusion of language in the indemnity agreement that expressly allows for the recovery of its attorney’s fees and expenses arising out of any failure by the indemnitor to fulfill its indemnity obligations. This will allow an indemnitee to recover its fees in prosecuting its right to indemnity against the indemnitor. Further, an indemnitee should also consider including language that provides for indemnity for attorney’s fees and expenses incurred in prosecuting claims against third parties where such claims really are in furtherance of the defense of the indemnified claim. Without specific language addressing these issues, it is unlikely that a court will allow an indemnitee to recover its attorney’s fees and expenses except for those fees and expenses incurred in *defense* of indemnified claims brought by *third parties*.

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HOT CASES!!!



By Robert J. Walters

GRACE BRANDON HOLLIS LLP

In the employment law context in California, some arbitration provisions may be enforced and health plans offered to employees that are conditioned on acceptance of binding arbitration are not invalid. However, employees will not be able to manipulate medical leave requests if they are still able to do the essential duties of the position. In addition, an employer cannot rely preemptive firing to avoid a claim of retaliation under Labor Code §6310. In the medical malpractice context, a physician does not need to have an actual subjective belief of an emergency to be a Good Samaritan. Also, patients who signed an arbitration agreement cannot be compelled to arbitration for disputes regarding a later unrelated treatment provided the bill had been paid in full. Prop 64 appears to be favoring defense counsel and will be applied retroactively in the Fourth District. In the general interest category, the California Supreme Court does not preclude applica-

tion of punitive damages in a breach of contract action but limits the availability of lost profits as either general or special damages. Not to be outdone, the United States Supreme Court has held that a litigant's taxable income includes attorney's contingent-fee.

EMPLOYMENT LAW

In *Viola v. Department of Managed Health Care* (2005) 126 Cal.App.4th 373, 23 Cal.Rptr.3d 821, the Second District Court of Appeal held that health plans offered to employees that are conditioned on acceptance of binding arbitration are not invalid. Eunice Viola and others filed a declaratory action against the Department of Managed Health Care (DMHC). They alleged that their constitutional rights to a civil jury and to due process were violated by its approval of health insurance service contracts offered through their employers that contained mandatory arbitration provisions. The trial court sustained the DMHC's demurrer, which was affirmed by the Court of Appeal. Although it recognized in *Madden v. Kaiser Foundation Hospitals* that an employer may waive the right to jury trial of its employees through agreement to binding arbitration when it enters into a health care plan on their behalf, since the employees had no right to choose whether the health plans they were with which they were presented allowed them a trial by jury, their rights to a jury trial and due process were not violated by the DMHC when it approved the health care plans that contained the binding arbitration clauses.

In *Lonicki v. Sutter Health Central* (2004) 124 Cal.App.4th 1139, 22 Cal.Rptr.3d 177, the Third District Court

of Appeal held that the statutory definition of serious health condition that makes employee unable to perform functions of her position is not employer-specific. Sutter Health Central denied a request for medical leave submitted by Antonina Lonicki, who based her request on the Family Rights Act (CalFRA). Sutter denied the claim after Lonicki acknowledged that she was successfully performing the functions of an identical job for another hospital in the same area. Lonicki sued Sutter for violating CalFRA. The trial court entered summary judgment in Sutter's favor. The Court of Appeal affirmed holding that an employee must be either unable to work at all or unable to perform any one or more of the "essential functions" of the position of that employee, as defined in the California Fair Employment and Housing Act. The Department of Fair Employment and Housing used the term "essential functions" to mean the fundamental job duties of the employment position. The purpose of the formulation in the context of discrimination is to prevent an employer from discriminating by adopting an expansive definition of the duties of a job. With respect to the right to medical leave, the same narrow standard is used to prevent employees from abusing the right by asserting some broad desire for leave. Thus, an employee who successfully performs the essential functions of a job cannot thereafter establish that she was incapable of doing so for another employer. Since CalFRA's definition does not make "essential functions" employer-specific, the trial court properly granted summary judgment in Sutter's favor.

