

The Update

Spring 2008

SAN DIEGO DEFENSE LAWYERS

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THE BOTTOM LINE

Case Title: Rebecca Howell v. Hamilton Meats & Provisions, Inc.; Dion International Trucks, LLC and Juan Saenz

Case Number: GIN 053925

Judge: Hon. Adrienne Orfield

Plaintiff's Counsel: Jude Basile of Basile Law Firm, San Luis Obispo, California

Defendant's Counsel: Robert Tyson/Mark Petersen of Tyson & Mendes, LLP, La Jolla, California

Type of Incident/Causes of Action: Admitted liability, causation, and damages personal injury action. The suit arose from a vehicle collision between plaintiff's Ford Explorer and defendant Hamilton Meats' delivery truck in November 2005. Plaintiff underwent anterior neck surgery in January 2006 to fuse C4-C6 vertebrae. Plaintiff underwent a second posterior neck fusion surgery at C4-C6 vertebrae in November 2006, which included bone graft extraction from her left iliac crest (hip). Plaintiff underwent a third surgery to relieve complications on the bone harvest site in August 2007. Plaintiff was advised she would need a fourth surgery, another neck fusion, in the future.

Defendants stipulated to liability, causation, and damages. Defendants did not dispute plaintiff was entitled to recover \$340,000 in past and future economic damages. Defendants also stipulated that they caused plaintiff to sustain pain and suffering.

The only issue to be determined by the Vista jury was how much pain and suffering plaintiff was entitled to recover for three past surgeries and a lifetime of limited activities and pain, including the need for a future surgery. Plaintiff's counsel asked the jury to award pain and suffering damages in a range over \$2,000,000.

Defendants had no experts testify at trial. Defendants called no witnesses. Defendants offered no evidence.

Settlement Demand: Lowest pre-trial demand \$999,000.00

Settlement Offer: Although plaintiff refused to accept the insurance policy limits of \$1,000,000 once trial began, defendants offered \$500,000 during trial. Defendants were advised by settlement judge verdict could be over \$1,000,000.

Trial Type: Jury

Trial Length: 6 days

Verdict: \$690,000 total (\$340,000 medical specials and \$350,000 general damages)

Misc.: Defense filed a post-trial motion to reduce medical specials by approximately \$130,000 pursuant to Hanif v. Housing Authority (1988) 200 Cal.App.3d 635, for a total judgment of \$560,000. The hearing is scheduled for May 2008. Plaintiff hired attorney John Rice to argue the Hanif motion

PRESIDENT'S MESSAGE



24 years ago on January 23, 1984, a young San Diego defense lawyer, with little more than five years in practice, envisioned something bigger than himself and wrote to a dozen or so of his colleagues about it:

"As I may have discussed privately with some of you, it is my personal feeling that there is presently a need in San Diego for some type of organization or association of defense counsel . . . [I]t is my personal feeling that the insurance defense industry is rapidly changing its character in such a manner as to require new input from the younger members of the Bar. Therefore, I have . . . arranged for an informal meeting at the Cuyamaca Club, in the Board Room, on February 1, 1984 at 5:30 p.m.

I must be frank with you that I have no specific suggestions as to what type of association or organization may be helpful. It may well be that all that is needed is a forum to discuss topics of mutual concern. I can guarantee that this particular meeting will certainly be quite informal. . .

I would appreciate you all getting back to me so that I can make the proper arrangements. I look forward to seeing you all."

They met on February 1, 1984; they discussed their ideas; they formed what they called a "steering committee" composed of six young lawyers, and the organization known as San Diego Defense Lawyers was born. The young lawyer then sent the following invitation of membership to the San Diego defense community:

"San Diego Defense Lawyers is an organization of lawyers engaged in the defense of civil litigants. Our purpose is to provide a forum of mutual education through the exchange of ideas within the defense Bar of San Diego County. At this time, it is our pleasure to extend to you an invitation to become a member of San Diego Defense Lawyers.

We believe our organization is long overdue in the San Diego County area. We encourage all members of the defense Bar to join. Invite your peers. This is an opportunity to help establish a strong and active organization of defense counsel. . . . An application for membership is enclosed. "

The Membership fee? \$50. The young lawyer? Jack B. Winters, Jr., an insurance defense lawyer and future insurance bad faith plaintiff attorney in San Diego. The Steering Committee? Future Superior Court Judges Dave Danielsen, Ron Johnson, Adrienne Orfield, Michael Orfield, and attorneys Bruce Sulzner and Jack Winters.

Jack Winters' "personal feeling" of the need for an organization joining forces to discuss topics of mutual concern, has blossomed into one of the very largest and most accomplished local defense bar organizations in the Country. From its rather humble beginnings as a "forum for the exchange of ideas," SDDL now does some rather important things in the community. SDDL is actively engaged in teaching trial practice classes to its Membership. Our nearly 400 members can each earn 20 MCLE credits per year in classes taught by preeminent attorneys, judges and other scholars from both here in San Diego and elsewhere. Based upon an idea belonging to attorneys Bruce Lorber and Cary Miller 17 years ago to host an annual competition between California Western School of Law and USD, SDDL now hosts a major National Mock Trial competition each fall which has become a hallmark in the trial practice curriculum of many law schools around the Country. Last year, for example, 22 teams competed from more than a dozen law schools, including Duke, Berkeley, Hastings, Fordham, Pepperdine and our own, California Western, USD and Thomas Jefferson Schools of Law. SDDL also continues the tradition of giving back to the community through its annual Golf Tournament to benefit the Juvenile Diabetes Research Foundation in honor of our own who fell to the disease, Tom Dymott. Last year, with your help, SDDL donated \$11,000 to the Foundation.

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GOLF TOURNAMENT NEWS- READ ALL ABOUT IT!

By Darin J. Boles, Esq. of Aiken & Boles

Fore! Now is the time to gather your buddies, clients or anyone else who enjoys the San Diego sunshine to schedule your foursome in the Seventh Annual San Diego Defense Lawyers Golf Tournament to benefit the Juvenile Diabetes Research Foundation. This year's event is Friday, May 23, 2008, at 12:30 p.m. at the beautiful Twin Oaks Golf Course in San Marcos.

Twin Oaks is the flagship course of the JC Resorts Golf courses and stretches over 6,535 yards of the rolling hills and valleys in San Marcos. There are dramatic elevation changes, streams, waterfalls and wild life making the course enjoyable for the novice, the hacker and the skilled player. With a scramble format, everyone has a chance to be in the hunt and to have a load of fun!

All players receive a delicious lunch, bountiful barbeque dinner, goody bag and a chance to win many prizes in addition to the green fees, cart and practice range balls. Most importantly, your contributions will benefit the Juvenile Diabetes Research Foundation. See you there! For more information on signing up to play or to be a sponsor, please contact jboley@neildymott.com.



THE BOTTOM LINE

Case Title: Anthony Yniguez v. Dariusz Cena, CRT Transportation

Case Number: Los Angeles Superior Court case number VC 047765

Judge: Judge Patrick T. Meyers

Plaintiff's Counsel: Brian McKibbon of the L/O of Jacob Emrani

Defendant's Counsel: Norman Ryan, L/O of Ryan, Mercaldo & Worthington

Type of Incident/Causes of Action: Motorcycle v. Tractor Trailer: Truck turned from #1 (of 2) lane; motorcycle passed on right and collided with drive wheels of tractor. Multiple fractures of right leg, ribs, lacerated spleen, subsequent knee surgery. Medical specials of \$293,000; minimal loss of earnings but plaintiff claimed he couldn't work as an LA County Sheriff because he couldn't pass the physical due to accident injuries.

Settlement Demand: \$1million policy limits); dropped to \$925,000 in trial

Settlement Offer: 998 of \$750,000 increased to \$800,000 just before closing

Trial Type: Jury trial

Trial Length: 8 days, 1 day of deliberations

Verdict: For plaintiff, \$817,000 reduced by 20% comparative, net verdict to plaintiff: \$653,630. Defense cost bill pending.

Case Title: In re: Conservatorship of Angeline Harrison

Case Number: MH 100 360

Judge: Randa M. Trapp

Plaintiff's Counsel: James Boley, Neil, Dymott, Frank, McFall & Trexler (counsel for County of San Diego, Office of Public Conservator)

Defendant's Counsel: Patrick J. Hearn, Koeller, Nebeker, Carlson, & Haluck (counsel for Angeline Harrison)

Type of Incident/Causes of Action: Civil Conservatorship Proceeding (County of San Diego petitioned to re-establish an involuntary conservatorship over Ms. Harrison on the basis that she was unable to provide herself food, clothing, and shelter due to a mental disorder and thus gravely disabled)

Settlement Demand: None

Settlement Offer: None

Trial Type: Jury

Trial Length: 3 Days

Verdict: Defense

SDDL GOLF TOURNAMENT BENEFITS JUVENILE DIABETES



By James D. Boley, Esq. of Neil Dymott

As we approach the San Diego Defense Lawyers' annual golf benefit, scheduled on May 23, 2008, several people asked about the organization's relationship with Juvenile Diabetes Research Foundation and how it became the recipient of our sponsorship. I have the honor of answering that question.

In August 2002, Tom Dymott, a beloved partner of Neil, Dymott, Frank, McFall & Trexler APLC, lost his battle with cancer. Tom was well-known as a consummate professional and an outstanding member of the defense bar. After graduating from law school, Tom began working as a law clerk at Holt, Rhodes and Hollywood, the predecessor of the current Neil, Dymott firm. Tom handled a wide variety of cases and distinguished himself as an excellent trial attorney. He was admitted into the American Board of Trial Advocates in April 1987. In the fine tradition of the San Diego Defense Lawyers organization, Tom was also an outstanding teacher and mentor to young attorneys. Tom devoted countless hours to training and helping young lawyers both within and outside his firm. Tom served as an instructor in the San Diego Inn of Court for many years, and enjoyed a reputation for always having an open door to young attorneys, a brilliant legal mind and many words of encouragement. Tom was the first recipient of the SDDL Defense Lawyer of the Year award.

Tom, who suffered from diabetes, was very active when it came to the Juvenile Diabetes Research Foundation. He had been an active member of the organization and served on the Board of Directors, fervently raising money for the foundation. He was also very generous with his time and never hesitated to spend time with families who had a child with a new diagnosis of diabetes.

In 2002, San Diego Defense Lawyers held its first annual golf tournament, benefiting Juvenile Diabetes Research Foundation in honor of Thomas Dymott. Last year's tournament alone raised \$10,500 for Juvenile Diabetes Research. What a fantastic opportunity for us as defense lawyers to have an impact on the lives of children afflicted with this disease, by simply playing an afternoon round of golf. Tom would have been very proud and honored by San Diego Defense Lawyers' commitment to the Juvenile Diabetes Research Foundation.



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SAN DIEGO DEFENSE LAWYERS

2008 JUVENILE DIABETES RESEARCH FOUNDATION GOLF BENEFIT

PRESENTING SPONSOR:

IRVING HUGHES

Life is a lease. Negotiate well.

A Portion of the Proceeds Will Benefit the
 Juvenile Diabetes Research Foundation



dedicated to finding a cure.



