The Update

Winter 2005 - Volume 8, Issue 7

San Diego Defense Lawyers

In This Issue

The Bottom Line:

Case Title: Carmen Contreras v. Jorge Pelayo-Garcia, M.D.

Case No: GIC 830526

Judge: Honorable Ronald L. Styn

Plaintiff's Counsel: David C. Sullivan, Esq., GOLPER, SULLIVAN & RIVERA

Defendant's Counsel: Daniel S. Belsky, Esq. and Carolyn M. Balfour, Esq., Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice/Alleged failure to diagnose colon cancer

Settlement Demand: Plaintiff initially sent defendant a CCP §998 offer for $99,999.00 and within two weeks of trial, sent another CCP §998 offer for $50,000.

Settlement Offer: Defendant sent plaintiff a CCP §998 offer for zero dollars and a waiver of costs. In the week before trial, defendant offered plaintiff the opportunity to dismiss the claim for a waiver of costs.

Trial Type: Jury

Trial Length: 7 ½ days

Verdict: Defense (12-0)

Case Title: Nelson v. Pickford Realty Ltd. dba Prudential California Realty

Case Number: 03CC08719

Judge: Honorable Dennis Choate (Santa Ana)

Counsel for Plaintiff(s): Brent Ayscough, Esq. of Ayscough & Marar

Counsel for Defendant(s): Suzanne Smigliani, Esq. of Maxie Rheinheimer Stephens & Vrevich

Type of Incident/Causes of Action: Real estate non-disclosure; fraud-concealment; intentional and negligent misrepresentation; negligence.

Settlement Demand/Offer: Plaintiffs offered $330,000; Defendants offered $30,000; Plaintiffs sought $500,000 plus punitives at trial.

Trial Type: Jury

Trial Length: 12 days

Verdict: Defense

Back to the Future

John Farmer

This year's Board of Directors has spent considerable time and effort evaluating the responsiveness of SDDL to its membership. We have "taken the temperature" of the membership through e-mail and written surveys, in an effort to determine what you think about the organization - what it does well and the ways it might improve. We received a number of thoughtful responses, which have served to guide us in planning for some changes in the way we do things to make the organization more relevant and meaningful to you, our members.

We have heard strong messages and themes in several areas, and we are listening. In an effort to evaluate these, I thought it would be a useful exercise to compare these to the ideas and precepts on which SDDL was founded. This led me to a recent interview of our first Board President, Charles R. Grebing (1985).

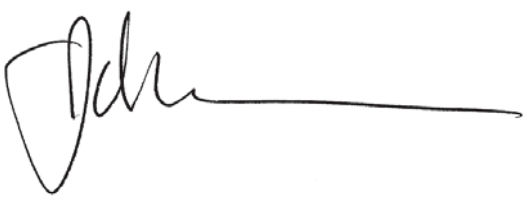
Charlie who, along with his firm members, has remained a supporting member of SDDL throughout the years, was kind enough to share his thoughts and recollections. He began by indicating that the group was formed to provide a local forum or organization responsive to the needs and interest of San Diego civil defense lawyers and, in particular, young and upcoming lawyers. To that end, one goal was to provide regular, meaningful seminars to members focusing on the "how to's" that would serve to provide practical information to defense associates hungry to learn how to be solid defense practitioners. Another goal was to serve all members with a "deposition bank" of transcripts from opposing experts. In addition, the fledgling organization strove to enhance collegiality and camaraderie amongst its members. The focus of this was the Installation Dinner, initially held at the La Jolla Country Club. The event was short on speeches and long on fun, recalls Charlie.

Interestingly, many of these same themes emerged from your survey comments:

- Make SDDL more relevant to younger members
- More and better MCLE offerings
- Make the Installation Dinner a worthwhile, fun and memorable event

This Board is listening to you. We intend to make the organization worthwhile to its up and coming members. We will continue to focus on CLE offerings of practical utility to the majority of its members - those associates and young partners who are actively working cases from beginning to end. We are in the process of developing an online opposing expert witness deposition bank, accessible with a click of the mouse. And this year will bring the first steps in dramatic changes to the Installation Dinner to make it the fun and entertaining social event as it was originally conceived. Please join us there in January and see how we are moving to the "future" by appreciating and looking "back" to the past.

Finally, speaking of moving forward, Elections for new SDDL Board Members is right around the corner. Several openings will be available. I would strongly encourage those of you who have the interest and feel they can make a difference in keeping the organization in tune with its members and move it forward, including younger members, to run for the Board.



Confusion Created by Inconsistent Amendments by the Legislature

By Rachael A. Campbell, Esq. of Deuprey & Associates, LLP[1]

Can Civil Code Section 3291 and Code of Civil Procedure Section 998 Apply In Contractual Arbitration Where A Party "Beats" Their Code of Civil Procedure Section 998 Offer But Has Contractually Agreed To Bear His Or Her Own Costs And Fees?

Confusion has been created by the fact that the Legislature specifically amended Code of Civil Procedure Section 998(d) ("Section 998")[2] Section 998 provides, in relevant part:

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs to apply to arbitration in 1997, but did not similarly amend Civil Code Section 3291 ("Section 3291")[3] to specifically apply to arbitration. Prevailing parties have a convincing argument that they are entitled to expert fees and costs pursuant to Section 998 (*absent* contractual language excepting Section 998) in a case where they "beat" their 998 offer, but does it necessarily follow that plaintiff is entitled to prejudgment interest after an arbitration award that exceeds plaintiff's 998 offer since Section 3291 is silent on whether or not it applies to arbitration?

Further, how should Section 998 be applied where the arbitration agreement expressly provides that each party bears its own fees and costs and the arbitration panel (or the Superior Court, on a motion to confirm the arbitration award) is asked to award expert witness fees and costs anyway? Prevailing parties would argue that the Arbitration Agreement contract cannot "trump" the Legislature's intent, but the well-settled principle of law that the parties' agreement governs the details of a contractual arbitration cannot be ignored. (Caro v. Smith (1997) 59 Cal.App.4th 725, 737.) These issues are illustrated by the following hypothetical.

Hypothetical:
Emma Payne v. Dr. X

Ms. Payne consults Dr. X, and prior to Dr. X providing care and treatment to Ms. Payne, both parties expressly agree in a signed, written Arbitration Agreement (in 2001, after Section 998 was amended to apply to arbitration) that each party would bear its own fees and costs of the arbitration. The Arbitration Agreement contains a clause that provides:

Each party to the arbitration shall pay such party's pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees, or other expenses incurred by a party for such party's own benefit.

Ms. Payne later sues Dr. X for medical malpractice. Dr. X successfully asserts that the Arbitration Agreement controls and the parties proceed to arbitrate the dispute. Ms. Payne serves a Section 998 offer on Dr. X, which he does not accept. After an arbitration award in her favor, Ms. Payne requests, (in her motion to confirm the award with the Superior Court) that she be awarded prejudgment interest pursuant to Section 3291 and expert witness fees and costs pursuant to Section 998.[4]

Dr. X opposes the requests based on the fact that the parties agreed to bear its own fees and other expenses of the arbitration and that Ms. Payne's request for expert fees and costs pursuant to Section 998 should be denied on that ground. Dr. X argues that it is well-settled in California that "Private arbitration occurs only pursuant to agreement, and it is the agreement which determines the details of the process." (Caro, supra, 59 Cal.App.4th at 737.) Dr. X further argues that the appellate authority on these issues is scant and unclear, and that since the Legislature did not see fit to amend Section 3291 when it amended Section 998, Ms. Payne's request for prejudgment interest should also be denied.

Ms. Payne argues that the Arbitration Agreement cannot trump the Legislature's intent that Section 998 applies to arbitration, and that it necessarily follows that Section 3291 applies to arbitration as well. Ms. Payne further argues that the 1997 amendment reflects a deep-seated concern by the Legislature that settlement should be promoted in arbitration by Section 998 just as it is in a case disposed of in the Superior Court. Ms. Payne asserts her entitlement to prejudgment interest and expert fees (based on non-acceptance of a Section 998 offer in an arbitration proceeding versus traditional litigation) was resolved by the Court of Appeal for the Second Appellate District, in Weinberg v. Safeco Ins. Co. of America (2004) 114 Cal.App.4th 1075.

Continued on page 4

Confusion Created by Inconsistent Amendments

Continued from page 3

Dr. X points out that the Weinberg case did not involve contractual language such as that present in the Arbitration Agreement between Ms. Payne and Dr. X, which expressly states that each party bears their own respective costs of the Arbitration.