In *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 21 Cal.Rptr.3d 861, the Second District Court of Appeal held that preemptive retaliatory firings are covered by Cal-OSHA. Shala Minagar fired her employee, Noelle Dianella, fearing Dianella would file a workplace safety complaint against her. The Labor Commissioner filed a complaint against Minagar for retaliatory job termination under Labor Code §6310 (part of California's Occupational Safety and Health Act). The trial court dismissed the complaint on jurisdictional grounds, finding that Dianella was not covered under Section 6310 because Dianella had,

in fact, not filed a complaint with Cal-OSHA. The Court of Appeal reversed holding that the intent behind Labor Code §6310 is to encourage employees to file workplace safety complaints without fear of reprisal from their employers. This Section also punishes employers who retaliate against employees who make any such complaint. Allowing employers the power of preemptive retaliation was considered to defeat Labor Code §6310's purpose and allow them to circumvent the law. If Labor Code §6310 were to be interpreted so strictly, then employers like Minagar would have an incentive to fire any employee they suspected were going to file a complaint against them and thus avoid liability; employees like Dianella would be without the protection of Section 6310.

MEDICAL MALPRACTICE

In *Reynoso v. Newman* (2005) 126 Cal.App.4th 494, 24 Cal.Rptr.3d 5, the Fourth District Court of Appeal held that a doctor need not show a subjective belief that he was responding to emergency to be protected by Good Samaritan statute. Bruce Adams, a licensed dentist, administered general anesthesia while performing oral surgery on Orlando Reynoso. Dr. Adams called Jeffrey Newman, an internist, after noticing that Reynoso's oxygen saturation levels were abnormally low. Dr. Newman examined Reynoso and suggested that he be taken to the hospital. By the time Reynoso got to the hospital, the oxygen deprivation had caused permanent brain damage, which exacerbated the mental retardation from which Reynoso had suffered since birth. Reynoso sued the doctors for negligence. Although some question existed about whether Dr. Newman knew he was responding to an emergency, the trial court granted his motion for summary judgment on the ground that he was immune from liability. The Court of Appeal affirmed. Business and Professions Code Sections 2395 and 2396 provide immunity from liability to medical licensees who in good faith render emergency care. Those sections were created to induce physicians to render assistance to persons in need of such care by discouraging even the commencement

of an action against a health care professional who has rendered emergency assistance. The test for determining the existence of an emergency is objective, and the heart of the inquiry is whether a duty of professional care pre-existed the emergency. Since an emergency undisputedly existed when Dr. Newman responded as a volunteer, it does not matter whether he knew that an emergency existed.

In *Reigelsperger v. Siller* (2005) 125 Cal.App.4th 1008, 23 Cal.Rptr.3d 249, the Third District Court of Appeal held that the plaintiffs were not required to arbitrate medical malpractice claims because open-book account relationship did not exist. Under Code of Civil Procedure Section 1295, once an arbitration agreement is signed, it governs all subsequent open-book account transactions for medical services for which the agreement was signed. "Open-book" is defined as an account with unsettled items or dealings still continuing. After the August 2000 treatment, plaintiff paid the physician and thereby closed his account. No future treatments were scheduled, and there was no ongoing doctor-patient relationship. Plaintiff returned two years later for an unrelated condition. Because the first treatment was not an open-book account transaction, when plaintiff returned for treatment, the arbitration agreement was no longer binding. The agreement's phrase "now or in the future treats" could not reasonably be construed to bind the parties in perpetuity. Certified for partial publication.

PROPOSITION 64 AFTERMATH.

In the last election, California voters approved Proposition 64, which added a significant standing requirement for claims brought under the state's Unfair Competition Law and false-advertising law (Business and Professions Code Sections 17200 and 17500). "Prop 64" provides that a person can seek relief under Section 17200 or Section 17500 only if the person "has suffered injury in fact and has lost money or property as a result of" the alleged wrongdoing. The proposition also eliminates the "private attorney general" provisions in those

statutes and requires that any collective or group action brought under the statutes satisfy the state's class-action requirements. One of the anticipated issues was the extent to which Prop 64 would be held retroactive.