Your Entry Fee of \$125.00 Includes:

Green Fees, Cart
 Angus Burger lunch
 Scramble Format
 Putting Contest
 Hole-In-One Contest
 Longest Drive Contest
 Raffle Prizes and Awards
 Post-Event Dinner

Come one, come all to the 7th annual SDDL Golf Benefit. This is a great chance to relax and have fun with business associates, clients, friends and co-workers. If you don't golf, join us for the Post-Event dinner (\$30.00) and awards.

Friday, May 23, 2008 at 12:30 pm (check-in at 10:30 am)

Twin Oaks Golf Course

Call Jim Boley at 619.238-1712

or jboley@neildymott.com for more information.

Sponsorship opportunities are also available.

Print out sponsor form at www.sddl.org

Number of Golfers: _____ x \$125 or \$500 per foursome

Name(s): _____

Firm/Company Name: _____

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Telephone: _____

Fax: _____

Please Make Checks Payable to:

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 San Diego, CA 92192

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THE BOTTOM LINE

Case Title: Sherry Parsons-May v. Mark A. Nocera, DDS, dba Avia Dental Care

Case Number: GIC 85942

Judge: John S. Meyer

Plaintiff's Counsel: Hoyt E. Hart, II

Defendant's Counsel: Robert W. Harrison and Patrick Kearns, Koeller, Nebeker, Carlson, & Haluck

Type of Incident/Causes of Action: Dental negligence and one count of fraud

Settlement Demand: None

Settlement Offer: Dismissal for a waiver of costs

Trial Type: Jury

Trial Length: 6 Days

Verdict: Defense. Defendant was also awarded \$15,729.49 in costs.

Case Title: Robertson vs. Rashidi, et al.

Case Number: GIC878921

Judge: Honorable David Olberholtzer

Plaintiff's Counsel: Bart Blechschmidt, Esq. of Galuppo & Blechschmidt

Defendant's Counsel: Robert Juskie, Esq. of Wingert, Grebing, Brubaker & Goodwin, LLP

Type of Incident/Causes of Action: Nuisance/Trespass

Settlement Demand: CCP 998 for \$104,999.99

Settlement Offer: CCP 998 for \$35,001.00

Trial Type: Jury

Trial Length: 6 1/2 days (1/2 day deliberation)

Verdict: Defense verdict on Trespass cause of action (12-0), Defendant responsibility of \$4,921.00 on Nuisance cause of action.

President's Message

continued from page 2

We are San Diego's defense lawyers. We are an essential part of the legal system. Although we rarely, if ever, get the kind of glory that consumer attorneys get with their million dollar verdicts, we do something equally important. We provide the balance. We temper the system by rejecting the frivolous claims, and we provide the funds to respect the genuine ones. And, we do it all with a sense of professionalism. Ask any judge. The defense lawyer is known in town for his/her respect for both the system and its players, including judges, court personnel, and opposing counsel. That's who we are. It's all about Civility, Integrity, and Balance.

Jack Winters has always been a strong advocate for what's important in life. Did he have any idea in 1984 how important his dream was? Did the members of the Steering Committee ever envision what SDDL has now become? As a very young lawyer, I worked with and knew all of these young lawyers. I witnessed both their brilliance as trial attorneys as well as their intense passion for the profession. I truly believe that each one of them saw the future of our Organization. And I publicly thank them for pioneering this important endeavor. I also thank each of you for your membership in SDDL. Here's to a successful and prosperous year!

Kenneth N. Greenfield

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Recent U.S. Supreme Court Decisions Clarify the Scope of Federal Preemption of Drug and Medical Device Regulation

By Lane E. Webb, Esq. and Alan E. Greenberg, Esq. of Wilson Elser



On February 20, 2008 the U. S. Supreme Court decided the case of *Riegel v. Medtronic*, 2008 U.S. LEXIS 293, 169 L. Ed. 2d 892, 128 S. Ct. 999 (2008). The Court held that state common law product liability claims involving Class III medical devices, whether sounding in strict liability or negligence, are preempted by the Food and Drug Administration (FDA) premarket approval of those products.



In 1996, Charles Riegel had a procedure to unblock a clogged artery. To unblock the clogged artery, Mr. Riegel's doctor used a balloon catheter. The catheter label specified that it not be blown up above the "rated burst pressure" of 8 atmospheres, but the doctor inflated it several times up to a pressure of 10 atmospheres. It burst after the final inflation. Mr. Riegel subsequently lost consciousness, was placed on life support, and underwent emergency coronary bypass surgery. Mr. Riegel and his wife then sued Medtronic, the manufacturer of the catheter.

In *Riegel*, the Supreme Court agreed with Medtronic's argument that The Medical Device Amendments of 1976 (MDA) contain an express preemption clause which prohibits states from establishing "any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device . . ." 21 U.S.C. § 360k(a). The *Riegel* Court held that the premarket approval process under the MDA, known as "PMA", imposed "requirements" within the meaning of § 360k(a). The MDA therefore preempted the common law claims raised by the plaintiffs as these claims amounted to additional or different "requirements" from those imposed by the MDA. The Court stated: "State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation." *Riegel*, supra, 128 S. Ct. at 1008, 169 L. Ed. 2d at 903.

The *Riegel* decision implicitly assumes that the FDA competently undertakes a thorough premarket approval process for every new Class III medical device. Class III medical devices include products that sustain life, prevent major health problems or that might pose unreasonable risk if they malfunction. The Supreme Court concluded such a premarket approval process would bar patients from filing lawsuits that, in effect, "second guess" the FDA regulators' judgments about the safety and effectiveness of devices that they reviewed and approved. The *Riegel* decision also presumes that the warning labels the companies develop to warn of side effects and product limitations are adequate because they also receive FDA approval as part of the PMA.

The *Riegel* Court acknowledged that not all state law claims are pre-empted but failed to explicitly enumerate what claims survive. After *Riegel*, general claims relating to design, labeling, and perhaps even marketing (consumer fraud) are arguably preempted. Claims based on

specific violations of FDA regulations that can be directly linked to a particular device may not be preempted. Manufacturing defect claims may also fit within this exception and still survive.

The Supreme Court also heard oral argument on January 25th and ruled on March 3rd in the Michigan case of *Warner-Lambert Co., LLC v. Kent*, 2008 U.S. LEXIS 2235, 128 S. Ct. 1168 (2008). The company argued in that case that even if the plaintiff claims that the company defrauded the FDA during the approval process, the claim is still preempted. The Court split 4 to 4, with Chief Justice Roberts not participating in the opinion. This allowed the Michigan decision to stand under a "fraud on the FDA" theory. The "fraud on the FDA" theory of liability was first established in the Court's decision in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).

While the *Riegel* decision is limited to medical devices, the Supreme Court on January 18, 2008 granted a petition for writ of certiorari in a drug case from Vermont, *Wyeth v. Levine*, 2008 U.S. LEXIS 1100, 169 L. Ed. 2d 845, 128 S. Ct. 1118 (2008). The *Wyeth* case will decide whether there is implied preemption of state tort law claims for prescription drugs. There, the company argues that FDA approval of warning labels on prescription drugs preempts state product liability claims even if the plaintiff claims that the warning was inadequate. Hopefully, the Court will give clear guidance to manufacturers in that industry as well.

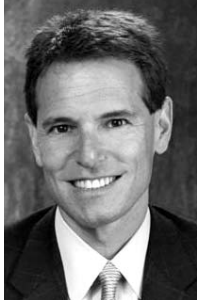
As things now stand, many plaintiffs' attorneys in medical device litigation will leave design questions behind. The next major battleground in medical device litigation will be over alleged manufacturing defects.

The recent Supreme Court decisions will not directly effect the growing dietary supplement and over-the-counter ("OTC") drug industries. Dietary supplements and OTC drugs do not require FDA safety and efficacy review and approval before marketing. Congress has passed, however, the Dietary Supplement and Nonprescription Drug Consumer Act ("the Act") to regulate the industries through mandatory reporting of serious adverse events to the FDA in mandated Adverse Event Reports. The Act includes an express state preemption provision intended to ensure that state requirements relating to serious adverse event reporting are consistent with the Act, and to preempt those state requirements that are contrary or different. 21 U.S.C. §§379aa(h), 379aa-1(h). The scope of such preemption will undoubtedly be the subject of future rulings by the courts.

Lane E. Webb is the Regional Managing Partner of the San Diego office of Wilson, Elser, Moskowitz, Edelman & Dicker LLP. Mr. Webb specializes in environmental, toxic torts, latent injury and products liability litigation.

Alan E. Greenberg joined the Wilson Elser firm in 2005 after opening the San Diego office of Lewis, Brisbois, Bisgaard & Smith LLP (formerly Lewis, D'Amato, Brisbois & Bisgaard LLP) in 1983 as the Founding Partner. He is a former Board member and Secretary of the San Diego Defense Lawyers. He specializes in environmental and toxic torts and products liability litigation.

INSURANCE LAW



*James R. Roth, Esq.
The Roth Law Firm*

Mindful of the obligation of the carrier to undertake a thorough and reasonable investigation, the common thread that weaves itself through the cases discussed below is

that policy language controls and efforts to sidestep that language will be thwarted, no matter how creative the argument.

THE GENUINE DISPUTE RULE DOES NOT RELIEVE AN INSURER FROM ITS OBLIGATION TO THOROUGHLY AND FAIRLY INVESTIGATE, PROCESS, AND EVALUATE THE INSURED'S CLAIM; A GENUINE DISPUTE EXISTS ONLY WHERE THE INSURER'S POSITION IS MAINTAINED IN GOOD FAITH AND ON REASONABLE GROUNDS. In Reagan Wilson v. 21st Century Insurance Company (2007) 42 Cal.4th 713, 68 Cal.Rptr.3d 746, the California Supreme Court affirmed a judgment of the Court of Appeal, Second Appellate District, reversing summary judgment in favor of an underinsured motorist ("UIM") insurer in a bad faith action. In this first party insurance bad faith action, the question on review was whether summary judgment was properly granted for the insurer. Eight months after Reagan Wilson was injured in an automobile accident by a drunk driver, her insurer, 21st Century Insurance Company, rejected her demand for payment of the \$100,000 policy limit on her underinsured motorist coverage. Although Wilson's treating physician had opined that the 21-year-old woman had "degenerative disk changes as a result of occult disk injury at the levels in her neck from her high speed motor vehicle accident," and that these spinal changes were atypical for her age and "almost certainly" caused by the automobile accident, 21st Century rejected the claim on the asserted ground that she had suffered only soft tissue injuries in the collision and had "preexisting" degenerative disk disease. Because, based on the undisputed facts in the summary judgment record, a jury could reasonably find 21st Century reached this medical conclusion without a good faith investigation of the claim and without a reasonable basis for genuine dispute, the Supreme Court agreed with the Court of Appeal

that summary judgment on Wilson's bad faith cause of action was improper. The Supreme Court observed that while an insurer has no obligation to accept every claim, an insurer acts unreasonably when it ignores evidence that supports the claim and focuses solely on facts justifying denial. The Supreme Court concluded Wilson had demonstrated a triable issue whether 21st Century's initial denial was unreasonable and in bad faith. 21st Century offered no medical evidence that would have allowed it to ignore Wilson's physician's conclusion that the probable source of her injuries was the accident. While 21st Century argued its denial rested on a genuine dispute as to the true value of Wilson's claim, the Supreme Court held the doctrine only applies when an insurer has discharged its obligation to thoroughly investigate and fairly evaluate a claim.