Weinberg involved a mandated arbitration pursuant to the uninsured motorist statutes. There, the plaintiff was awarded damages by the arbitrator that exceeded his Section 998 offer. Plaintiff then sought to confirm the award in a money judgment. In its response to the petition to confirm, defendant Safeco argued that awards in UM/UIM arbitrations are not liability assessments against the insurer, and therefore cannot be confirmed into money judgments. (Id. at 1081.) At the hearing, the judge stated that he would confirm the award, because he lacked jurisdiction to correct or vacate the award, since Safeco had not asked the court to correct or vacate the award. (Id.)

The Court of Appeal in Weinberg then discussed the issue of the trial court's award of prejudgment interest and costs, finding that although the arbitrator had not determined that plaintiff was entitled to costs, he had not determined that plaintiff was **not** entitled to costs, and therefore, plaintiff was entitled to prejudgment interest. (Id. at 1085.) Dr. X argues that the Court did not explain its reasoning as to why plaintiff was entitled to prejudgment interest, and gave trial courts no guidance whatsoever in reconciling the inconsistency in the Legislature's failure to amend Section 3291 when it amended Section 998 to apply to arbitration.

Dr. X further argues that rules of statutory construction require that the Court give "the statute's words their plain, commonsense meaning. . . ." (Cal. School Employees Assn. v. Governing Bd. (2004) 124 Cal.App.4th 574, 583.) Civil Code Section 3291 makes no mention of its application to arbitration. Dr. X further argues that it is also well-established that "when the Legislature amends a statute without altering portions of the provision that have been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (Id. at 587.) Since Section 3291 has previously been construed *not* to apply to a "true," (or contractual) arbitration, (Parker v. Babcock (1995) 37 Cal.App.4th 1682, 1687) and the Legislature subsequently amended Section 998 but not Section 3291 to apply to arbitration, it did not intend Section 3291 to apply to a "true" (or contractual) arbitration.

Dr. X argues that the Court should not permit Ms. Payne to circumvent the Legislature's intent by awarding prejudgment interest on an arbitration award that arises from contractual arbitration, where the parties "expect that their dispute will be resolved without necessity for any contact with the courts," unlike judicial arbitration. (Parker, supra, 37 Cal.App.4th at 1687.)

Dr. X further argues that Ms. Payne is not entitled to expert witness fees and costs, since she expressly agreed to bear her own costs and arbitrator fees, win or lose. In contractual arbitration, the arbitration agreement governs the process. (Caro, supra, 59 Cal.App.4th at 737.) There, the Court of Appeal affirmed the trial court's award of prejudgment interest based on plaintiff's recovery of a more favorable judgment than her pretrial statutory offer. (Id. at 730-731.)

However, the Court noted that the arbitrator's award was not a judgment within the meaning of Code of Civil Procedure Section 3291, and that it did not intend to "obliterate the distinction between true (or contractual) arbitration and judicial arbitration." The Court of Appeal stated that "the critical question is: To what did the parties agree? . . . Private arbitration occurs only pursuant to agreement, and it is the agreement which determines the details of the process." (Id. at 737.) The Caro Court noted that "Caro does not seek to recover costs she incurred *in* arbitration. Unless the parties to a true arbitration otherwise agree, [t]he Legislature has... established a policy that arbitration costs are to be paid by the party incurring them. [Citations.] . . . [T]he stipulation to arbitrate provided that the costs incurred for the arbitrator services and time are to be shared evenly between the parties." (Id. at 738, fn. 7, citing Austin v. Allstate Ins. Co. (1993) 16 Cal.App.4th 1812, 1817 [italics in original].) Dr. X further argues that the principle established by the Legislature that each side bears its own arbitration costs is well-established by case law. [5]

How should the Superior Court rule? Conclusion And Recommendations

On one hand, it can be argued that Ms. Payne should not be permitted to recover expert fees and costs, or prejudgment interest. Allowing parties to expressly waive fees and costs regardless of the statutory basis enabling parties to make any claims for such fees and costs (Section 998 or otherwise) supports the Legislature's policy to promote arbitration as an *alternative* to civil actions, which congest the Superior Court. Allowing parties to waive these fees and cost penalties makes arbitration a more efficient and inexpensive alternative to a Superior Court case. The Legislature has expressed its intent in general that each side bear its own costs in Code of Civil Procedure Section 1284.2, and the Legislature has enabled parties electing arbitration to waive the fundamental, Constitutional right to a jury trial. Thus, to find the contract governs these issues is within the strong line of policy supporting arbitration. With regard to prejudgment interest, the Legislature's failure to amend Section 3291 when it amended Section 998 supports the position that 3291 does not apply to arbitration.

Continued on page 5

Confusion Created by Inconsistent Amendments

Continued from page 4

On the other hand, Ms. Payne's argument that the Arbitration Agreement cannot trump the Legislature's intent that Section 998 applies to arbitration, and that it necessarily follows that Section 3291 applies to arbitration also has support. In 1997 the Legislature saw fit to amend Section 998 so that settlement would be promoted in arbitration by Section 998 just as it is in a case disposed of in the Superior Court. In addition, Ms. Payne's entitlement to prejudgment interest and expert fees (based on non-acceptance of a 998 offer in an arbitration proceeding versus traditional litigation) is arguably supported by the Court of Appeal for the Second Appellate District, in Weinberg. Finally, Ms. Payne's position is supported by the fact that in drafting the arbitration contract at issue Section 998 is not expressly excluded.

Given the lack of clear appellate authority, the inconsistencies in the applicable statutes and the competing public policies, future drafting of arbitration agreements should include an express provision excluding Section 998, if it is the drafter's intent to make arbitration proceedings less expensive by an express exclusion of the Section 998 penalties for both sides. In the meantime, until and unless the Court of Appeal sees fit to clarify these issues, they are best resolved on a case by case basis, with an in depth examination of the intention of the parties to the specific arbitration contract at issue.

(Footnotes)

[1] Deuprey & Associates, LLP's practice is dedicated to civil litigation and family law, including: professional liability (medical and legal); insurance; appellate; arbitration and mediation; business litigation; construction defect; entertainment law; and other related areas.

[3] Section 3291 provides, in relevant part: If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.

[4] For purposes of this article, it is assumed that the Court will deny Dr. X's argument that it lacks jurisdiction to change the award, because where parties agree that their dispute will be resolved by binding arbitration, judicial intervention is limited to reviewing the award to see if statutory grounds for vacating or correcting the award exist. (Corona v. Amherst Partners (2003) 107 Cal.App.4th 701, 706.) It is also assumed that the Court will reject Dr. X's argument that since the Superior Court was not the hearing officer, it cannot possibly exercise its discretion to determine the good faith and reasonableness of an offer to compromise as required by California law. (Jones v. Dumrichob (1998) 63 Cal.App.4th 1258, 1264.)

[5] Code of Civil Procedure section 1284.2 sets forth the legislative policy of California that arbitration costs are to be borne by the party incurring them, unless the arbitration agreement provides otherwise. (Austin, supra, 16 Cal.App.4th at 1815.) Section 1286.2 provides: "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit."

The Courts have continued a mostly favorable view of interpreting the law of insurance contracts.

Insurance Law, by Jim Roth

STATUTORY AMENDMENT EXTENDING LIMITATIONS PERIOD FROM ONE YEAR TO TWO YEARS FOR CLAIM ON UNINSURED MOTORIST COVERAGE DID NOT APPLY RETROACTIVELY TO CLAIM BASED ON ACCIDENT OCCURRING BEFORE STATUTE'S EFFECTIVE DATE. In Bullard v. California State Automobile Association 129 Cal.App.4th 211, 28 Cal.Rptr.3d 225 (2005) the California Court of Appeal for the Third Appellate District affirmed a trial court decision rejecting the insureds' petition to compel CSAA to arbitrate a claim under the insureds' uninsured motorist policy, concluding, among other things, that the petition was untimely under the provisions of Insurance Code section 11580.2 in effect at the time of the accident. The court ruled that a subsequent amendment to section 11580.2 expanding the limitations period did not apply retroactively. The court noted that a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. No such express or implied intent of retroactivity applied to the statute at issue. While an "A" for effort applies, it is what it is.