The first opinion held that Prop 64 did not apply retroactively. In *Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386, 24 Cal.Rptr.3d 301, the First District Court of Appeal held that the limits on private enforcement of UCL violations applied only prospectively, and thus did not apply to the UCL action. However, the appellate decisions that followed held otherwise, including two opinions from the Fourth District, Division One Court of Appeal. In *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392, 24 Cal.Rptr.3d 847, held that Prop 64 effectively repealed the portion of the UCL that granted standing to private persons who had not themselves suffered injury as a result of the allegedly unfair, unlawful or fraudulent business practices complained of in the lawsuit. The Court further reasoned that "[a]lthough Prop. 64 did not act to entirely repeal any of the UCL's causes of action, its repeal of unaffected plaintiff standing is sufficient to completely extinguish Bivens's right to bring his claims." This Court noted that because Prop 64 completely eliminated the right of uninjured individuals to pursue a remedy under the UCL, its amendment of section 17204 entirely repeals a statutory right previously held by one class of individuals. In addition, the Court noted that Prop. 64 contained no savings clause to exclude from its reach cases filed prior to its effective date. Accordingly, without a savings clause, Prop. 64's repeal of unaffected plaintiffs' statutory authorization to pursue UCL claims was effective immediately. *Supra*, 24 Cal.Rptr.3d at 854-855.

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Hot Cases

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Likewise, more recently in *Lytwyn v. Fry's Electronics, Inc.* (2005) 2005 WL 40736, the Fourth District, Division One Court of Appeal held that Proposition 64, which repealed right of noninjured plaintiffs to bring UCL actions, applied to this case; although the purchaser was entitled to amend his complaint to allege individual claims. In a footnote, the Court indicated that it was following the *Bivens* case over the Californians For Disability Rights case because Prop 64 modified a common law right. The Fourth District, Division Three Court of Appeal in *Benson v. Kwikset Corp.* (2005) 24 Cal.Rptr.3d 683, also held that Proposition 64, which limited parties entitled to bring actions under unfair competition and false advertising laws, applied retroactively to this case and that a remand was required to afford plaintiff opportunity to establish standing to sue.

The Second District Court of Appeals in *Branick v. Downey Sav. and Loan Ass'n* (2005) 24 Cal.Rptr.3d 406, has also held that Proposition 64, which eliminated uninjured private plaintiffs' rights to bring actions under unfair competition and false advertising laws, applied retroactively, although a remand was required to determine whether to grant plaintiffs leave to amend.

OF ADDITIONAL INTEREST:

In *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 102 P.3d 268, 22 Cal.Rptr.3d 352, the California Supreme Court held that the economic loss rule does not bar tort action for intentional misrepresentation or fraud in performance of contract. Robinson purchased thousands of "sprag clutches" from Dana to build its helicopters. The federal government requires aircraft manufacturers such as Robinson to produce its helicopters to certain specifications. From 1996 to 1997, Dana changed the specifications of the sprag clutches it sold to Robinson. Dana did not inform Robinson of the change but provided false certificates of conformance. As a result, the failure rate of the clutches increased dramatically. No one was injured due to the failures, but

Robinson spent \$1.5 million to replace the clutches. A jury awarded Robinson \$1.5 million in compensatory damages and \$6 million in punitive damages. The California Court of Appeal held that the punitive damages award could not stand. The California Supreme Court held that that economic loss rule did not bar manufacturer's fraud and intentional misrepresentation claims based on supplier's provision of false certificates of conformance. The economic loss rule provides that a purchaser can recover only in contract for purely economic loss that does not lead personal injury or physical damage to other property. The Court of Appeal struck the punitive damages after finding that Robinson could not recover in tort for its purely economic losses. However, Robinson had an independent action based in tort. Dana's issuance of false certificates of conformance was a tort that was independent of its breach of contract. Dana's affirmative misrepresentations exposed Robinson to liability for personal damages independent of its economic losses. Thus, the economic loss rule did not apply.