CALIFORNIA SUPREME COURT GRANTS REVIEW TO DETERMINE STATUS OF CLAIMS ADJUSTERS AS EXEMPT ADMINISTRATIVE EMPLOYEES. On November 28, 2007, the California Supreme Court granted review of Harris v. Superior Court (2007) 154 Cal.App. 4th 164, which involved four coordinated class actions against Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation by claims adjusters employed by defendants, alleging that defendants improperly classified them as exempt from the overtime compensation requirements under California law. Plaintiffs seek to recover the unpaid overtime to which they are allegedly entitled. The Court of Appeal, Second District, held that plaintiffs are not exempt administrative employees.

AN ISSUE CONCERNING AN "OTHER INSURANCE" CLAUSE IN A POLICY CAN ARISE ONLY BETWEEN CARRIERS ON THE SAME LEVEL OF COVERAGE, SUCH AS TWO PRIMARY CARRIERS. In JPI Westcoast Construction, L.P. v. RJS & Associates, Inc. (2007) 156 Cal.App.4th 1448, 68 Cal.Rptr.3d 91, the Court of Appeal for the First Appellate District affirmed the trial court's rulings on motions for summary judgment finding a subcontractor's excess carrier was not obligated to contribute to the settlement of a wrongful death action until both the subcontractor's and general contractor's primary insurance was exhausted, regardless of an indemnity provision in a subcontract requiring the subcontractor to indemnify the general contractor. JPI Westcoast Construction, L.P. (JPI), the general contractor on

a large construction project, hired RJS & Associates (RJS) as a subcontractor on a phase of the project. The construction contract between JPI and RJS contained an indemnity clause in favor of JPI. During the course of the work undertaken by RJS, a worker was killed in an accident. In the underlying action, the worker's family sued JPI, RJS and others for wrongful death. RJS's insurers assumed defense of the action on behalf of JPI and RJS. A jury found that JPI was 20% at fault for the accident and RJS was 70% at fault. This appeal arises from the subsequent round of litigation between JPI and its primary insurance carrier, Transcontinental Insurance Company (Transcontinental) and RJS and its excess carrier, Great American Insurance Company (Great American), over contributions to the settlement of the underlying action. On stipulated facts, the trial court ruled in favor of RJS and Great American, and against JPI and Transcontinental, on four separate motions for summary judgment. In affirming the trial court's summary judgment rulings, the Court of Appeal reasoned that there is a fundamental distinction between primary and excess insurance coverage: "primary coverage" is coverage whereby, under terms of the policy, liability attaches immediately upon the happening of an occurrence that gives rise to liability, and "excess coverage" or "secondary coverage" is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. Thus California law requires primary policies to exhaust before excess policies must pay.

COMPANY THAT ENCOURAGED ITS EMPLOYEES TO VOLUNTEER WITH NON-PROFIT CORPORATION'S RECONSTRUCTION PROJECT WAS NOT ADDITIONAL INSURED ON CORPORATION'S LIABILITY POLICY ENTITLED TO RECOVER COSTS FOR DEFENSE OF UNSUCCESSFUL LAWSUIT AGAINST COMPANY BROUGHT BY VOLUNTEER INJURED WHILE WORKING ON PROJECT. In Boeing Co. v. Continental Casualty (2007), 157 Cal.App.4th 1258, 69 Cal.Rptr.3d 322, the Court of Appeal for the Second Appellate District held that an employer which encouraged its employees to volunteer with a non-profit corporation's reconstruction project was not additional insured on the non-profit corporation's liability policy where an employee sought recovery for personal injuries sustained while performing volunteer

work on behalf of the non-profit corporation. Christmas in April USA (CIA) is a nonprofit corporation which enlists volunteers to repair and rehabilitate the homes of low-income, elderly and disadvantaged persons. CIA solicits companies such as Boeing to encourage its employees to volunteer for reconstruction projects. Todd Black (Black), an employee of California State University at Long Beach, allegedly was injured while working as a volunteer on a CIA project. Black filed suit against Boeing, CSULB and others. Boeing embarked on a search for insurance coverage. It learned that CIA was insured under a CGL policy issued by Continental Casualty Company. Thereafter, Boeing tendered its defense in Black to Continental. Unsurprisingly, Continental declined the tender in a letter which stated in relevant part: “[Continental] insured [CIA] under the above-referenced policy, however, this policy does not identify [Boeing] as an additional insured. We have confirmed with our insured that they did not have a legal requirement to name [Boeing] as an additional insured nor did [Boeing] request to be added as an additional insured on [CIA’s] policy.... [¶] We have also confirmed that no contract exists as between your client and our insured. At this time, [Continental] respectfully rejects your request to defend and indemnify [Boeing].” The trial court sustained Continental’s demurrer without leave to amend and dismissed complaint. The Court of Appeal held, as a matter of law, Boeing did not qualify as an additional insured under Continental’s CGL policy. The court found no ambiguity in the additional insured endorsement.

CLAIMS THAT INSURED HOMEOWNER’S DEFAMATION OF CLAIMANT RESULTED IN EMOTIONAL AND PHYSICAL AILMENTS DID NOT TRIGGER INSURANCE COVERAGE FOR “BODILY INJURY” UNDER HOMEOWNER’S POLICY, SINCE UNDERLYING DEFAMATION CLAIM WAS NOT COVERED UNDER POLICY COVERING “ACCIDENT.” In *Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 69 Cal.Rptr.3d 350, the Court of Appeal for the Second Appellate District held that a defamation action against insured homeowners did not allege a covered “occurrence,” which the policy defined as an “accident” because the Plaintiff specifically alleged that the insureds’ conduct was willful and intentional, and arose from an evil and

improper motive. Moreover, the insureds offered no extrinsic evidence to support their characterization of their conduct as negligent. Accordingly, the trial court properly granted summary judgment in State Farm’s favor on the ground that the underlying action did not involve a covered “occurrence” triggering State Farm’s duty to defend.

LIABILITY INSURERS’ EQUITABLE CONTRIBUTION CLAIM AGAINST NON-SETTLING INSURERS AROSE FROM EQUITY, NOT CONTRACT, AND, THUS, INSURERS WERE NOT REQUIRED TO STAND IN INSURED’S SHOES AND FULFILL ITS CONTRACTUAL OBLIGATION TO ARBITRATE DISPUTES WITH NON-SETTLING INSURERS. In *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008), 158 Cal.App.4th 1061, 70 Cal.Rptr.3d 605, the Court of Appeal for the First Appellate District held that where an insurance policy contains a mandatory arbitration provision governing disputes between the insured and insurer, that provision does not apply to equitable contribution claims brought by insurers who were not signatories to the policy. In this case, the Court was asked to consider the relationship, if any, between domestic and foreign insurance agreements in an arbitration dispute involving equitable contribution between insurance companies. The insured, Crowley Maritime Corporation, received indemnification for claims from two of its insurers. These two carriers in turn sought equitable contribution from other insurers of Crowley. One of the carriers thereafter petitioned to compel arbitration of another carrier’s equitable contribution claim under English law, based upon arbitration agreements the petitioning carrier had with Crowley. The trial court denied the petition on two grounds: (1) the equitable contribution claim does not arise from contract; and (2) each of the carriers were not signatories to the arbitration agreements, and the general rule under both California and federal law is that non-signatories cannot be compelled to arbitrate. The Court of Appeal concluded that an equitable contribution claim does not arise from contract, but from equity. Although there are exceptions to the general rule against compelling non-signatories to arbitrate, those exceptions were not found by the Court to be applicable.

HOMEOWNERS INSURER’S DENIAL OF CLAIM FOR MOLD DAMAGE STEMMING FROM TOILET OVERFLOW DID NOT VIOLATE THE EFFICIENT PROXIMATE CAUSE DOCTRINE IN LIGHT OF INSURANCE POLICY’S EXPRESS EXCLUSION “UNDER ANY CIRCUMSTANCES” FOR MOLD DAMAGE, EVEN IF RESULTING FROM COVERED PERIL OF A SUDDEN AND ACCIDENTAL DISCHARGE OF WATER. In *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 70 Cal.Rptr.3d 652, the Court of Appeal for the Second Appellate District upheld the application of a mold exclusion in an “all risk” property policy to mold resulting from the overflowing of toilet. A homeowner with an “all-risk” homeowners insurance policy returned home from vacation to find that a toilet had overflowed, causing significant water damage to his home. As a result of the water damage, the house became contaminated by mold. The homeowner made a claim under the policy for all of the damage, including the mold damage. Although the policy covered losses resulting from a sudden and accidental discharge of water from plumbing or household appliances, the insurer denied the claim for the mold damage based upon terms in the policy that provide that any loss resulting from mold is always excluded, however caused. The question raised in this case was whether an insurer may rely upon an “absolute” mold exclusion to deny coverage for mold damage resulting from the covered discharge of water, in light of the “efficient proximate cause doctrine.” Under that doctrine, when a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss, but the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause. Here, the Court of Appeal held that because the policy at issue in this case “plainly and precisely communicate[d]” that mold damage is not covered even when it results from a covered sudden and accidental discharge of water, the insurer’s denial of coverage did not violate the efficient proximate cause doctrine.

CONSTRUCTION LAW

Protecting Your Clients' Mechanic's Lien Rights in These Tough Economic Times



By Coleen H. Lowe, Esq., of
Grace Hollis Lowe Hanson
& Schaeffer LLP

A large percentage of Southern California contractors and subcontractors are finding that for the first time ever (or at least in many years) they are having a hard time getting paid for work performed. This is true for both new companies and established companies and with both their new and established customers.

Most contractors and most lawyers are aware of the mechanic's lien process in California which helps ensure speedy and complete payment for subcontractors, contractors and material suppliers (collectively referred to as contractors) on private construction work projects. However, as most contractors and therefore most lawyers, have never had to resort to the lien process to obtain full payment they are unfamiliar with the highly technical and precise procedures that must be followed in order to protect a contractor's ability to file and perfect a lien. As a lien can be filed against the property of an owner of a project, even though a contractor did not have a contract with that owner to perform work, the law is very specific on what exact steps must be followed before that owner can potentially lose their property to pay a debt to that third party (typically a subcontractor).

The way the lien procedures are set up, most of the steps are done before a contractor has its lawyer involved. Usually a lawyer is not involved until it's time to file an action to foreclose on the lien. Unfortunately by that time, somewhere along the way, the contractor has lost their right to pursue the lien process as a legally (constitutionally) guaranteed payment method. The rest of this article will explain the procedures that must be followed by a contractor to make sure that they do not lose the ability to file a lien as a method of securing payment.