HEALTH PLAN SUBSCRIBER COULD NOT ASSERT AN ERISA CLAIM AGAINST THE HMO FOR A THIRD-PARTY SERVICE PROVIDER'S ERRONEOUS BILLS. In Cohen v. Health Net of California, Inc. (2005)129 Cal.App.4th 841, 29 Cal.Rptr.3d 46, Cohen sued his health insurer asserting various claims including fraud, unfair business practices, intentional infliction of emotional distress, insurance bad faith, and negligence, arising from his receipt of balance billing statements and dunning notices after emergency hospital medical services were rendered to Cohen's son, for which services Cohen owed only a copayment under his employee health plan. The California Court of Appeal for the Fourth Appellate District affirmed a trial court decision granting summary judgment in favor of the defendant HMO, holding that all of the claims asserted by Cohen against his health insurer were related to Cohen's employee benefit plan, and thus were preempted by ERISA. Doesn't everybody know that a state law cause of action that duplicates, supplements, or supplants the civil enforcement remedy provided by ERISA is preempted? That's rhetorical, don't answer.

LIABILITY INSURER HAD DUTY TO DEFEND INSURED MANUFACTURER OF LATEX USED IN CARPETS AGAINST CARPET COMPANY'S PRODUCT LIABILITY LAWSUIT THAT INVOLVED LATEX PRODUCTS SUPPLIED BOTH BY INSURED AND BY OTHER COMPANY THAT MERGED WITH INSURED, NOTWITHSTANDING "PREMISES AND OPERATIONS" EXCLUSION RELATING TO OTHER COMPANY AS HARM ALLEGED IN LAWSUIT RESULTED FROM COMPLETED AND DISTRIBUTED PRODUCTS AND THUS IMPLICATED ONLY POLICIES' "PRODUCTS-COMPLETED OPERATION" COVERAGE FOR WHICH EXCLUSION DID NOT APPLY. Did you get all of that? In Travelers Cas. and Surety Co. v. Employers Ins. of Wausau (2005) 130 Cal.App.4th 99, 29 Cal.Rptr.3d 609, the California Court of Appeal for the First Appellate District affirmed in part and reversed in part trial court rulings relating to products-completed operations coverage. Travelers insured R&D, a carpet manufacturer, from February 24, 1988 to February 24, 1989. R&D merged with Mydrin in August of 1990 and Mydrin was the surviving corporation. Wausau insured only Mydrin from October 1, 1990 to March 31, 1992. An action filed by Royalty alleged damages caused by defective latex carpet backing purchased from R&D during a business relationship with R&D from 1988 until October of 1989. An action filed by Western alleged damages from defective latex purchased from Mydrin from May 15, 1988 through January of 1992. Travelers defended the actions and Wausau did not. Travelers sued Wausau for contribution. The Royalty action alleged damages caused solely by products supplied by R&D before the merger with Mydrin. The Wausau policy exclusion for R&D products precluded any possibility of coverage for these claims and the trial court correctly entered judgment for Wausau on the Royalty claim. The Western complaint alleged that products distributed by Mydrin failed after distribution and caused damage in the hands of Western's customers during the Wausau policy period. The court concluded that these facts triggered Wausau's duty to defend. The Wausau policies excluded coverage for liability arising out of R&D products that had been distributed and for liability arising prior to completion of the product before it left the R&D premises. The court further concluded that there was no indication that Wausau intended to exclude every future act by Mydrin solely because it used the former R&D facility to manufacture latex.

BINDING ARBITRATION CLAUSE IN DISABILITY POLICY WAS NOT DECEPTIVE. In Boghos v. Certain Underwriters at Lloyd's of London, (2005) 36 Cal.4th 495, the Supreme Court considered the effect and enforceability of an arbitration clause in a contract for disability insurance. The Supreme Court reversed the lower court and remanded the case for further proceedings. The insured had contended that the arbitration clause was unenforceable because it required him to pay costs he would not have had to pay were he suing in court. The court, in reaching its decision that the insured was

Continued on page 7

Insurance Law

Continued from page 6

required to arbitrate, stated that "[a] reasonable person reading the application and policy would understand that it would be required to arbitrate all disputes arising under the policy" (i.e. contract and tort claims).

INSURER WAS ENTITLED TO INTERVENE TO PROTECT ITS INTERESTS FOLLOWING PARTIAL PAYMENT TO INSUREDS FOR LOSS. In Hodge v. Kirkpatrick Development, Inc., (2005) 130 Cal.App.4TH 540, the Fourth District Court of Appeal in Orange County reversed the trial court's ruling by Judge C. Robert Jamison, that State Farm could not intervene in a construction defect action brought by its insured against third party tortfeasors. The appellate court determined that because State Farm had obtained partial subrogation rights against third parties by paying a portion of its insured's claims for property damage to their house, it had a statutory right to intervene in the construction defect action under C.C.P. § 387(b). State Farm issued the Hodges a homeowners insurance policy (we'll call it the "Policy") covering certain risks to their house in Laguna Beach. The Policy granted State Farm subrogation rights against third parties who cause covered losses. In December 2002, the Hodges submitted a claim to State Farm under the Policy for water and mold damage to their house allegedly caused by the negligence of third parties. The Hodges contended the cost to repair the water damage was about $685,000. The Hodges made a total demand on State Farm for water and mold damage for $1,699,680, the Policy's limits. State Farm denied the Hodges' claim for mold damage and paid the Hodges about $150,000 on the claim for water damage. In September 2003, the Hodges filed a construction defect lawsuit against the former owner, the developer, the general contractor, and one subcontractor who constructed the Hodges' house. The complaint alleged defendants caused the water and mold damage. In November 2003, the Hodges filed a complaint for bad faith against State Farm. State Farm moved for leave to intervene in the construction defect lawsuit to file a subrogation complaint. The trial court denied the motion, and State Farm appealed. Pursuant to C.C.P. § 387(b), a nonparty has a right to intervene in a pending action "if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties." The appellate court determined that State Farm, as a partially subrogated insurer, has an interest "relating to the property or transaction" that is the subject of the construction defect lawsuit. The court reasoned that under the doctrine of subrogation, "State Farm has stepped into the Hodges' shoes and, to the extent it has made payments under the Policy, has the same rights as the Hodges against the various defendants and tortfeasors in the construction defect lawsuit. As an insurance carrier with a right of partial subrogation, State Farm has a direct pecuniary interest in the Hodges' action against the allegedly responsible third parties."

INJURED EMPLOYEE OF INSURED WAS NOT AN "INSURED" UNDER AUTOMOBILE POLICY WHOSE COVERAGE WOULD HAVE OTHERWISE BEEN EXCLUDED BECAUSE EMPLOYEE WAS NOT OPERATING COMMERCIAL VEHICLE WHEN LOSS OCCURRED. In Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. (2005) 130 Cal.App.4th 890, the Second Appellate District Court of Appeal reversed the trial court's order granting summary judgment in favor of State Farm and Commercial Underwriters (we all refer to them as "CU"), finding that the operator of a cherry picker was not an insured and therefore an exclusion for bodily injury to an insured was not applicable. Llamas (the employee, not the animal we all remember from Dr. Dolittle) was injured when the bucket of a "cherry picker" in which he was riding fell. JMSD owned the cherry picker and the truck to which it was attached. Llamas filed suit against JMSD. Scottsdale issued a CGL and an excess policy to JMSD. State Farm issued an auto policy to JMSD. CU issued an excess auto policy to JMSD. The Llamas action settled for $1.375 million with Scottsdale paying $620,000, State Farm paying $655,000, and CU paying nothing. Scottsdale filed a declaratory relief action against State Farm and CU. The trial court ruled that Scottsdale's policy covered the accident and was primary. It reasoned that there was no coverage under the State Farm policy because Llamas was an insured under the policy and the accident fell within a policy exclusion for bodily injury to an insured and that the excess CU policy followed form. Scottsdale appealed. Scottsdale contended Llamas was not an insured because California Insurance Code § 11580.06(g) provides "The term 'use' when applied to a motor vehicle shall only mean "operating, maintaining, loading, or unloading a motor vehicle." Subdivision (f) states "operated by" or "when operating" describes the conduct of the person sitting directly behind the steering controls of the motor vehicle. The Court of Appeal held that subdivision (f) defines what constitutes the operation of a motor vehicle and is not restricted to situations where the terms "operated by" or "when operating" appear in the code. Thus, subdivision (f) applies to define "operating . . . a motor vehicle," which constitutes "use" of a motor vehicle within 11580.06(g). The Court of Appeal held that these terms applied to someone sitting directly behind the steering controls of the truck. Llamas was not, he was in the cherry picker.