In *Lewis Jorge Const. Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 22 Cal.Rptr.3d 340, Lewis Jorge was awarded a contract by the Pomona Unified School District to perform certain construction work. Eventually, the school district terminated the contract with Lewis Jorge and caused the contractor's surety to complete its work. The contractor brought breach of contract action against school district and its employee after construction contract was terminated when project was not timely completed. Lewis Jorge in turn provided evidence at its trial that the termination by the district caused it to lose bonding capacity, projecting that it had lost \$95 million in gross revenue as a result of its impaired bonding capacity. The jury returned a verdict that included \$3,148,197 in lost profits because of impaired bonding capacity. The Los Angeles County Superior Court entered judgment awarding contractor damages including lost profits for prospective contracts it never won because of impaired bonding capacity suffered as a result of the termination of the contract

with district. District and employee appealed. The Court of Appeal affirmed in part and reversed in part, and the Supreme Court granted district's petition for review. The California Supreme Court affirmed holding that (1) lost profits contractor may have earned on future projects were not recoverable as general damages, and (2) lost profits were not recoverable as special damages.

In *C.I.R. v. Banks*, ___ U.S. ___ 125 S.Ct. 826 (2005), the United States Supreme Court held that a litigant's taxable income includes attorney's contingent-fee. John Banks obtained a \$464,000 settlement from his employer in a discrimination case. Banks paid his attorney \$150,000 from this amount pursuant to their contingent fee agreement. Banks did not include the settlement as income in his tax return. The Commissioner of the Internal Revenue Service issued Banks a notice of deficiency. The Tax Court held that the \$150,000 Banks paid his attorney must be included in Banks's gross income. The 6th U.S. Circuit Court of Appeals reversed. The 9th U.S. Circuit Court of Appeals, in a different case, reached a similar conclusion, finding that an Oregon law which grants attorneys a superior lien in the contingent-fee portion of any recovery does not operate as an anticipatory assignment. The U.S. Supreme Court reversed holding that when litigant's recovery constitutes taxable income, such income includes portion of recovery paid to litigant's attorney as contingent fee. The anticipatory assignment doctrine is intended to prevent taxpayers from avoiding taxation through arrangements designed to prevent income, when paid, from vesting in the person who earned it. The key question is whether or not the clients retained control over their income-generating assets—the cases. In the context of litigation, clients have ultimate control over their cases and although the taxpayers diverted some of the income to their attorneys, they realized a benefit from doing so. As long as the fundamental principal-agent character of the attorney-client relationship remains unchanged, the portion of a money judgment paid to an attorney is not excludable from the client's gross income.

SDDL Brown Bag Series, March:**Something Old,
Something New,
What Your
Spinal Expert Can Do**

By Eydith Kaufman, *The Roth Law Firm*

On February 28, 2005, SDDL held a great Brown Bag MCLE on the Forensic Use of X-rays, CT scans, and MRIs in Civil Litigation. This series was part two,

addressing spinal injuries, and the speaker, Dr. John Hesselink, had previously presented part one on brain injuries. Dr. Hesselink, a Neuroradiologist, focused on how to read films and interpret whether an injury is old or new, traumatic or degenerative. The one hour presentation featured plenty of real films which were analyzed and which really gave me an appreciation for the experts who can read them.

Dr. Hesselink explained that typically x-rays are used to show fractures and degenerative disease, while CT scans show fractures, and MRI scans are good for ligaments and other structures, such as nerve roots and spinal elements. There are two views for the MRI, T1, which provides a good view, and T2, which will light up the central spinal fluid and can be particularly helpful when there is a pushing disc. Dr. Hesselink cautioned that while the spinal pathology is much simpler than the brain, it is much harder to see, which he proved by showing us actual films and then pointing out the injuries.

Dr. Hesselink provided some general guidelines for determining whether an injury is new and/or traumatic. For instance, newer injuries tend to be fractures with sharp edges, ligamentous disruption, facet dislocation, anular tear, disk extrusion, or hemorrhage. However, if a disk extrusion or herniated disk shows up dark on a film, it could mean it has been there for a while. Anular tears consist of concentric tears, radial tears and transverse tears. Out of the three, usually only a radial tear is from trauma, and transverse and concentric are typically from degeneration.