The Preliminary 20 Day Notice

When do you give notice? As set forth in California Civil Code section 3097 the lien process starts with a Preliminary 20 Day Notice. The law requires that preliminary notice be sent before a lien can be filed. The notice must be sent in the proper time frame, it must meet the legal specifications of the code and there are penalties for improper notice or failure to give notice. How is a contractor to

know when and if they must give notice on the project? Notice is required when the contractor/supplier does not have a direct contract with the owner and it must be given not later than 20 days after labor or materials are first supplied to the project. If notice is given later then potential recovery under the lien is limited to amounts for labor or materials furnished 20 days prior to the notice and later.

Who gets notice? Notice must be given to the owner or reputed owner, the original contractor (the entity with the direct contract with the owner) and the construction lender.

How is notice sent? Notice may be given by personal service or by first-class certified or registered mail. If the owner to whom notice is to be given resides out of state and cannot be served personally or by mail then notice can be given by first class or register mail to the construction lender or original contractor. Notice need only be given once even if the scope of work expands, with the possible exception of multiple contracts for multiple works and there is the possibility of lost lien rights if multiple notices are sent for the same contract. There must be a proof of service of the notice either by affidavit or by receipt. The notice may also be filed with the county recorder which requires the county to notify those persons when a notice of completion or notice of cessation of work is filed on the property. Per statute these requirements cannot be waived by the owner.

What has to be on the notice? The Preliminary 20 Day Notice must contain the name of the owner, original contractor and lender. It must also contain a general description of the labor/materials to be furnished and an estimate of the total price of the labor/materials, the name/address of the person furnishing the labor/materials, the name of the person who contracted for the furnishing of the labor/materials, a description of the jobsite sufficient for identification and the required "NOTICE TO PROPERTY OWNER" statement which is set out in full at Civil Code section 3097.

What happens if some or all of these requirements are not met? A contractor can lose its ability to file a lien (Cal. Civ. C. Section 3114), lose its ability to file a stop notice, and lose the ability to assert a claim against a payment bond. They can also be subject to disciplinary action by the Registrar of Contractors (if the contract exceeds \$400) and subject to attorneys fees to the owner or lender for up to \$2000 for release of an

improperly filed mechanic's lien (Cal. Civ. C. Section 3154).

The Lien

What do I file and where do I file it?

California Civil Code section 3084 sets out the required lien information. The filing of the lien document itself is also something usually done without an attorney's assistance. The lien is filed with the county recorder in the county where the property is located. The lien must contain the name of the owner, a general description of the services provided, an adequate description of the site where the work was performed, the name of the person with whom the lien claimant contracted for the work and the amount the lien claimant is owed. This amount is usually different from the amount in the original 20 day notice and is calculated as the amount for services provided minus credits or offsets for what has already been paid. Any amount for interest is to be kept separate with just an indication of the percentage of the interest and the date on which it began to accrue. Also although attorneys fees may be available, that amount is not part of the lien itself but an amount, like interest, that the court will add into the judgment. The lien must additionally be verified and then should be served on the owner, a copy will also be mail to the owner by the county recorder.

When do I file it? California has very short time frames filing and pursuing liens. A subcontractor or material supplier must file within 30 days of filing of a notice of cessation of work or notice of completion of the project or 90 days if no notice is filed (Cal. Civ. C. Section 3116). The original contractor must file within 60 days of the filing of a notice of completion or cessation of work or 90 days if no notice is filed (Cal. Civ. C. Section 3115). The 90 days applies if a notice of completion or cessation is not filed or served on time—within 10 days of cessation or completion (Cal. Civ. C. Section 3117). The actions that trigger commencement of 90 day timeframe are (1) acceptance of a work of improvement by the owner, (2) use or occupancy of the work of improvement or (3) actual cessation of work on the improvement for more than 60 days (Cal. Civ. C. Section 3086).

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Employment Law

The California Supreme Court Rules That Supervisors Cannot Be Personally Liable For Retaliation Claims

By Daniel H. Lee, Esq. of Wilson Elser (L.A. office)



I. Introduction

A decade ago, in Reno v. Baird (1998) 18 Cal.4th 640, the California Supreme Court ruled that individual supervisors cannot be held personally liable for discrimination claims brought by employees under the Fair Employment and Housing Act (“FEHA”). On March 3, 2008, the Court, in Jones v. The Lodge at Torrey Pines Partnership, et al. extended that protection for retaliation claims brought under FEHA.

II. The Supreme Court’s Analysis

At issue was the meaning behind the word “person” contained in Government Code Section 12960, subdivision (h), and whether the Legislature intended to make individual supervisors and managers personally liable for retaliation claims. The statute at issue states that it is unlawful “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”

The word “person” was added through the enactment of AB 1167 (1987-1988 Reg. Sess.).

The Court concluded that there was no legislative history supporting the position that by adding the word “person,” the Legislature intended to extend personal liability for retaliation to employees. The Court noted that the bill adding the word “person” passed both houses of the Legislature with few dissenting votes. The Court reasoned, “[i]t is hard to imagine that a bill that created individual liability for retaliation where none had existed could be considered so noncontroversial.” The Court noted that individual supervisors can avoid engaging in harassment and, therefore, it is fair to subject them to personal liability for harassment. However, in the case of discrimination and retaliation, which involve job actions, supervisors oftentimes cannot avoid making the personnel decisions that are allegedly discriminatory or retaliatory. The Court explained that “[i]f every personnel manager risked losing his or her home, retirement savings, hope of children’s college education, etc., whenever he or she made a personnel management decision, management of industrial enterprises and other economic organizations would be seriously affected.”

III. Impact of Jones

While the Court did not fully decide all of the individual liability issues that may arise in the future, now, at least supervisors and managers can rest assured that there is no personal liability for retaliation claims when executing the employer’s personnel decisions.

Daniel H. Lee is a member of the Labor and Employment Practices Group at Wilson Elser, LLP in Los Angeles, California. He can be contacted at Daniel.Lee@wilsonelser.com.

In Memorium- Carl E. Flick, Esq.

By Gary P. Sinkeldam, Esq.
of Maxie Rheinheimer Stephens & Vrevich LLP

Former SDDL member, friend and attorney, Carl Edward Flick, Esq., 59, of North Las Vegas, passed away Feb. 14, 2008.

He was born June 25, 1948, in San Pedro, Calif., graduated from Westfield Academy and Central School in 1966, and had been a resident of Nevada for the past 10 years. Carl proudly served in the U.S. Marine Corps from 1966 to 1970. He received a degree from Hastings College of Law in 1987, and subsequently became licensed to practice law in California, Nevada and Arizona. He was a successful trial attorney for over 20 years and dedicated the past four years exclusively to the practice of mediation and arbitration in Nevada. The Mayor of Las Vegas declared February 28, 2008 as Carl Flick Day as part of a fundraiser organized by Carl’s colleagues. Prior to moving to Las Vegas, Carl was a well respected and experienced defense lawyer in San Diego, working at such firms as Hollywood & Neil, Sparber, Ferguson, Naumann, Ponder & Ryan, and Springel & Fink. He also co-founded the firm Tharp, Dockendorf, Flick & Jaroszek. Carl was a loving husband and father, an avid golfer and Harley enthusiast. His playful humor and love for life were contagious, and those who were fortunate enough to know him, will be forever blessed.

He was preceded in death by his father, Carl Leroy Flick; his mother, Betty (Manning) Clute; his stepfather, Kenneth Clute, and a stepbrother, Daniel Clute.

Carl is survived by his wife, Susie; daughter, Chrystal, son, Curtis and his wife, Melissa; granddaughters, Christi, Katelyn and Brianna; brother, Larry and his wife, Susan; sister, Constance Breads; nieces, Jeanine Valle and Nicole Drutch; nephew, Gregory; stepbrothers, James, Timothy, Clarence, and Kenneth Clute; stepsisters, Jeanne Rusch and Bonnie Dellatorre.

A memorial service to celebrate Carl’s life was held Feb. 23, at the Aliante Golf Course Tent Pavillion, 3100 W. Elkhorn Road in North Las Vegas. A reception followed at the family’s home. Please send donations to the National Brain Tumor Foundation, 22 Battery St., Suite 612, San Francisco, Calif. 94111, or phone (800) 934-2873.

BROWN BAG PROGRAMS

Brown Bag Series Summary - January 30, 2008



Ethics

By Brian A. Rawers, Esq.
of Lewis Brisbois Bisgaard & Smith

February 1, 2008 was the reporting date to the State Bar of continuing legal education hours for those whose names are in the last third of the alphabet. Of the 25 hours of continuing legal education that those attorneys needed to obtain, four hours of that needed to be in legal ethics. As part of the San Diego

Defense Lawyers attempt to assist attorneys in getting at least one hour of legal ethics MCLE credit, SDDL held a brown bag luncheon on January 30, 2008 on ethics. The speaker that afternoon was Charles "Chuck" Dick, the managing partner of the San Diego office of Baker & McKenzie, the world's largest law firm.

Mr. Dick earned his law degree from the University of Iowa in 1967 graduating Cum Laude. During his 40 years of the practice of law, Mr. Dick has had a distinguished career. He is a fellow in the American College of Trial Lawyers. He is a member of the American Board of Trial Advocates (ABOTA). He is general counsel to the San Diego County Bar Association and is a master in the American Inns of Court. He lectures on the responsibilities of corporate directors and officers and is a former commissioner on the City of San Diego Ethics Commission. He is also a retired captain in the United States Naval Reserve.

In his discussion of ethics, Mr. Dick decided to speak on "real life" issues. He chose three: (1) billing, (2) lawyer mobility, and (3) standards of professionalism and conduct.

With respect to billing, Mr. Dick recounted that when he was a young lawyer the goal of many young associates in those days was to bill three hours of time during a hour period of time. He noted that if you were doing construction defect work, you could accomplish that task merely by reviewing your mail. Mr. Dick stated that those days were over and have been long over. He said an attorney who bills clients by the 6 minute intervals (.1, .2, .3, etc.) should, in billing and recording time, keep in mind the following question: "How do I make my time records withstand scrutiny?!" Mr. Dick suggested several ways within which to do so.

First, in order to assist an attorney in making his or her time records withstand scrutiny, Mr. Dick recommended that an attorney record his or her time contemporaneously. That means recording your time at the time that the activity is being done. He stated that "recording time contemporaneously", means entering your billing, at a minimum, on a daily basis, not weekly and not monthly. The attorney who records his time contemporaneously, has the greatest likelihood of recording his or her time accurately.

The second concern in recording time so that it can withstand scrutiny, relates to "what to say?" Mr. Dick stated that someone should be able to read your time billing entry and understand what it is that you are billing them for. The entries don't need to be a small novel or a short story, but neither should they be so cryptic or short that a client is left to guess what activity you were engaged on that client's behalf.

Mr. Dick also talked about lawyer mobility. He noted that in this day and age there is a lot of movement of lawyers among law firms. He stated that there was an appropriate way to leave a firm. Lawyers should not leave their firm in the middle of the night. Moreover, it should be up to clients to decide whether to stay with the firm or go with the lawyer. Mr. Dick suggested that when an attorney decides that he or she is going to

leave a law firm, that they be open and honest about their intention with their current law firm. He noted that this may seem to be the harder route to take, but nevertheless it is the appropriate and correct route, and one that can be done. He cited in numerous examples of partners in major law firms who, when they decided to leave that law firm, reported to the executive, or management, committee of that firm their decision. By doing so, these attorneys were able to establish an open and honest dialogue and insure an amicable split between the partner and the law firm.