NOTICE-PREJUDICE RULE, WHICH RELIEVES INSURED FROM FAILURE TO GIVE TIMELY NOTICE OF CLAIM UNLESS INSURER SHOWS PREJUDICE, DOES NOT APPLY GENERALLY TO MALPRACTICE "CLAIMS MADE AND REPORTED" INSURANCE POLICES, WHICH REQUIRE INSURED TO REPORT CLAIM WITHIN POLICY PERIOD; RATHER,

Continued on page 8

Insurance Law

Continued from page 7

INSUREDS MAY BE EQUITABLY EXCUSED FROM TIMELY REPORTING IN APPROPRIATE CASES. In Root v. American Equity Specialty Ins. Co., (2005) 130 Cal.App.4th 926, the Fourth District Court of Appeal in Orange County reversed the trial court's ruling by Judge James M. Brooks, concluding that the reporting requirement in a "claims made and reported" legal malpractice policy can be excused so that a claim reported to the insurer after the policy expired may be covered. The insured received possible notice of a claim at the very end of his policy period, i.e., a telephone call from a reporter inquiring of the insured's reaction to a suit filed against him. The insured dismissed it as a crank call. Immediately after the policy expired the insured became aware of the claim, after reading about the suit in a legal newspaper, and reported it to the insurer under the expired policy. The insured also reported the claim to his current insurer (different from the prior insurer.) The first insurer denied coverage because the claim was reported after the policy expired and the current insurer denied because the claim was made prior to the inception of the policy. The court agreed that a claim was made against the insured during the first insurer's policy period. However, the insured reported the claim to the first insurer only a "de minimis" time after the policy expired. Significantly, the insurer of the expiring policy did not offer the insured an opportunity to purchase an extended reporting endorsement. The reporting requirement was a condition, and not a condition precedent to coverage, that could be excused where equity required particularly in these circumstances where the insured was "whipsawed" by the two insurers. Since a triable issue of fact was presented whether the reporting requirement should be excused, the insurer's summary judgment was reversed. Although the court excused the reporting condition, it refused to apply a blanket "prejudice" requirement to claims made and reported policies, such that an insurer could only decline coverage for failure to report if it was prejudiced by the late notice. Nonetheless, the decision certainly blurs the line when late notice is grounds for denying coverage.

INSURED FAILED TO SHOW CONTRACT DAMAGES AGAINST ITS NON-DEFENDING INSURER FOR CLAIMS INSURED SETTLED WHEN SETTLEMENT AND COSTS WERE PAID FOR BY SEPARATE INSURER OF INSURED. In Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp., (2005) 130 Cal.App.4th 1078, the Fourth District Court of Appeal in Orange County affirmed the trial court's ruling by Judge David R. Chaffee, dismissing an insured's claims for breach of contract and bad faith because the insured failed to plead or prove any compensable loss. The insured homeowners association (which we all lovingly refer to as the "HOA") was sued by unit-owners over a dispute involving efforts to construct unit improvements. The HOA tendered the suit to Golden Eagle which issued a general liability policy providing $2 million in primary limits. The HOA also tendered to Federal which issued D&O policies providing $1 million in self-liquidating primary limits and $10 million in excess limits. Federal agreed to defend the HOA. Golden Eagle allegedly delayed in responding to the HOA's tender, but eventually agreed to defend under reservation. After the underlying plaintiffs filed an amended complaint, Golden Eagle withdrew from the defense, but nonetheless eventually paid $200,000 towards the HOA's defense costs. The HOA sued Golden Eagle for breach of contract and bad faith. It sought recovery of approximately $600,000 in defense costs paid by Federal. Federal subsequently paid $2 million to settle the underlying action on the HOA's behalf. The HOA then entered into an agreement with Federal under which it agreed to reimburse Federal for its defense and indemnity payments, but only from amounts recovered from Golden Eagle in the coverage lawsuit (which we'll call the "Post Settlement Agreement"). Golden Eagle filed a motion for summary judgment against the HOA in the coverage action contending that the HOA suffered no damages. The trial court concluded triable issues existed and denied the motion. The action was then transferred to another department for trial. During trial, the court generously suggested that the HOA amend its complaint to allege that it received Federal's claims through an assignment. The HOA in its unique wisdom declined to amend its complaint and at the conclusion of its case, the trial court granted Golden Eagle's motion for nonsuit. The court concluded that the HOA had no supportable damages as a matter of law and failed to allege or to prove an assignment of Federal's claims against Golden Eagle. Curiously, the HOA appealed. The appellate court affirmed the trial court's finding of no damages. It recognized that the HOA could not show that it suffered damages because the defense and indemnity payments alleged in its complaint had been paid for in full by insurance. It also rejected the HOA's reliance on the Post Settlement Agreement reasoning that "the mere fact that Federal and plaintiff agreed between themselves to characterize Federal's payments as a loan does not alter the legal effect of what occurred. [Golden Eagle's] alleged liability for breach of its contractual obligations was reduced to the extent both it and Federal paid the [underlying] litigation expenses, and by the amount Federal paid to settle that case." The appellate court also relied on the fact that the HOA had not alleged an assignment from Federal. It noted that even if an assignment had been alleged, that assignment could only be of Federal's equitable contribution claim against Golden Eagle and that such a claim was inconsistent with the breach of contract and bad faith claims asserted by the HOA.

Unreliable Opinions

The Expert Extrapolation Mirage

by Ronald E. Hood and John E. Cuttino

Experts often create illusions that they want others to perceive as reality. The illusion may be nothing more than a mirage based upon what they want you to believe is true. This article discusses the use of statistics to separate valid opinions based upon scientifically proven methods from those based upon assumptions and unfounded beliefs. The discipline of "statistics" is an underappreciated tool that can be used to analyze the validity of expert opinions. Statistics are very valuable and can be used to determine whether an opinion given by an expert is *probably* a correct opinion.

How many times have you entered an appearance in a case after one or more expert witnesses have already opined that defects are present in a building; your client is responsible for plaintiff's damages; no depositions have been taken; and you are scheduled for mediation? For instance, a plaintiff brings suit against a general contractor alleging water infiltration into a newly constructed hotel. The general contractor files third-party actions against the subcontractors on the project. The EIFS application subcontractor then hires an expert to test a window and determines it is defective and is the cause of water infiltration and damages. This same expert then prepares a report stating that all the water infiltration throughout the hotel is a result of defects in the design of the windows. The window manufacturer is then named as an additional third-party defendant. You are retained to represent the window manufacturer. Mediation has been set for three weeks from the time that you filed an answer and there is no time to perform your own testing. Problem: What can you do to defend the attacks against your client's products? Solution: Prove the expert's opinions are not reliable through the use of *statistics*.

Ronald E. Hood is a partner with Cokinos, Bosien & Young in Houston. He practices primarily in the areas of construction, tort and commercial litigation. John E. Cuttino is a shareholder at Turner, Padget, Graham, and Laney P.A. in Columbia, South Carolina. His practice emphasis is on the defense of products liability, major personal injury and construction defect cases. Both authors are members of DRI's Construction Law Committee, with Mr. Hood currently leading its Exterior Cladding Practice Group.

Destructive Testing and Extrapolation

Is an expert witness' opinion always reliable when it is based upon destructive testing? In most construction defect lawsuits, the parties will retain expert witnesses to conduct destructive testing and record any defective conditions found. Destructive testing is expensive and disruptive to occupants and, therefore, usually limited to the areas of the building that show the greatest damage. Expert witnesses conducting this type of testing regularly take the findings from limited samplings of locations observed and extrapolate the same condition to the entire property. Once construction defects are identified, the expert reports the defects observed in the tested areas exist throughout the entire property. This article attempts to assist in determining whether this type of testing and extrapolation yields reliable results.

An interesting application of the use of statistics to invalidate an expert's opinion can be found in the opinion in *Soldo v. Sandoz*, which arose out of a products liability claim. *Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F.Supp.2d 434 (W.D. Pa. 2003). In that case, a mother brought a products liability action alleging that a manufacturer's drug caused her to have a stroke. *Id.* The court held that in a products liability action alleging that the plaintiff was injured by a drug manufacturer's product, opinions of the plaintiff's expert witnesses must be based upon a reasonable degree of certainty. *Id.* at 525, 571–72. In its analysis, the court asserted that "[a] particular epidemiologic study's measurement of relative risk had no meaning by itself, but must be interpreted in conjunction with its statistical degree of confidence." *Id.* at 449. The court found the medical expert's hypothesis was not based on statistically significant epidemiologic studies showing that the use of the drug increased the risk of postpartum intracerebral hemorrhage or postpartum stroke of any kind. *Id.*

The United States Supreme Court has adopted the requirement that expert witnesses' opinions be statistically reliable. In *General Elec. Co. v. Joiner*, the plaintiff worked as an electrician. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997). This job required him to work with and around electrical transformers. *Id.* Plaintiff was exposed to fluid in transformers that were contaminated with polychlorinated biphenyls (PCBs). *Id.* Plaintiff was diagnosed with cancer and then brought suit against General Electric Company and Westinghouse Company, who manufactured the transformers, and Monsanto Company, who manufactured the PCBs. *Id.* Plaintiff alleged a causal connection between his development of cancer and his exposure to the

PCBs. *Id.* at 139–40. The Federal District Court for the Northern District of Georgia granted summary judgment to the defendants because, in part, the testimony of the plaintiff's experts failed to show there was a link between the exposure to PCBs and the form of cancer developed by plaintiff. *Id.* at 140. The Court of Appeals for the Eleventh Circuit reversed the District Court. *Id.*

The Supreme Court granted the defendants' petition for writ of *certiorari* and held that the district court did not abuse its discretion in finding that the plaintiff's experts' opinions, which had indicated an increase in the incidence of cancer among workers exposed to PCBs, were not statistically significant. *Id.* at 141, 146–47. In its opinion, the Court acknowledged that trained experts commonly extrapolate from existing data, but found that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* [he himself said it] of the expert." *Id.* at 146. Courts may conclude that there is simply too great an analytical gap between the existing relevant data and an expert witness's opinion. *Id.* This same reasoning was previously applied in *Turpin v. Merrell Dow, Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992), *cert. denied*, 506 U.S. 826 (1992).