Examples of what are more likely to be chronic or degenerative conditions include osteophytes/bone spurs, osteoarthritis, disk degeneration (such as bulging, disk space narrowing or desiccation), calcification or sclerosis, congenital anomalies, and a disk fragment. Again, the contrast material is helpful to show if a disk fragment is new or old, as the periphery of the disk will be enhanced when the injury is older. Stress fractures are linked to childhood and usually do not happen from trauma.

Interestingly, Dr. Hesselink stated that nerves around a disk can cause pain even if the nerves are not being compressed. For instance, in sciatica, there may be pain even when the nerves around the problem disk are fine, as the fibers in the spine can get "mixed up". Also, some people with severe disk problems may not have any symptoms. Thus, it is important to match the clinical symptoms with the radiology reports. This mixing of signals can be helpful, though, such as in severe cases, when spinal pulsation is used to stimulate the spinal cord and "confuse" the patient's brain, making it forget about the spinal pain.

If there is a real question of causation, Dr. Hesselink opined that conducting a bone scan will clarify if the injury is old or new. When a bone scan is conducted, a recent injury will show up as "hot". A new injury will stay hot for several weeks after the injury.

So, despite the fact that I still have more chance of seeing Elvis in an MRI scan than spotting an actual spinal injury, I did learn the lingo and the essential points for dealing with an expert radiologist, such as making sure the right films are taken, analyzing the likelihood the injury is chronic or degenerative, and making sure the symptoms match the film.



L to R: Jack Sleeth, Steve Polito, Scott Barber, Shari Weintraub, John Farmer, Martha Dorsey, Kelly Boruszewski, Tony Case, Denny Aiken and Jay Bulger.
Absent: Alan Greenberg

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Membership Information

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Membership dues are: \$ 90 for attorneys in practice less than one year and \$120 for attorneys in practice more than one year. Applications are available on the web at www.sddl.org.

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense attorneys, judges and persons allied with the profession as suppliers of goods or services.

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We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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EXTRA!!! Member News EXTRA!!!



SDDL Board member **Kelly Boruszewski** recently joined member firm Shewry & Van Dyke. Kelly will practice in the areas of employment law, personal injury, product liability and insurance defense work.



Tyson & Mendes has added **Tina Stanley** as an associate to their La Jolla office. Ms. Stanley is a 2004 graduate of USD Law School where she was Executive Editor of the International Law Journal. She will practice in the fields of general casualty and insurance coverage. Additionally, the firm is pleased to announce that Pierre Smith has joined the firm as an associate. Mr. Smith attended the University of Massachusetts at Amherst for his undergraduate work and graduated from the University of San Diego School of Law in 2002. His work will focus on the defense of contractors and material suppliers in construction defect cases.



On February 1st SDDL Board member **Alan E. Greenberg** opened his own office which is located at One America Plaza, 600 West Broadway, 7th Floor, San Diego, CA 92101. Tel: 619-744-7067. Fax: 619-232-3517. alangreenberg@sbcglobal.net.



L. Michael Hall and **Andres T. Carnahan** have joined White & Oliver as associates. Andres received his B.A. from the University of California, San Diego and his J.D. from Loyola Law School, Los Angeles. While in law school, he was a member of the Loyola of Los Angeles Entertainment Law Review and he received a Beverly Hills Bar Foundation Scholarship Award.



Michael received his B.A. from the University of Chicago and his J.D. from the University of San Diego. His practice areas include business, personal injury, and product liability litigation.



Farmer & Case is pleased to announce that **Joseph C. Scott** has recently joined the firm as an associate in its San Diego office.

Fredrickson, Mazeika & Grant, LLP, is pleased to announce the opening of its newest Northern California office, located in Roseville and that **Kara B. Persson**, **Jae K. Park**, and **Deborah A. Correll** have joined the firm as associates.

Ms. Persson, a graduate of Princeton University and U.C.L.A. Law School, was admitted to the California bar in 2000. She was an associate at O'Melveny & Myers, LLP, and then a law clerk to the Honorable Rudi M. Brewster, U.S. District Court for the Southern District of California, before spending two and a half years as a trial lawyer at Federal Defenders of San Diego. Kara will be specializing in insurance defense, construction defect, and personal injury.