In regard to lawyer mobility, Mr. Dick also spoke about the ethical conflicts that can arise in interviewing attorneys. Specifically, one issue that is raised relates to confidential client information and attorney client privilege. For instance, in interviewing an attorney, there may be questions that arise in regard to clients that attorney has and the case load that the attorney has. That can turn into a discussion of cases that the attorney has handled or is currently handling. Mr. Dick indicated that both the interviewing firm, and the interviewing attorney, have to be concerned they don't go too far in asking, or in revealing, confidential client information when discussing the types of cases that the attorney is handling.

Finally, Mr. Dick spoke about standards of professionalism and conduct in the legal profession. Mr. Dick stated that he would like to strike the word zeal from the phrase "attorneys should be zealous advocates" for their clients. He said zeal is "fit for fools not for wise men". He discussed that the root word for zeal comes from Zealots, who were people in the Bible who were anti-Roman, and in essence, were almost the world's first terrorists. These people despised Roman rule so much that they would use any means to attack the Romans, such as poisoning wells or destroying crops. Mr. Dick inquired whether we really wanted to be compared to the Zealots by being called "zealous advocates".

In dealing with standards of professionalism and conduct, Mr. Dick stated that it is his belief that each of us has an innate sense of morality and ethics. He asked us to each analyze how we lead our own lives. Do we want to lead our lives by having our own "moral compass" and following what we believe and know, is right, or would we rather react to other people's conduct. By that he meant would we rather use unprofessional acts of other attorneys as a trigger for us to act in an unprofessional manner in response to opposing counsel's unprofessional conduct. Or rather, would we strive to maintain our own professionalism, composure and sense of right and wrong in the face of unprofessional conduct by opposing counsel.

Mr. Dick stated that one of the problems he sees today in the practice of law is that the "profession of law" has morphed into the "business of law". He indicated that whether we liked it or not that situation is here to stay. There is increased competition; there are more good lawyers around that good cases around. He noted, we aren't business people. We got a license to practice law, not a license to practice business. As such, we shouldn't just strive to practice law to a standard of what is required, but rather of what we expect a professional lawyer to act like when engaged in the practice of law. To do that, we need to rely on our moral compass.

Mr. Dick indicated that he has used several sources to help ground himself in his own "moral compass" of how to practice law on a professional basis. One of the resources that he has used is a book entitled *Forensic Fables* by O. This is a book published in 1920 in England and is a compilation of articles. Mr. Dick read one of the articles entitled "The Fable of the Young Solicitor and The Sagacious Old Buffer." It was a humorous, and interesting story. Nevertheless, the point of the story helped to emphasize that in the hectic and busy practice of the law, we all need to take a moment to stop, pause and reflect on how we want to practice law, what we want our reputation to be, and how we want to be remembered as attorneys long after we have concluded the practice of law.

Brown Bag Series Summary - February 12, 2008



Mediation and Settlement Conferences

By Alexandra "Sasha" Selfridge
of Law Offices of Kenneth N. Greenfield

On February 12, 2008 Thomas E. Sharkey, Esq. of Judicate West spoke at the Brown Bag program regarding "Mediation and Settlement Conferences." Mr. Sharkey has been a very well respected trial attorney for more than 40 years. He began his alternative dispute resolution career in 1989. Since 2000, he has focused his practice exclusively on mediation, arbitration and private judging.

Mr. Sharkey provided valuable insight as to how we can be more effective during mediation and settlement conferences.

He opined that mediation briefs ought to be exchanged between counsel rather than kept confidential. The mediator will not need to paraphrase to opposing counsel the arguments set out in the briefs. Thus, the mediator can then have more time to focus his or her attention on facilitating mediation rather than on attempting to accurately represent the parties' legal arguments.

Brown Bag Series Summary - March 11, 2008



Responsive Pleadings

By Darin J. Boles, Esq. of Aiken & Boles

Better than any law school professor I had! What a great presentation! These are just some of the comments received following the March 11, 2008, San Diego Defense Lawyer Brown Bag MCLE presented by Peter Doody of Higgs, Fletcher and Mack on the topic, "Responsive Pleadings." Mr. Doody

took what could have been a rather dry subject and excited the interests of the standing room only crowd.

With respect to Answers, Mr. Doody cited several reference sources to assist with determining the necessary affirmative defenses with the most significant being Schwing, California Affirmative Defenses (2007). This is a multi-volume set that focuses entirely on the lonely topic of affirmative defenses. Just like not leaving home without an American Express card, you will not want to file another Answer in a complex case without consulting this treatise.

Mr. Sharkey believes that mediations should be conducted in the form of a joint meeting, including all parties. He has found that this format tends to increase the level of credibility that is perceived by the respective sides. In addition, clients such as insurance claims people have the opportunity to see how opposing counsel will conduct themselves at trial, or to see the extent of the Plaintiff's actual and manifested injuries, both physical and emotional. Mr. Sharkey explained that the joint meeting format need not hinder an aggressive style or stance at mediation.

Mr. Sharkey described the role of the mediator in the negotiation process. He stated that the mediator attempts to anchor a party to a figure with the understanding that most cases have some sort of value. It should be considered that even a good case has a 20% chance of failure at trial, and there is no such thing as a "slam dunk" case.

Even when cases do not settle, both sides may be able to take something valuable away from a mediation or settlement conference. Each side is likely to better understand the point of view and legal arguments of the other side. In addition, the ground has been broken for future discussion with regard to settlement.

While Verified Complaints do not arise very often, he cautioned to keep a look out since positive denials or other appropriate responses to each paragraph are required rather than the customary general denial in the Answer. The pros and cons of Demurrers were discussed, including the concern of educating your opponent. Where no legal duty is alleged on the face of the Complaint, a Demurrer may be appropriate. It was noted that if a plaintiff is given leave to amend, but fails to do so within the allocated 10 days, the defendant can move for a dismissal with prejudice via an ex parte application under CCP 581(f)(2), CRC 3.1320(h) and Cano v. Glover (2006) 143 Cal.App.4th 326.

Further discussions concerning when to use, or not use, certain initial pleadings, included Motions to Strike, Special SLAPP Motions to Strike, Motions for Judgment on the Pleadings and Cross-Complaints. Mr. Doody energized the lunchtime crowd and stimulated significant enthusiasm on matters others may have treated as routine, but this presentation was far from it.

Construction Law

Continued from page 10

What happens next? The next step is typically when a lawyer gets involved. After a lien is recorder it must then be foreclosed upon for a contractor to collect money under the lien. This is the step that moves the process into the court system. It also has a very short time frame. An action to foreclose the lien must be filed within 90 days of the recording of the lien (CA Civil Code Section 3144). The time can be extended an additional 90 days if credit

is given, but in no case longer than 1 year from completion of the improvement. The lien, no matter its amount, must be filed in Superior Court as there are no lien procedures in small claims court. A lien becomes null and void if a foreclosure action is not timely commenced. An action to foreclose a lien must also be brought to trial within two years (not five) of its filing.

For attorneys who regularly represent contractors, subcontractors and materials suppliers it is a good idea to review these procedures with your clients. As most com-

panies have rarely, if ever, pursued the lien process through to foreclosure they have not had the opportunity to find out if they are following all the legal steps along the way. Many times an important part of the process is being overlooked completely or prepared incorrectly. Now is the time to advise your clients of the proper and required steps they must take to protect their ability use the lien statutes to receive payment for all of the work they have performed.

"AER"ing on the Side of Caution

Complying with the FDA's Adverse Event Report System for Dietary Supplements and Nonprescription Drugs

By Kelly E. Jones and Frederick H. Fern of Harris Beach LLP, New York City

In the wake of the nationwide controversy surrounding the FDA ban of PPA and ephedra, Congress passed the Dietary Supplement and Nonprescription Drug Consumer Protection Act (hereinafter "the Act"), which President George W. Bush signed into law on December 22, 2006. See 21 U.S.C. §§ 379aa, 379aa-1 (2007). This landmark legislation, effective December 22, 2007, authorized the FDA to promulgate regulations mandating that dietary supplement and over-the-counter (OTC) drug manufacturers and distributors maintain and submit all reports of serious adverse events to the FDA. On October 15, 2007, the FDA issued two draft guidances delineating the minimum data elements that must be included in the adverse event report (AER) mandated by the Act; the first, *Guidance for Industry: Postmarketing Adverse Event Reporting for Nonprescription Human Drug Products Marketed without an Approved Application* (hereinafter "*OTC Drug Guidance*"), and the second, *Guidance for Industry: Questions and Answers Regarding Adverse Event Reporting and Recordkeeping by the Dietary Supplement and Nonprescription Drug Consumer Protection Act* (hereinafter "*Dietary Supplement Guidance*"). See *OTC Drug Guidance*, U.S. Dep't of Health and Human Services, Food & Drug Administration (FDA), Center for Drug Evaluation and Research (CDER), available at www.fda.gov/cder/Guidance/7950dft.htm (October 2007); *Dietary Supplement Guidance*, U.S. Dep't of Health and Human Services, FDA, Center for Food Safety and Applied Nutrition (CFSAN), available at www.fda.gov/cfsan.fda.gov/~dms/dsaergui.html (October 2007).

It is estimated that over 150 million Americans consume dietary supplements to maintain or improve healthy lifestyles, generating approximately twenty billion dollars in sales annually for the industry. See Rock, C., *Multivitamin-Multimineral Supplements: Who Uses Them?* 85 AM. J. CLIN. NUTR. 277, 277-79 (2007). With the nationwide increase in nutraceutical

use and the tendency toward self-medicating, many lawmakers felt the need to address the potential public health concerns associated with these burgeoning less-regulated industries. This article examines the requirements and implications of this cutting-edge legislation for the growing multi-billion dollar dietary supplement and OTC industries, geared for the young lawyer practicing or interested in this expanding area. It is important for young lawyers to familiarize themselves with these new regulations, and to comprehend their implications, which provides a perfect opportunity for young lawyers to track a significant regulatory change for the industry and counsel existing or potential clients on the expanded requirements.

Background

Fostered in large part by numerous adverse event reports and the scientific controversy associated with natural ephedra supplements and the subsequent FDA ban of all ephedrine alkaloid products, the Dietary Supplement & Nonprescription Drug Act amends the Federal Food, Drug and Cosmetic Act (FDCA) to establish two new parallel mandatory reporting systems: one for nonprescription OTC products, and the other for dietary supplements. See 21 U.S.C. §§ 379aa, 379aa-1. Understanding the import of the Act requires an appreciation of the regulations currently in place with respect to the reporting of adverse events by manufacturers of nonprescription drugs and dietary supplements.