How Reliable Is an Expert's Opinion?

A party offering expert testimony bears the burden to prove that the witness is qualified. Federal Rules of Evidence 702 requires an expert witness to be qualified and his or her opinions to be reliable. Courts have held that in determining whether an expert witness should be allowed to testify, it must also be examined whether the testimony is "helpful" to the finder of fact. For example, in *Quiet Tech. DC-8 v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003), the court noted "[A]lthough there is some overlap among the inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion… are distinct concepts…" In other words, an expert must make an effort to tie pertinent facts of the case to the scientific principles that are the subject of his testimony. *See Quiet Tech.*, 326 F.3d at 1341. The relevant inquiry, pursuant to Rule 702, is whether the expert's testimony took into account enough of the pertinent facts to be of assistance to the trier of fact on a fact in issue. *Id.* at 1347. (Note: as the focus of this article is on the reliability of expert testimony, relevancy of the testimony will not be addressed here.)

Even the opinions of a *qualified* expert must be reliable. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995). In determining whether an expert witness's opinion is reliable, the courts will generally consider the following:

- Whether there is a basis for the expert asserting a conclusion, *i.e.*, whether the expert witness's opinions are directly supported by the facts, connected to or tied to the underlying data;
- Whether the expert witness has excluded other possibilities that would contradict his/her explanation of events;
- Whether the expert can show why other explanations for the underlying facts are not at least as consistent with his/her own opinions;
- Whether the expert witness can show that what he/she believes could have happened actually did happen;
- Whether the specific methodology used by the expert witness to form his/her opinion is acceptable:
  - Is it the generally accepted methodology used within the industry or profession?
  - Whether other experts have used the same methods to determine the same type of issues;
  - Are there neutral treatises or commonly accepted professional periodicals that support the expert witness's conclusions and methodology?
- The extent to which the opinion offered relies upon the subjective interpretation by the expert witness of any facts or data.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591–95 (1993) (in *Daubert*, the Supreme Court stated that Rule 702 of the Federal Rules of Evidence requires expert testimony to be *reliable*). The factors cited in *Daubert* supplanted the D.C. Circuit Court's holding in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *Id.* at 589 n.6. The *Frye* court held that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as *reliable* in the relevant scientific community. *Id.* at 584. *Daubert* rejected *Frye*, holding that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial. *Id.* at 588–89, 591.

Using Probability, *i.e.*, Statistics, to Attack Reliability

The qualifications of experts are routinely challenged. However, the reliability of such opinions, based on the potential rate of error for the methodology used in reaching those opinions, is often not challenged. Statistical probability can be defined as an experimental method of assigning probabilities to events by measuring the relative frequency of an occurrence. Not only must an expert witness's opinion be likely to be true based upon existing data, but the underlying data relied upon by the expert in forming his or her opinion must also be likely to be correct. This is where counsel can make use of probability measurements through statistics. Even when an expert witness relies upon previously published scientific studies, the results of such studies should be analyzed from a statistical approach to determine whether they are scientifically reliable.

The probability of an expert's opinion being correct will be, at least in part, a function of whether a sample tested by an expert witness was *randomly* selected. The probability of the expert's opinion being reliable will also be based upon the size of the sample, which refers to the number of areas being tested (*i.e.*, *sample size*). The greater the sample size, the greater the information that the sample contains, which provides more confidence in the results. For an expert witness's opinion to be reliable, all testing *bias* must be removed, as well as confounding *variables* (*i.e.*, a variable that makes a causal relation between testing results and reliability of the results suspect). Parties usually do not address the *statistical* reliability of the underlying facts or assertions of opposing expert witnesses. This article suggests that it is reasonable and prudent to establish: a) the rate of error of an expert witness's opinion, and b) the rate of error of the data relied upon by the expert.

An Example

Plaintiff is the owner of a large, 300-plus-unit apartment property and has received complaints by tenants of water infiltration through the exterior cladding and subsequent mold colonization. Plaintiff retains a

forensic expert in the area of building envelopes to conduct destructive testing and water testing. The expert provides a protocol for the testing planned to be conducted. The protocol may read something like the following:

- Water test windows using accepted ASTM spray bar techniques;
- Observe and photograph all conditions around windows tested;
- Remove stucco from a 2 ft. radius around each window, photograph and record observations of water intrusion;
- Water test windows a second time with stucco removed and observe and photograph all conditions;
- Remove all lath and substrate;
- Photograph and observe all conditions of lath and substrate;
- Remove all insulation from interstitial wall spaces and examine condition of wood framing;
- Reinstall all insulation, substrate, lath, and stucco;
- Apply finish coat to match color of existing stucco;
- Clean area of all debris and return landscaping to same condition as prior to the testing.

This testing procedure will present numerous challenges to the owner of the property. Any testing at occupied units will require the permission of the tenants. The sight of scaffolding and groups of attorneys, clients, and expert witnesses gathering around different locations on a commercial property could also impact tenant relations and raise issues as to the suitability of the property for occupation by residents even where their particular units are not being tested. This type of testing is also, of course, costly! These facts alone will influence an owner's decision as to how many units are to be tested and the period of time in which the testing must be conducted.

Further, the testing of occupied units must necessarily be completed in one day in order for the units to be habitable by the resident. This type of testing on the second or third floor of the property will also be considerably more expensive than testing on the first floor. Obviously, the owner will prefer that testing be conducted only at unoccupied units so as to minimize the disturbance to residents. Given the many costs and business factors that the owner must consider, it is eventually determined that only five units within the entire complex will be tested. It is also determined that only first-floor units will be tested. There are two unoccupied units at the ground level available for testing. The owner decides to test these vacant units and the remaining three units to be tested will be locations where there have been complaints of water infiltration by the current residents.

The owner's expert then conducts the testing according to the proposed protocol on these particular five units, which happen to all be on the west side of the property, the side subjected to the most severe weather. After the testing is complete, the expert states that water infiltration and mold colonization were observed at each location tested and reports that the same condition exists throughout the entire property, including all elevations on all sides of the property. It is claimed by the owner that, based upon this limited testing, the entire exterior cladding for the property must be removed; the structure must be remediated; and new cladding must be installed.

Even the opinions of a *qualified* expert must be reliable.

Is This Expert's Opinion Reliable?

The first question to be presented is whether the sample size of units tested is sufficient and representative of the units not tested. An expert statistician will be able to determine if the sample is representative of the property by first evaluating whether the sample was selected randomly. A statistical model will require that any samples be selected on a random basis in order to extrapolate the conditions observed during testing to the remainder of the property. Next, a statistician can provide an analysis based upon accepted statistical calculations of how many randomly selected units (sample size) must be tested to form the basis of a reliable opinion. In our above case, the sample was selected based upon the ease of access, cost factors, the presence of a known condition, and only included testing on 1.6 percent of the units. This is not an example of random selection, nor of sufficient sample size.

As stated, the reliability of an opinion based upon testing a sample of units will also be based upon whether the sample size is large enough to render reliable results. A forensic statistician will be able to utilize methods and formulas accepted within the world of statistics to provide an opinion as to whether the testing of only five units could lead to a reliable and significant opinion, which is sufficient for extrapolation. The statistician can then offer an opinion as to the scientific reliability of the testing expert's opinion.