Mr. Park, graduated from U.C.L.A. and U.S.D. Law School. At U.S.D., he served as Comments Editor of the San Diego Law Review, and was active in the Asian Pacific American Law Students Association. Mr. Park also worked as a law clerk at Gateway, Inc. during law school. His practice will include insurance defense, personal injury, construction defect, and business litigation.

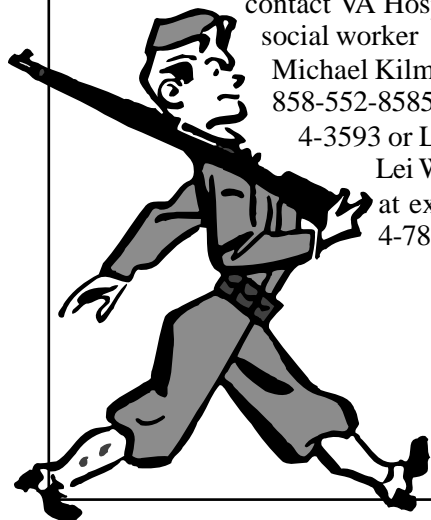
Ms. Correll is officed in Roseville, California. A graduate of the University of Hawaii at Manoa (undergraduate) and University of Santa Clara Law School, Ms. Correll has been practicing law in California since 1984. In the interim she was staff counsel with Farmers Insurance, and was a partner in her own law firms, Pederson & Correll and Correll & Associates. Ms. Correll will

VA Contribution

By: Constantine D. Buzunis, Neil Dymott
Brown Frank & Harrison

SDDL not only provides valuable services and benefits to its members, it is involved in charitable purposes in the community. Being a good neighbor and improving the image of attorneys is an important aspect of SDDL's function. In the past, SDDL has raised funds in support of The Juvenile Diabetes Research Foundation, The San Diego Police Foundation and recently gave a \$2,000.00 donation to the Veterans Administration Hospital in La Jolla for the specific benefit of approximately 300 military service personnel in rehabilitation treatment there as a result of serious injuries received in the ongoing conflicts in Afghanistan (Operation Enduring Freedom) and Iraq (Operation Iraqi Freedom). The funds will go to assist these individuals with their personal needs and expenses many of which are not covered by the government. Regardless of anyone's viewpoint on these conflicts, there should be no question that we should do what we can to support our military men and women who have placed themselves in harms way at the direction of the United States Government. This contribution by SDDL will hopefully send a message of appreciation, support and encouragement to these brave men and women and cause others to follow our lead and contribute to their support. Anyone interested in making a donation should

contact VA Hospital
social worker
Michael Kilmer at
858-552-8585, ext
4-3593 or Lore
Lei Winn
at ext
4-7819.



Member News

continue to represent the interests of insureds in the areas of general liability, automobile liability, products liability, and construction defect.



Koeller, Nebeker, Carlson & Haluck have added **Danielle Moore, Robert Michael Augst and Anita Tassviri** as associates.



Danielle received her B.A. in Political Science and Minor in Natural Science, with Honors, from the University of Southern California and her J.D. from the George Washington University Law School in Washington D.C. in 2004. She will focus her practice on the defense of developers in construction defect matters.

Robert (Bobby) received his B.S. in Business Administration from the University of Colorado and his J.D. Magna Cum Laude from the University of San Diego in 2004. His practice will focus on the defense of developers in construction defect matters.



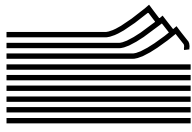
Anita received her B.A. from University of California Los Angeles and her J.D. from the University of San Diego in 2002. She is admitted to the State Bars of Nevada and California. Her practice focuses on the defense of developers in construction defect matters.

Save the Date!

San Diego Defense Lawyers 2005 Juvenile
Diabetes Research Foundation Benefit

- June 10, 2005 at THE AULD COURSE
- Shotgun start at 12:30 p.m.
- Bar-B-Que Dinner
and Awards at 6:00 p.m.
- Come one, come all!
Join us for dinner if you don't golf.





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