• The Difference between Dietary Supplements and OTCs

Dietary supplements are regulated by the Dietary Supplement Health and Education Act (DSHEA) of 1994, which categorizes dietary supplements as foods rather than drugs. Dietary supplements include any product that contains a vitamin, mineral, herb or other botanical, amino acid, or dietary substance for use to supplement the diet by increasing total dietary intake, or any concentrate, metabolite, constituent, extract, or combination of any of these

elements. *Dietary Supplement Guidance* at 3-4. Dietary supplements do not require FDA safety and efficacy review and approval before marketing. Rather, the FDA has the burden to prove that a dietary supplement is unsafe, and seek its withdrawal from the market if it "presents a significant or unreasonable risk of illness or injury" if used as recommended on the labeling. See 21 U.S.C. § 342(f)(1).

An OTC drug is a nonprescription drug product marketed for use by the consumer without the need for a written order by a health care professional. OTCs do not have mandatory adverse event reporting requirements, as the products are generally recognized as safe and effective. Vetted and approved OTC monographs represent regulatory standards for the marketing of non-prescription drug products. These standards provide the marketing conditions for OTC drug products, including labeling and other general requirements. Although adverse event reporting is not mandatory, many manufacturers of monographed drugs voluntarily submit adverse event reports to the FDA. Thus, it is not surprising that most of the controversy surrounding the Act has centered on its applicability to the less regulated dietary supplements.

• The FDA's OTC Drug Guidance

The *OTC Drug Guidance* provides that the "manufacturer, packer, or distributor whose name . . . appears on the label of an OTC drug marketed in the United States without an approved application . . . must submit to FDA any report received of a serious adverse event associated with such drug," along with a copy of the product's label, via a FDA MedWatch Form 3500A, within 15 business days after receiving the report. *OTC Drug Guidance* at 2. The FDA will accept reports via regular mail or electronically via the Adverse Event Reporting System (AERS). *Id.* at 10-11. The AERS system is the computerized information database designed to support the FDA's post-marketing safety surveillance program for all pharmaceutical and biologic products. *Id.*

• The FDA's Dietary Supplement Guidance

All dietary supplement serious adverse

event reports must be filed using FDA Form 3500A within 15 days of receipt. *Dietary Supplement Guidance* at 6–7. Serious adverse events for dietary supplements are identically defined as for OTC products, and the manufacturer, packer, or distributor whose name “appears on the label of a dietary supplement marketed in the United States is required to submit to FDA” all such reports “associated with use of the dietary supplement”. *Id.* at 5. Unlike OTC drugs, the FDA will only accept hard copy reports via regular mail, and will not allow electronic or facsimile submissions. *Id.* at 14–15.

What Qualifies as a Serious Adverse Event?

While pharmaceutical and medical device manufacturers are required to report all adverse events to the FDA, mandatory reporting for dietary supplement and OTC manufacturers is limited to events deemed serious. The definition of “serious” is nearly identical to the language for adverse experiences associated with pharmaceutical products, set forth in 21 C.F.R. 310.305(b). *Serious* adverse events include those that result in:

- death;
- life-threatening experiences;
- in-patient hospitalization;
- persistent or significant disability or incapacity;
- a congenital anomaly or birth defect; or
- where medical or surgical intervention is required to prevent any of these conditions.

Id. at 4.

Even if the receiver does not believe the event was serious or the consumer did not receive medical treatment, any report that falls within the definition of “serious” must be filed. Events that do not meet the criteria for “serious” may be reported voluntarily.

The Responsible Party

The responsible party is the manufacturer, packager, or distributor whose name appears on the label. *OTC Drug Guidance* at 2; *Dietary Supplement Guidance* at 5.

Retailers whose names appear on the label may designate the manufacturer or packer to submit reports on the retailer’s behalf. 21 U.S.C. §§ 379aa(b)(2), 379aa-1(b)(2). While the FDA has long required the label to contain the address or phone number of the responsible party, these entities may now include an e-mail address to report adverse events. Further, while the law specifically allows for a responsible party contractually to delegate reporting to another entity, the responsible party remains ultimately accountable for proper reporting. *OTC Drug Guidance* at 2; *Dietary Supplement Guidance* at 5–7.

The New Reporting Requirements

Prior to the enactment of the Act, the dietary supplement and OTC industry had no mandatory requirements, but could voluntarily report through the *Special Nutritional Adverse Event Monitoring System*. The voluntary nature of the system invariably resulted in underreporting, and incomplete reports, which yielded a compilation of limited data and only marginally useful information. The FDA should now have better data compiled through regulated and consistent reporting standards, which might provide an early signal of a health problem associated with a product, which could trigger a further scientific investigation.

A United States address or telephone number for reporting serious adverse events must appear on the product label, even if the phone is answered outside of the United States. *See* 21 U.S.C. § 352(x). The guidance provides that serious adverse event, as well as all follow-up reports with new medical information, must be submitted to the FDA no later than 15 business days after initial receipt or after new medical information is received. *See, e.g., Dietary Supplement Guidance* at 6. The guidance clarifies, however, that “[a]lthough the [Act] does not expressly provide a time-frame for serious adverse event reports that [are received] by other means (such as by e-mail or fax), the reporting of such adverse events is required by the plain language of [the Act].” *Id.* Accordingly, the FDA “strongly recommends” that all such reports also be submitted within 15 business days of their receipt. *Id.* Additional information received by the responsible

party within one year of the initial report must also be forwarded to FDA within 15 days; a new report need not be filed. *Dietary Supplement Guidance* at 13–14.

The FDA determined that the MedWatch Form 3500A is most appropriate for the mandatory reporting of the serious adverse events associated with OTC drug and dietary supplement use. To avoid duplication, provide sufficient substantive information, facilitate follow-up, and detect fraud, each report submitted for an OTC product must contain:

- an identifiable patient with enough information to indicate the existence of a specific consumer (*e.g.*, age, gender, initials, date of birth, or patient identification number);
- an identifiable initial reporter (*e.g.*, consumer, pharmacist, nurse, doctor);
- a suspect OTC product; and
- a serious adverse event or fatal outcome.

OTC Drug Guidance at 4.

Similarly, the minimum data elements that must be included in reports for dietary supplements are:

- an identifiable injured person;
- an identifiable reporter;
- identity and contact information for the reporting party (*i.e.*, the manufacturer, packer, or distributor);
- a suspect dietary supplement; and
- a serious adverse event or fatal outcome.

Dietary Supplement Guidance at 8.

Furthermore, each report of a serious adverse event associated with an OTC or dietary supplement must be accompanied by a copy of the current label. With the report one should also submit the full outer carton/container label and immediate container label, including the drug facts panel and the principal display panel. *See, e.g., OTC Drug Guidance* at 8. The label need not be resubmitted with any follow-up report, unless there have been changes since the initial submission. *Id.*

In addition to providing the product label with the 3500A form, both the *Dietary Supplement Guidance* and the *OTC Drug Guidance* provide that (1) hospital discharge summaries, (2) autopsy reports, (3) relevant laboratory data, and (4) other critical clinical data, also be filed, if available. *Id.* at 7; *Dietary Supplement Guidance* at 13. The MedWatch form 3500A can only be submitted by mail for dietary supplements; reports for OTC drugs can be submitted either by mail or electronically.

Maintaining Records

The Act also establishes new record-keeping requirements. Records of all adverse events reports received, both serious and non-serious, must be retained for six years, and be available to the FDA for inspection upon request. 21 U.S.C. §§ 379aa(e), 379aa-1(e). For record keeping purposes, the Act contains a very broad definition of adverse event for dietary supplements as “any health-related event associated with the use of a dietary supplement that is adverse.” See 21 U.S.C. § 379aa-1(a)1. With respect to OTCs, the definition is even broader, encompassing (in addition to the aforementioned criteria), events occurring from an overdose, whether accidental or intentional; abuse or withdrawal; or any failure of expected pharmacological action. 21 U.S.C. § 379aa(a)(1).

The Act also includes an express state preemption provision intended to ensure that state requirements relating to serious adverse event reporting are consistent with the Act, and to preempt those state requirements that are contrary or different. 21 U.S.C. §§ 379aa(h), 379aa-1(h). While encouraging, the scope of such preemption may ultimately need to be decided by the courts.

Penalties

Failure to timely submit reports, submission of false reports, or lack of record keeping may result in penalties. Potential penalties include:

- Monetary fines;
- Seizure of product;
- Injunctions; and/or

- Criminal penalties.

See 21 U.S.C. §§ 379aa, 379aa-1.

Furthermore, OTC and dietary supplement labels that do not contain the required telephone number or address will be deemed misbranded, and subject to the enforcement and penalty provisions for misbranded products under the FDCA. See 21 U.S.C. § 352(x).

Preparing for Compliance

Companies must establish standard operating procedures, train personnel and/or contract with independent companies to comply with the Act’s mandates. In establishing such procedures, the affected companies should train staff to be fully conversant with their surveillance, investigation, reporting and record keeping duties. Moreover, companies must immediately incorporate the manufacturer’s phone number and address on the label and designate an individual or group within the company to whom reports are directed for appropriate handling. Multiple employees should be cross-trained on different tasks of preparing reports, record keeping, and distinguishing between serious and non serious adverse events pursuant to the regulations. Companies should assess their in-house capabilities and train a team to determine whether an adverse event is serious and reportable. If the task is being outsourced to a reputable company, the contract should be negotiated with a hold harmless provision. Beyond just satisfying the mandated reporting requirements, responsible companies should draft, implement and keep scrupulous records of the standard operating procedures, as well as documenting the specific steps taken in follow-up with consumers in each individual case.

Additionally, examining all reported adverse events on a systematic basis (annually would be appropriate), would affirmatively show that companies devoted appropriate attention to the AERs and confirmed the safety of its products. Implementing such an annual review protocol by someone with medical knowledge would go a long way in establishing a good defense and evidencing corporate responsibility should claims arise from

multiple adverse event reports from the same product.

Implications of the Act

While the definition of serious adverse events is modeled on the language used for pharmaceuticals, the Act’s use of this definition is not to be construed as turning dietary supplements into drugs, nor subjecting dietary supplements to pre-market approval. From a liability perspective, the submission of a report is not to be construed as an admission that the dietary product caused or contributed to the adverse event. The FDA MedWatch form 3500A contains a specific disclaimer that “[s]ubmission of a report does not constitute an admission that medical personnel, user facility, importer, distributor, manufacturer or product, caused or contributed to the event.” Though reports submitted will continue to remain unavailable to the public per FDA policy, the adverse event data compilation can be obtained by submitting a Freedom of Information Act request to the FDA. While not proof of causation, multiple adverse event reports for the same product may help plaintiffs’ lawyers build their case based on association. Even though multiple anecdotal reports do not rise to proof of causation, they create a potential signal to companies to investigate further and, perhaps, suggest that an epidemiological study would be appropriate to confirm or rule out causation. Although the court’s causation analysis may protect a manufacturer from ultimate liability based on adverse event reports, it will not protect a manufacturer from the burden and expense of litigation prompted by the same reports.

Moreover, based on the FDA’s risk-utility assessment—with a lower standard than used in the courtroom—the FDA may seek to remove an OTC drug or dietary supplement from the market without proof of causation. Thus, some in the industry have well founded concerns that the new law may lead to the FDA banning certain OTC drugs and dietary supplements from the market, which will likely result in inevitable litigation. While argued that the new Act will help protect consumer health, it will certainly create

additional administrative costs for the industry. These costs will likely fall more heavily on the small to mid-size dietary supplement manufacturers, which generally do not have an existing infrastructure to handle the new reporting and record keeping requirements.