Another means of attacking the extrapolation of observed conditions to the entire property is the determination of the existence of any *confounding variables* that were not considered during the testing. Sample questions to be asked of plaintiff's expert are: (1) whether the units were all occupied at the time of testing; (2) were samples taken from all elevations of the property; (3) was there more than one subcontractor installing the windows and exterior cladding, and performing waterproofing; (4) were samples taken from the north, south, east, and west sides of the property; (5) were all the units tested constructed at the same approximate time during the construction process; (6) were there weather events which could have influenced the results of the testing; etc.

The forensic statistician can be called to testify regarding the likelihood of the results obtained from the sample tested occurring at the units not tested. If after performing a statistical analysis, it is determined that there is no more than, for example, a 50 percent chance of the observed condition existing at untested locations, then the testing expert's opinion is not precise or reliable. The forensic statistician can then be called upon to determine the level of confidence that must be obtained in order for the testing expert's opinions to be reliable. The usual degree of certainty applied by statisticians to obtain statistically significant testing results is .95–.99 percent reliability findings.

Statistics Have Broad Application

Although this article focuses on expert opinions in mainly a construction defect context, statistics can be applied to a broad range of expert disciplines, *e.g.*, products liability, personal injuries and pharmacol-

ogy cases. There is an interesting case where the opinion of an expert statistician himself was held not to be admissible because the statistician did not conduct a proper statistical analysis and his opinions were, therefore, not reliable. In *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940 (7th Cir. 1997), an employee brought an age discrimination suit against a former employer. The plaintiff attempted to proffer a statistical analysis regarding employee retention related to age by the former employer. *Id.* at 941. The court held that the expert's statistical analysis was not admissible, finding that omissions from the sample were arbitrary, that the expert failed to correct for any explanatory variables other than age, and that the expert completely ignored the more than remote possibility that age was correlated with a legitimate job-related qualification. *Id.* at 942.

Conclusions

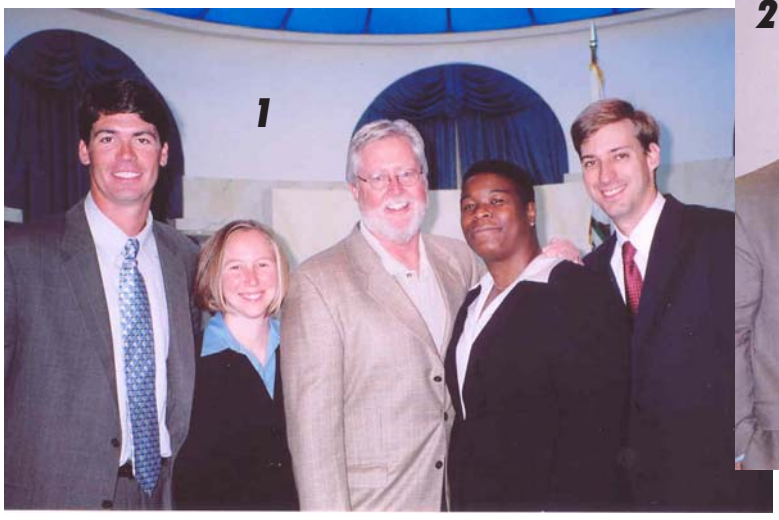
Any time an opinion is expressed by any witness regarding the existence of a condition not observed, but based upon the presence of such a condition at another location, that witness's opinion should be analyzed for its reliability and precision. An expert statistician will be able to provide the technical expertise to identify the information needed in order to test the extrapolation of another witness's opinion. Further, a forensic statistician may also be able to offer an opinion as to the percentage chance that the testing expert's opinion is *unreliable*. The expert statistician will be able to test the hypothesis of the witness performing the destructive test in our hypothetical. For example, the "Chi-Square random variable" is a test that is useful in hypothesis testing and determining confidence intervals. There are numerous other statistical models that can be used for determining probability, but this area lies best with the forensic expert. The use of statistics is a powerful tool and should be considered when analyzing extrapolation mirages created by expert witnesses concerning liability or damages.

There are various resources available for further research on statistics. Internet resources and references pertaining to statistical analysis and consulting services include:

- Science Ops, *at* http://www.scienceops.com;
- "Statistics on the Web" *at* http://my.execpc.com/~helberg/statistics.html (providing references for statisticians and statistics book lists, publications and publishers, as well as other educational resources, professional organizations and institutes);
- Statistica, *at* http://www.statsoft.com/;
- Statistically Significant Consulting, LLC, *at* http://www.statisticallysignificantconsulting.com/ (providing consulting services);
- Rimkus Consulting Group, *at* http://rimkus.com/public_home.jsp (providing consulting services);
- Most major universities also have statistics departments where experts in the field of mathematics and statistics can be contacted for assistance as consultants. World Wide Web Virtual Library, *at* http://www.stat.ufl.edu/vlib/statistics.html provides a listing of universities throughout the United States with Statistics Departments that can be located at a website provided by the university). FD

This article is reprinted from FOR THE DEFENSE June 2005
with permission of The Defense Research Institute.

SDDL 15th ANNUAL MOCK TRIAL COMPETITION



1. *And taking home Lady Justice is: Rob Woelfel, Krista Bell, Coach Geoff Hansen, Lauren Williams and Ward Winkslosky*

2. *Nathan Bartos, Chris Alex, Theona Taat, Naomi Goodno, Patrick O'Hara.*

3. *Judges John Pearson, Matthew Mason and Michael Mason*

4. *California Western School of Law - 2nd Place*

5. *Hastings School of Law competitors: left to right (front row): Matt Foley, Jenni Khuu, Krista Bell, Lauren Williams. left to right (backrow): Rob Woelfel, Skye Foster, Geoff Hansen, Ward Winkslosky, Patrick Foster*

6. *Judges John Clifford, Former SDDL President and Board member Kelly Boruszewski*


3


4

San Diego Superior Court Judges Roger Krauel, David Gill and retired judge Arthur Jones were there to support the 15th Annual Mock Trial Competition by serving as judges at the competition held October 13 - 15, 2005.

Schools competing were Brooklyn Law School, California Western School of Law, Chapman University School of Law, Hastings College of the Law, Jones School of Law (all the way from Alabama!), University of the Pacific McGeorge School of Law, Pepperdine University School of Law, Thomas Jefferson School of Law, University of San Diego School of Law, and Whittier Law School. Eighteen teams competed for the coveted Lady Justice.

After two nights of preliminary rounds, teams from Pepperdine, California Western School of Law and the two teams from Hastings School of Law advanced to the final day of competition. The students participating in the competition were extremely well prepared, and many demonstrated excellent advocacy skills. Most participating law schools hold tryouts, enabling them to select the best advocates from a large pool of very competitive applicants. The Mock Trial arena has become a fertile ground for cultivating new associates. SDDL members who volunteered to serve as judges were able to see, outside of the usual job interview context, just how talented these law students really are. This year's competition presented evidentiary and courtroom skills issues in the context of a personal injury case. Competitors were required to represent the plaintiff one night and the defendant the next night.

A "happy hour" reception for all student competitors and the SDDL "judges" was held Friday night following the second round. The final four teams were announced at the reception and the final round was held Saturday, October 15th at the University of San Diego.

In the final round Hastings School of Law prevailed over California Western School of Law and took the trophy to San Francisco.

San Diego Defense Lawyers would like to thank all of the judges for participating and would like to give a special thanks to David Carr, Jo Custer and Ellen Hunter for their participation as judges for the final rounds on Saturday, October 15th.


5


6

HOT CASES!!!

Article By Robert J. Walters of
GRACE HOLLIS LOWE HANSON & SCHAEFFER, LLP

Employment law cases seemed to predominate the State Supreme Court's attention, issuing three important decisions within the last quarter. Corporate officers may not be liable in wage-and-hour complaints, circumstantial evidence could have a key role in proving unlawful discrimination, and sexual favoritism at work may now be actionable in California. In addition, in a case of first impression (?), employers may not be obligated to hire a person who tests positive on a pre-employment drug test for marijuana even if it is for medical purposes. Also, employers may debit exempt workers for part-day absences. In the construction defect context, the appellate court refused to extend the statute of limitations for a bankrupt developer and class representatives that are dismissed do not also dismiss the class action or prevent a putative class representative from being named by an amended pleading even after the original plaintiff has voluntarily dismissed. In the medical malpractice context, a privacy decision (not HIPAA though) asks the question, "VISA, is it every where you want to be?" If a person pays for your medical treatment, he or she may be entitled to the medical information related to the charges.

EMPLOYMENT LAW

Reynolds v. Bement (2005) 36 Cal. 4th 1075, 32 Cal. Rptr.2d 3d 483. Plaintiff, a former employee of an automobile painting business, brought claims for overtime wages against defendants, several individuals who were officers, directors, or shareholders of the corporation that owned the business. The trial court sustained defendants' demurrer, and the Second District Court of Appeal upheld that decision. The employee sought further review. The Supreme Court affirmed the judgment of the court of appeal. The former employee contended that the officers, directors, and shareholders were employers within the meaning of 8 Cal. Code Regs. §11090(2)(F) because they exercised control over the employee's wages. The court rejected that argument, observing that the plain language of § 11090, defining "employer," did not expressly impose liability under Cal. Lab. Code § 1194 on individual corporate agents. Because § 1194 did not define "employer," it was appropriate to apply the common law test of employment. Under the common law, corporate agents acting within the scope of their agency were not personally liable for the corporate employer's failure to pay its employees' wages. Therefore, the former employee could not state a § 1194 claim against the officers, directors, and shareholders. Nonpayment of overtime wages was not tortious conduct such as could result in personal liability of corporate directors. Allegations of conspiracy lacked merit because agents and employees of a corporation could not conspire with the corporation. Failure to request further leave to amend in the trial court or to argue that issue properly in the court of appeal also waived the issue.

Yanowitz v. L'Oreal USA, Inc. (2003) 106 Cal. App. 4th 1036, 131 Cal. Rptr.2d 2d 575. Defendant employer appealed a decision from the First District Court of Appeal, which, in a retaliation action brought by plaintiff employee under Cal. Gov't Code §12940(h), reversed the trial court's grant of summary judgment in favor of the employer. The employee, who was a sales manager, presented evidence that a supervisor directed her to fire a female sales associate because the associate was insufficiently attractive. The employee further stated that, after she refused to do so and repeatedly asked for adequate justification, she was often criticized in front of her subordinates and received negative performance evaluations. The Supreme Court, in affirming, concluded that a trier of fact could find that the supervisor knew that the employee's refusal to comply was based on the employee's belief that the order constituted discrimination on the basis of sex, even though the employee did not explicitly say so. The Supreme Court held that the proper standard for defining an adverse employment action was whether the action materially affected the terms and conditions of employment. The continuing violation doctrine was applicable. Because the employee showed that the incidents of criticism occurred with sufficient frequency to constitute a continuous and temporally related course of conduct and placed her career in jeopardy, she presented sufficient prima facie evidence of an adverse employment action. Evidence of pretext was sufficient.

Miller v. Department of Corrections (2005) 36 Cal. 4th 446; 115 P.3d 77; 30

Cal. Rptr.2d 3d 797. Plaintiff former prison employees appealed from a decision of the Third District Court of Appeal, which affirmed a summary judgment in favor of defendants, the California Department of Corrections, a state prison, and related individuals, in the employees' action alleging sexual harassment in violation of the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900 et seq. The employees claimed that the prison warden accorded unwarranted favorable treatment to numerous female employees with whom he was having sexual affairs. The court held that an employee could establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment. Summary judgment was improper because there was evidence that advancement for women at the prison was based upon sexual favors, that the warden viewed female employees as sexual playthings and that his ensuing conduct conveyed this demeaning message in a manner that had an effect on the work force as a whole, and that the warden's sexual favoritism not only blocked the way to merit-based advancement for the employees, but also caused them to be subjected to harassment at the hands of one of the warden's girlfriends, whose behavior the warden refused or failed to control even after it escalated to physical assault. The employees were not required to elaborate to their employer on the legal theory underlying the complaints they were making to be protected from retaliation. The Supreme Court reversed the judgment of the court of appeal and remanded the matter for further proceedings.

Ross v. Ragingwire Telecommunications Inc. (2005) 132 Cal.App.4th 590, __ Cal.Rptr.2d __, 2005 Cal. App. LEXIS 1407. Plaintiff former employee appealed a judgment of the Sacramento County Superior Court in favor of defendant former employer in the employee's action for wrongful termination, employment discrimination, and breach of contract. In accordance with the Compassionate Use Act of 1996, Cal. Health & Safety Code §11362.5, the employee had a physician's recommendation to use marijuana for his chronic back pain. When the employer learned the employee had tested positive for marijuana during a pre-employment drug test, it discharged him from the position. The court held that employers had legitimate interests in not employing persons who used illegal drugs. Nothing in the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) precluded an employer from firing, or refusing to hire, a person who used an illegal drug. Because the possession and use of marijuana was illegal under federal law, a court had no legitimate authority to require an employer to accommodate an employee's use of marijuana, even if it was for medicinal purposes and thus legal under California law. The court also held that permitting employers to fire a person who exercised his statutory right under state law to use marijuana for medicinal purposes did not violate California policy created by the Compassionate Use Act, which said nothing about protecting the employment rights of persons who used marijuana for such purposes.

Conley v. Pacific Gas and Electric Co. (2005) 13 Cal.App.4th 260, 31 Cal.Rptr.3d 719. Departing from the position of the California Division of Labor Standards Enforcement, the First District Court of Appeal held that exempt employees may have their leave banks docked for partial-day absences without losing their exempt status. The appellate court considered this question of first impression. The plaintiffs in this class action alleged that the employer's policy of charging its exempt employees' vacation leave banks for partial-day absences from work rendered those employees nonexempt as a matter of state law. The employer made such deductions from an employee's vacation leave bank only for absences of at least four hours. The court declined to consider whether deductions for a shorter time would violate the law. The plaintiffs argued that employers who require their employees who have not exhausted their vacation leave to apply that leave to partial-day absences are violating the employees' vested right to vacation pay under the state Supreme Court's 1982 decision in *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 744 (1982), which had been adopted by the Division of Labor Standards Enforcement in several interpretive advice letters. The court acknowledged that the federal Fair Labor Standards Act precludes an employer from docking the pay of an exempt employee for an absence of less than a full day. However, the act allows an employer to require an absent exempt employee to draw down an accrued vacation leave bank for partial-day absences without losing exempt status with the following limit: Exempt employees who have exhausted their vacation leave must be allowed to continue taking partial-day absences without a corresponding loss in pay. Although advice letters are properly considered by the courts and may be entitled to some weight, they do not have the force of law and are not controlling on the court and disagreed with the Division of Labor Standards Enforcement's analysis. The court noted that the federal salary test may require employers to give exempt employees additional time off for partial-day absences after they exhaust their vacation leave banks. However, a policy which requires deductions from a vacation leave bank that has not been exhausted still provides the employees with all of the paid time they have earned and simply regulates the timing of exempt employees' use of their vacation time by requiring them to use it when they want or need to be absent from work for four or more hours in a single day. The court found that this was entirely consistent with *Suastez*, in which the Supreme Court expressly noted that California law does not purport to limit an employer's right to control the scheduling of its employees' vacation time.

CONSTRUCTION DEFECT

Inco Development v. Superior Court (2005) 131 Cal. App. 4th 1014; 31 Cal. Rptr.2d 3d 872. Inco Development Corp. constructed 216 homes in 1993. It

filed for bankruptcy in 1999. The action was dismissed, and a stay was filed in 2001. The homeowners filed construction defect claims more than 10 years after the homes were completed. Inco moved for summary judgment on the ground that the statute of limitations for latent defects barred the actions. Petitioner developers requested a writ of mandate, seeking review of a denial of their motion for summary judgment in consolidated construction defect cases against them. The trial court denied summary judgment on the ground that the 10-year limitations period was subject to tolling under CCP §356. The developers moved for summary judgment on the ground that the 10-year statute of limitations pursuant to CCP §337.15 for latent defects barred the action as to 157 of the homes involved, because it was a statute of repose and was not subject to the tolling principles of CCP §356. The trial court agreed with the homeowners that the statute of limitations was tolled for the period during which the bankruptcy stay was in effect. It therefore denied the motion. Inco petitioned for a writ of mandate. The Court of Appeal granted the petition. The bankruptcy stay at issue was a statutory prohibition. CCP §356states that the limitation period of an action stayed by statutory prohibition is tolled during the period of the stay. Code of Civil Procedure Section 337.15, the provision providing a 10-year limitation for bringing construction defects actions based on latent defects, was created to ensure a generous but firm cutoff date for latent-defect suits. Section 337.15 has the characteristics of a statute of repose, which does not cut off an existing right of action, but provides that nothing that happens thereafter can be a cause of action. Because it is tied not to the date of injury, but to the date on which the construction is completed, it imposes an absolute requirement. The Legislature thus intended CCP §337.15 to create an absolute 10-year period that is not subject to CCP §356. Thus, trial court should have granted the motion.