Conclusion

Young defense lawyers, practicing in the fields of product liability and mass torts, should familiarize themselves with the FDA's new reporting requirements. The Dietary Supplement and Nonprescription Drug Consumer Protection Act is a cutting-edge regulatory issue that will affect virtually every "responsible person," whether it be a retailer, manufacturer and/or distributor of vitamins, herbal remedies, OTC drugs, nutritional supplements, and performance enhancing products. The FDA's final regulations closely resemble those currently in place for pharmaceutical and medical device manufacturers requiring the tracking and reporting of adverse events. Once the regulations are enacted, manufacturers and distributors will be faced with the daunting task of developing and implementing procedures for the receipt, evaluation, surveillance, investigation, reporting and maintenance of records of serious adverse events.

Kelly E. Jones is an associate, and Frederick H. Fern is a member, of Harris Beach PLLC in New York City. Ms. Jones focuses her practice in the areas of product liability and mass and toxic tort litigation and currently serves as the vice chair of the DRI Young Lawyers Sponsorship Subcommittee. Mr. Fern's practice includes a range of experience in pharmaceutical, medical device, nutraceutical, biotechnology and complex health care litigation. He currently serves as a steering committee member of DRI's Medical Liability and Health Care Law and Drug & Medical Device Committees.

This article is reprinted from FOR THE DEFENSE February 2008 with permission of The Defense Research Institute.

Edifications

Our Founding Fathers (or is that politically incorrect and should be "Founding Parents?")



by Lori J. Guthrie, Grace Hollis Lowe Hanson & Schaeffer

In dealing with the recent transitions of past president of the SDDL to current president and the recent (and terribly saddening) resignation of Sandee Rugg as our Executive Director, we located a copy of what appears to be one of the first (if not the first "Update"). It began ... "Just a quick update on the status of S.D.D.L." and was dated August 6, 1984. In 1984, I was in my second year of college at California State University at Fresno (after which I quickly moved back to San Diego). The members of the SDDL at that time totaled 66. Of that, only 6 were women (only 9% of the membership). Today (or at least as of the member list of 3/13/08), SDDL has membership of 353 and going strong. Of the current members, 125 are women (roughly 35%). WOW!!!

As I was going through the names of the early members of this fine group of defense attorneys, I recognized some that I worked for as a paralegal early in my career at McCormick & Mitchell. That got me thinking about which, if any (other than Glenn Mitchell) of our Founding Parents had moved on, from this world into the next. Out of these original 66, only 4 were listed in the California Bar website as being deceased: David C. Holdway, III, Patrick A. McCormick, Jr., Denis Long and Glenn Mitchell. All died too young.

Also while perusing these "ancient" documents, I discovered that 8 of our "original" members then went on to become Superior Court Judges: Michael Anello, David Danielsen, Judith Haller, Ronald Johnson, Thomas LaVoy, Timothy Tower, Adrienne Adams Orfield and Michael Orfield. Of these, 4 of them were on the original "Steering Committee" and 2 were on the original "Board of Directors."

I knew when I was going through the list that I recognized some of the names from the early membership as current members of SDDL. These 6 members are Charles R. Grebing, W. Patrick Grimm, Steven R. Haasis, Bruce W. Lorber, Steven Shewry and Paul Traficante. SDDL thanks these gentlemen for their ongoing support of our distinguished organization. We look forward to another fun-filled year with the SDDL.

Thank You

San Diego Defense Lawyers would like to thank
Brenda Peterson of Peterson Reporting
for sponsoring our Brown Bag Luncheon programs
held in her offices at:

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2008 DRI YOUNG LAWYERS SEMINAR

Mark your calendar and register today for the 2008 DRI Young Lawyers Seminar, June 5-6, 2008 at Disney's Yacht & Beach Club Resort in Orlando, Florida. On the heels of a hugely successful seminar in San Diego this past summer, the 2008 seminar will feature all the things you've come to know and love in DRI seminars including outstanding CLE presentations from the nation's best trial lawyers, seasoned in-house counsel and young lawyer superstars along with ample opportunities for networking, dine-arounds a public service project and, of course, the big Friday night party! If you thought this year's Padres game in San Diego was cool, just wait until you see what we have planned for 2008! You won't want to miss it!

Check out the DRI website, download the seminar brochure and register today! Then mark your calendar for June 5-6, 2008 for this fabulous event. Here's a link for the seminar webpage: <http://www.dri.org/DRI/open/CLE.aspx?sem=20080240>

If you are not yet a member of DRI, you can join right now. Go to www.DRI.org and download a membership application. On the left hand side of the DRI home page, about half way down, you will see "Membership Applications." If you are a member of your local defense organization (and you probably are if you are reading this) and you have never been a member of DRI, select the "SLDO Promotion" application from the dropdown menu. You can join DRI



free for one year and get a certificate for one free seminar if you are a young lawyer. If you have been a DRI member in the past, but would like to re-join, choose the "Individual Membership" application. Young Lawyers dues are only \$130 per year and include a subscription to DRI's outstanding monthly magazine.

If you would like get involved in spreading the word about this great seminar or if you need more information about joining DRI, contact Laurie Miller lmiller@jacksonkelly.com or Kevin Baltz kbaltz@millermartin.com. We hope to see you in Orlando this summer!

MCLE Schedule

2008 Schedule for Upcoming Brown Bag MCLE Programs

Members Free Guests \$25.00 1.0 MCLE Credit

Noon – 1pm at Peterson Reporting, 530 B Street, 11th Floor Training Room

5/13/08	Jury Voir Dire
6/10/08	Opening Statements
7/8/08	Presentation, Introduction and use of Demonstrative Evidence at Trial
8/12/08	Direct and Cross examination of witnesses, both expert and percipient
9/9/08	Jury Instructions and the use of verdict forms
10/14/08	Closing Arguments
11/5/08	Post trial issues
12/9/08	Appeals, Writs, and Re-Trials

2008 Schedule for Upcoming Evening MCLE Programs

Members Free Guests \$45.00 2.0 MCLE Credits

5:30 reception; 6:00pm – 8:00 pm program

San Diego County Bar Association

1333 Seventh Avenue – Broderick Room

6/25/08	Trial preparation and organization
9/24/08	Evidence 201 for the trial lawyer Making and overcoming objections
12/10/08	Anatomy of a DUI

MCLE Schedule

EXTRA!!! Member News EXTRA!!!



The 2008 SDDL Board of Directors is sad to announce that Executive Director, **Sandee Rugg**, has resigned her position in order to pursue other interests. The Board presented Sandee with a diamond pendant in appreciation for the seven years of outstanding service to the Organization. We wish her well in all her endeavors.



Thomas W. Byron and Michael M. Edwards of Byron & Edwards, APC, are pleased to announce that **Scott B. Hilberg** has agreed to become a partner of the firm, effective April 1, 2008. Mr. Hilberg has been with the firm since April 1, 2005. He received his Bachelor of Arts degree in Political Science from the University of California at Irvine in 1990 and his J.D. from the

University of San Diego School of Law in 1994. Mr. Hilberg's main areas of practice include Complex Litigation, Professional Negligence, Defense of Developers, Architects and Engineers as well as General Insurance Defense.



Bacalski, Ottoson & Dubé LLP congratulates **Paul Johnson** on his appointment as an Administrative Law Judge with the United States Department of Labor in Washington, DC. It is a well-earned capstone to a distinguished career.

As an administrative law judge, Paul will preside over formal hearings concerning many labor-related matters, including, as the largest part of the office's work, hearings concerning black lung benefits and longshore workers' compensation. The administrative law judges, however, also hear and decide cases arising from about 80 other labor-related statutes and regulations including whistleblower retaliation, working conditions for migrant farm workers, civil fraud, and ERISA record keeping violations.

We wish Paul all the best in his new position.



The Law Offices of Kenneth N. Greenfield is pleased to announce that **Bethsaida C. Obra** has joined the firm as an associate. Beth's primary area of practice is civil litigation, in the areas of first and third party insurance litigation and insurance bad faith. Prior to her joining the firm, she practiced real estate, business, and employment litigation.

The 2008 SDDL Board of Directors is pleased to announce the appointment of Jeanette Robinson as Executive Director. Jeanette has been a San Diego Certified Shorthand Reporter for over 30 years, and has been a business owner for more than 20 years. Importantly, she has been a friend of the insurance defense community since at least 1980. We welcome Jeanette and look forward to an exciting year with the SDDL.



On February 28, 2008, **Hugh McCabe** a shareholder at Neil Dymott Frank McFall & Trexler was formally introduced as a member of the prestigious American Board of Trial Advocates (ABOTA). Mr. McCabe was inducted into ABOTA in October of 2007. Membership in this organization is by invitation only to trial attorneys who have demonstrated excellent trial skills while maintaining the highest levels of professionalism, integrity, honor, and courtesy. Members must also have at least five years of active experience as a trial lawyer and must have tried a minimum of twenty civil jury trials to a verdict in a court of general jurisdiction or a federal court.

WHERE ARE THEY NOW? [Answer]

The one on your right is your current **SDDL President**. The one on the left is..... current board member **Brian Rawers** (circa 1980).



WRITING TRIAL COURT MOTIONS TO WIN

By Randall Christison, Esq.



During a break the other day, the judge talked about the challenges of running her motion calendar. The conversation turned quickly enough to how the lawyers' written work made her task immeasurably harder. That reminded me of another judge's comment to the same effect a few days before, along with the common lawyers' complaint I hear, "The judge just didn't get it." One judge recently, knowing of my interest in lawyers' writing, gave me a memo-

randum of points and authorities to review, with the challenge to turn it into something he could understand, because he sure could not. The memorandum's problem? It took three pages to get to the point, and then the lawyer buried it in wordiness. Repeatedly, both from lawyers and even more strongly from judges, the common complaint is lawyers' points are not getting across to the judges.

Why? Simple analysis of a typical civil judge's case load tells the problem. Between trials, ex parte hearings, oral argument calendar, and other administrative jobs dumped on judges, they only have a few minutes per motion. Five minutes per Ps&As is a good rule of thumb. That means either you persuade the court in the first five minutes of your brief, or you lose. Or you can hope your opponent's brief is even worse. Otherwise, you are having to depend on the judge's research attorney somehow understanding your papers.

I ask judges, is there one thing you want me to tell lawyers? The unhesitating response, "Get to the point," another way of saying "you have only got five minutes." "Well," lawyers answer, "that's easy to say, but we're dealing in complex problems with lengthy, often esoteric facts. How can we get to the point when it takes many hundreds if not thousands of words to explain it?"

Not only do we lawyers write thousands of words, we write them in a complicated way. Readers, meaning judges, struggle to get through it. Judges hope lawyers will help them decide the case properly, for they lack the time to do any but the quickest independent research. That hope is usually frustrated.

If judges had a mantra, it would be this:

1. Tell Me *What* I Need to Decide.
2. Tell Me *Why* I Should Decide It Your Way.
3. *Every* Unnecessary Word Is Your Enemy.

Let me suggest you adopt the following strategy. Five minutes means five hundred words. The first five hundred words need to answer the judge's questions, and any word that does not do so needs to be eliminated. Ruthlessly. Take for example these opening lines of a brief from a well-regarded lawyer in a well-regarded law firm. (Rest assured, not an SDDL member.) Ask yourself how many of these words in fact advanced the judge's understanding of the issue.

INTRODUCTION

This is an action for damages caused by the failure of Defendant United Title Insurance Company to pay a commission to Plaintiff John J. Jones at the close of escrow. United was an escrow holder for the sale of 203 unimproved single family lots in Hollister Ranch by Atlantic Homes, LLC to Lassen Homes for a purchase price of \$22,330,000. [United's Separate Statement of Undisputed Material Facts (the first column), hereinafter "SS," I; Jones's Response to the Separate Statement (the second column), hereinafter "RSS," I.] The Purchase Agreement and Escrow Instructions provided for payment of a commission to Jones at the close of escrow equal to 5% of the purchase price, which amounts to \$1,116,500. [SS 4, RSS 4.]

Plaintiff John J. Jones is referred to herein as "Jones," Defendant United Title Insurance Company is referred to herein as "United," and Atlantic Homes, LLC, is referred to herein as "Atlantic."

Jones alleges four causes of action: (1) Breach of Contract, in that Jones was a third party beneficiary of the Purchase Agreement and Escrow Instructions; (2) Intentional Interference with Contract, in that United interfered with the Purchase Agreement and Escrow Instructions and with a separate Exclusive Listing Agreement between Atlantic and Jones; (3) Negligent Interference with Contract, in that United negligently interfered with both contracts; and (4) Negligence, in that United breached a duty to Jones to pay the commission.

The central issue in this case is whether the commission was "assigned" to Jones. If the commission was "assigned" to Jones, then neither the buyer, the seller nor the escrow holder had the right to alter the transaction to deprive Jones of payment of the commission through escrow and at the close of escrow. Whether the commission was "assigned" to Jones, either in the Exclusive Listing Agreement between Atlantic and Jones [RSS 11] or in the Purchase Agreement and Escrow Instructions [SS 4], or the combination of both, is a question for the jury to decide under BAJI 10.96:

A right arising out of a contract may be transferred by the holder of the right to another person. This transfer is called an assignment. The person making the transfer is the assignor. The person receiving the transfer is the assignee. Unless some law provides otherwise, an assignment may be oral, written, or partly oral and partly written. There need be no consideration for the assignment. If there is consideration, it is a contract of assignment, and subject to all laws relating to contracts.

Jones was assigned the commission, and United should have paid the commission to Jones at the close of escrow. Instead, United disbursed the funds to Atlantic.

This lawyer used almost all of her allotted 500 words and, more important, expended her allotted judicial patience. She had 60 words left to persuade the court of the rightness of her position. So, how many of these 440 words were necessary? Let's

look again, striking out the unnecessary words (but with some of my commentary):

INTRODUCTION

~~This is an action for damages caused by the failure of Defendant United Title Insurance Company to pay a commission to Plaintiff John J. Jones at the close of escrow (when else do we pay commissions but at the close?) United was escrow holder for the sale of 203 unimproved single family lots in Hollister Ranch (does the right to a commission depend on whether there were 203 or 23 lots, whether they commercial or residential, or improved or unimproved? Just because you know the details does not mean the judge needs to know them) by Atlantic Homes, LLC to Lassen Homes for a purchase price of \$22,330,000. {United's Separate Statement of Undisputed Material Facts (the first column), hereinafter "SS," I; Jones's Response to the Separate Statement (the second column), hereinafter "RSS," I.} (Why put citations in the introduction? You can prove the validity of your facts later. First you need to make your point.) The Purchase Agreement and Escrow Instructions provided for payment of a commission to Jones (as it appears later, the agreement did not do so, so don't blow your credibility at the beginning) at the close of escrow (when else?) equal to 5% of the purchase price, which amounts to \$1,116,500. (A detail? Yes, but this tells the judge something of interest-it's a big case.) {SS 4, RSS 4.}~~

~~Plaintiff John J. Jones is referred to herein as "Jones," Defendant United Title Insurance Company is referred to herein as "United," and Atlantic Homes, LLC, is referred to herein as "Atlantic." (Every one of these labels is obvious and a waste of ink.)~~

~~Jones alleges four causes of action: (1) Breach of Contract, in that Jones was a third party beneficiary of the Purchase Agreement and Escrow Instructions; (you identified the agreement a few words ago; we don't need the full title again) (2) Intentional Interference with Contract, in that United interfered with the Purchase Agreement and Escrow Instructions and with a separate Exclusive Listing Agreement between Atlantic and Jones; (3) Negligent Interference with Contract, in that United negligently interfered with both contracts; and (4) Negligence, in that United breached a duty to Jones to pay the commission. (Why these are here is hard to fathom, other than to add complexity to a straightforward case. The only issue is in the next paragraph.)~~

~~The central issue in this case is whether the commission was "assigned" (why the quote marks around the word? Got me.) to Jones. If the commission was "assigned" to Jones, then neither the buyer, the seller nor the escrow holder had the right to alter the transaction to deprive Jones of payment of the commission through escrow and at the close of escrow. Whether the commission was "assigned" to Jones, either in the Exclusive Listing Agreement between Atlantic and Jones [RSS 11] or in the Purchase Agreement and Escrow Instructions [SS 4], or the combination of both, is a question for the jury to decide under BAJI 10.96:~~

~~A right arising out of a contract may be transferred by the holder of the right to another person. This transfer is called an assignment. The person making the transfer is the assignor. The person receiving the transfer is the assignee. Unless some law provides otherwise, an assignment may be oral, written, or partly oral and partly written. There need be no consideration for the assignment. If there is consideration, it is a contract of assignment, and subject to all laws relating to contracts. (If you want to ensure the judge will not read your text, nothing is better than a single-spaced block quote, especially when it does not tell the judge he or she doesn't already know.)~~

~~Jones was assigned the commission, and United should have paid the commission to Jones at the close of escrow. Instead, United disbursed the funds to Atlantic. (Finally, what the case is about.)~~

~~So, it took 430 words to get across 180 words' worth of information.~~

~~Here is what is left, without substantially rewriting it. Rewriting would undoubtedly reduce the word count even further. My challenge to you, loyal SDDL reader, is to see if you can get it below 150 understandable words.~~

~~Atlantic Homes, LLC sold property to Lassen Homes for \$22,330,000. Plaintiff Jones, as the real estate agent under an exclusive listing agreement, was entitled to a 5% commission, \$1,116,500. But Defendant United Title Insurance Company, the escrow holder, failed to pay that commission to Jones, paying it instead to Atlantic.~~

~~The central issue in this case is whether the commission was assigned to Jones. If the commission was assigned to Jones, none of the parties had a right to alter the transaction to deprive Jones of his commission. Whether the commission was assigned to Jones, either in the Exclusive Listing Agreement or in the Purchase Agreement and Escrow Instructions, or both, is a question for the jury.~~

~~Jones alleges four causes of action: (1) United's breach of contract, in that Jones was a third party beneficiary of the Purchase Agreement; (2) United's intentional interference with contract, the separate Exclusive Listing Agreement between Atlantic and Jones; (3) United's negligent interference with both contacts, and (4) United's negligence.~~

~~Now you have told the court in 166 words what your case is about, what your position is, and given a large hint what questions the court needs to decide. We could make that hint explicit in another 58 words, such as:~~

Continued on page 23



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WRITING TRIAL COURT MOTIONS TO WIN

Continued from page 21

The questions for the court are these:

[1] May United, once it learned of the commission's assignment, ignore it and pay the commission to the seller instead?

[2] Because whether the parties assigned the commission is a disputed issue of fact and a jury question, is it appropriate to adjudicate the issue on a summary judgment motion?

Now you have met most of the criteria of the 500-word opening, using only 220 words. But you still need to tell the court why you should win. Can you do that in 300 words? I think so. Let's replace the 58-word issue statement by this approach, and let's assume the law is as I have paraphrased it here.

The issues for the court are these:

[1] California law permits contracting parties to assign their rights to someone else orally or in writing. Evidence, although disputed, suggests Atlantic orally assigned the right to a sales commission to Jones in return for Jones's substantial and successful efforts in making a \$22 million sale. Is there a question of fact whether this assignment is effective?

[2] A party who is aware of a contract may not interfere with the contract rights of the parties, whether negligently or intentionally. United knew of the assignment of a sales commission to Jones. Yet United ignored the assignment, made no inquiry as to its validity and paid the commission to the seller, nothing to Jones. Does Jones have a claim for interference with contract against United?

Now you have used another 130 words to tell the court what it needs to decide, and the decisions should be obvious. Your total is up to 300. You can still use 200 more words to fill in the blanks or expand on anything to which you care. What is more, the store of judicial patience is still intact. Rest assured, your opponents will exhaust any residual good will. Let 'em.

And what about the rest of the brief? It exists to prove your first 500 words are correct. That's the research attorney's job to read. Remember, research attorneys are human. They run out of patience and get confused as quickly as anyone. Presenting the case in an up-front, clear, and explicit fashion wins you friends in the courthouse's back halls. These friends who see the judge many times a day are good friends to have.

As one last suggestion to help keep these new friends run the grammar check program, to see what your Fleisch-Kincaid grade level is. If it is below 12.0, great. (This article is 10.6.) 12.0 means a high-school graduate can read it, but more important, it means a judge can read it quickly and easily. If yours has a score above 14.0, you need to work on simplifying it. You go off the chart at 16.0. Most Ps&As I review score off the chart. Yes, a 16.0 means it's a chore to read. Which do you think the judge wants to read, the one that's easy to read or the one that's scores a 16.0?

Randall B. Christison, when he is not an appellate lawyer, consults with law firms through Wolf Management Consultants. He specializes in lawyer skills, including writing, listening skills and other matters. He may be reached at 858.459.9900 or randy-christison@sbcglobal.net.



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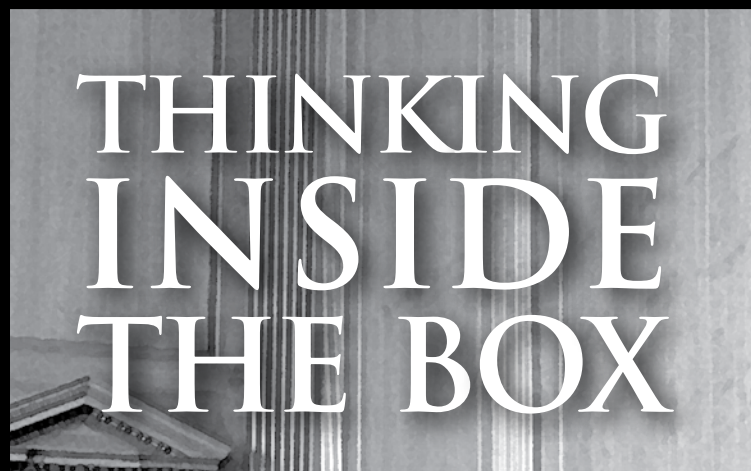
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