Shapell Industries Inc. v. Superior Court (2005) __ Cal.App.4th __, __ Cal.Rptr.2d __, 2005 Cal. App. LEXIS 1470. The original plaintiff, Borecki, filed a class action on behalf of himself and others who bought homes from Shapell Industries Inc. Plaintiff sought to name another homebuyer, Stark (also real party-in-interest), as an additional plaintiff. Shapell filed a demurrer to the complaint. While the demurrer was pending, Borecki was voluntarily dismissed from the class action without prejudice. Shapell filed a petition for a writ of mandate or other extraordinary relief challenging the decision of the Los Angeles County Superior Court to grant real party-in-interest's motion for leave to file a second amended complaint adding a new plaintiff as an individual and as the representative plaintiff of an uncertified class. Petitioners argued that the trial court lacked subject matter jurisdiction to allow the second amended complaint to be filed to add real party in interest as a new plaintiff because the original plaintiff had voluntarily dismissed himself as a party to the action, after attempting to name real party in interest as a co-plaintiff in a first amended complaint without first obtaining leave of court. The court held that the order of dismissal pertained to the original plaintiff alone, and that his dismissal did not divest the trial court of subject matter jurisdiction, such that it became incompetent to continue to hear the matter and permit the second amended complaint to be filed. Real party in interest was a party interested in the action, by virtue of his membership in the uncertified class, at the time the original plaintiff dismissed himself out, rendering the dismissal only a partial one. Although real party in interest was ineffectually named as an additional plaintiff because leave of court had not been obtained, he was a party to the action in a sense sufficient to perpetuate the action when the original plaintiff dismissed himself out. Upon Borecki's dismissal, the alleged putative class members remained interested parties. A justiciable controversy therefore existed, pending an amendment to add a named representative plaintiff. Upon Borecki's dismissal, Stark was an interested party through membership in the class. The court did not err in permitting Stark to pursue the action.

MEDICAL MALPRACTICE

Colleen M. v. Fertility And Surgical Associates Of Thousand Oaks (2005) __ Cal.App.4th __, __ Cal.Rptr.2d __, 2005 Cal. App. LEXIS 1520. Plaintiff patient, who paid for in vitro fertilization treatment using her ex-fiancé's credit card, sued defendant health care provider for invasion of privacy and infliction of emotional distress, alleging the provider wrongfully disclosed the contents of her medical records to the ex-fiancé and to his attorney. The Los Angeles County Superior Court granted the provider's motion for summary judgment and the patient appealed. Although the appellate court held that the trial court erred in determining as a matter of law that the patient could not establish a reasonable expectation of privacy in her medical records, the California Confidentiality of Medical Information Act (CMIA), and in particular, Civil Code §56.10(c)(2), permitted disclosure of the patient's medical information to the ex-fiancé without her consent. The ex-fiancé qualified as someone responsible for paying for health care services rendered to the patient and was entitled to receive limited information necessary to allow his responsibility for payment to be determined and payment made. Upon learning the procedure was not something he had agreed to pay for with his credit card, the ex-fiancé could protest payment with his credit card company or otherwise seek recovery from the patient just as an insurance company could decline to pay for the medical services in a similar situation. The provider was not liable for disclosure of the patient's medical records to the ex-fiancé's attorney because disclosure was compelled, pursuant to §56.10(b)(3) of the CMIA.

October 5, 2005 MCLE Seminar

"HOW TO AVOID BEING SUED FOR LEGAL MALPRACTICE"

By Kelly Boruszewski of Shewry & Van Dyke

By the time SDDL's October 2005 Evening Seminar was over, everyone agreed Dan White and Dan Stanford were the perfect duo to conduct the presentation. During the evening's two hours (which felt like 30 minutes), these two experienced attorneys verbally sparred their way through both the simple and complex world of legal malpractice by the citation of statute, law, and "war stories." Sometimes agreeing, sometimes not, the mutual respect—both professionally and personally—that these two lawyers share with one another united into a common theme woven throughout the evening: Leave a paper trail because if it is not in the file, then it never happened. If you attended the seminar, you are 90% ahead of the game in looking for potential areas of concern. If you did not attend, do so the next time these two gentlemen speak on the topic, your E&O carrier will thank you. In the interim, here is a snippet of the presentation.

First, if you do nothing else, read the Rules of Professional Conduct. When was the last time you read the rules? Perhaps in law school? Go to http://www.calbar.ca.gov. Enough said.

Second, have an engagement letter for every matter. This includes repeat clients you have been doing business with for years. That once signed 1998 engagement letter that can be no longer be located will likely not protect you in the matter you have today. Is a separate engagement letter required for insurance defense counsel? One Dan says yes, the other says no. The answer may ultimately lie with your E&O carrier requirements. What does one put in an engagement letter? Attorney fee clause? Arbitration provision? Mandatory mediation provisions before lawsuit is filed? The evening's debate was lively as to the pros and cons, but all agreed that some E&Os require you to notify them regarding the inclusion of these provisions. Of equal importance is the disengagement letter, i.e., "As of today this firm no longer represents you in this matter." When the assignment is completed—as spelled out in the engagement letter, right?—the sending of the disengagement letter begins the running of the statute of limitations. How long does it run? One-year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. (Code Civ. Pro. § 340.6(a).)

Third, communicate. Whether the event or information is good, bad, or indifferent; whatever you tell the carrier, you should be telling your client. And you probably should be telling them everything. Remember Rules of Professional Conduct, Rule 3-500? "A member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." This Rule is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See, Bus & Prof. Code § 6068(m).) But the question of "What is significant?" never comes to bear in a malpractice situation when you hold nothing back from the carrier and client. Give them the bad news and overestimate the expected fees. If nothing else, call them and then put it in writing.

Fourth, bill regularly and often. Stay on top of the billing because the last thing a lawyer wants is to be only weeks away from trial and the client stops paying you. When the trial date nears, say 90 days out, communicate the estimated cost of trial and get the money, or tell them that you expect to be paid weekly (that's in your engagement letter, right?). One other suggestion, keep the retainer in your CTA and do not dip into it. Instead, bill your client regularly. If they stop paying, take it out of the retainer. If they pay, the retainer is returned to the client with the disengagement letter.

Fifth, *Cumis* counsel. If the provisions of a policy of insurance impose a duty to defend and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. (Civ. Code § 2860(a).) Such a conflict might arise if the insurance company is denying full coverage. If so, the defendant can demand that the insurance company pay the fees of his own attorney rather than use an insurance company lawyer. When in doubt whether *Cumis* counsel should be involved, contact your carrier.

Sixth, a plaintiff's favorite "trump" card, Conflicts of interest. Everyone remembers Rules of Professional Conduct, rule 3-310 right? Part of the rule tells us that a member shall not accept or continue representation of a client without providing written disclosure to the client where the member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter. And do not forget that a member shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the

Continued on page 15

"HOW TO AVOID BEING SUED FOR LEGAL MALPRACTICE"

Continued from page 18

interests of the clients potentially conflict; or accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected. In addition, other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Bus. & Prof. Code §6068(e); *Woods v. Sup.Ct.* (1983) 149 Cal.App.3d 931; *Klemm v. Sup.Ct.* (1977) 75 Cal.App.3d 893.) The conclusion, do not place yourself in a conflict of interest situation unless you have to, which should be agreed upon in writing.

EXTRA!!! Member News EXTRA!!!

Members in the News

Balestreri, Pendleton & Potocki proudly announces principal, **Mary Pendleton**, has been selected as one of the Top San Diego County Attorneys for 2005. In a peer review process published August 11, 2005 by the San Diego Daily Transcript, of 6300 surveyed attorneys, Ms. Pendleton was one of 10 attorneys named in the field of Real Estate/ Construction Law.

Ruben Tarango, Lane Webb and Wyeth Burrows have joined Wilson, Elser, Moskowitz, Edelman & Dicker, LLP.

The 2005 Golf Benefit Committee and Board Members present JDRF Executive Director and Board Member Carroll Dymott (wife of Tom Dymott) with a check in the amount of $8,136.00. THANK YOU SDDL members and Benefit Sponsors for your great support of this event!
Left to right: Martha Dorsey, Scott Barber, Linda Riley, John Farmer, Tony Case, Carroll Dymott and Dennis Aiken.

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

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.

Views and opinions expressed in THE UPDATE are those of the authors and not necessarily those of SDDL. Products and services advertised are paid advertisements and not endorsed by SDDL.

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

Jay M. Bulger
Koeller, Nebeker, Carlson & Haluck
225 Broadway, 21st Floor
San Diego, CA 92101
Phone: 619-233-1600
Jay.bulger@knchlaw.com