THE UPDATE

SAN DIEGO
DEFENSE LAWYERS

SUMMER 2009

In this Issue

THE BOTTOM LINE:

Case Title: DJA (a minor) v. City of Chula Vista, Agent James Horst, Officer John Rodrigues, Officer Oscar Miranda

Case Number: 37-2008-00069534-CU-PO-SC

Trial Judge: Honorable Timothy B. Taylor

Plaintiff's counsel: Brian T. Dunn, Esq. (The Cochran Firm - Los Angeles)

Defense Counsel: Mitchell D. Dean, Esq. and Andrea Johhson, Esq. (Daley & Heft)

Type of Incident/Cause of Action: Plaintiff is the surviving son of Terrence Allen, who was shot and killed by Agent Horst and Officer Rodrigues in a parking lot adjacent to the Chula Vista courthouse on the night of August 2, 2007. Allen was standing alone at about 11:00pm in the courthouse parking lot as two officers pulled into the area to fill their police cars up with gas. Officer Rodrigues stopped and asked Allen if he was okay, and why he was there. Allen made a comment about the power of God. Rodrigues and Miranda exited their cars to speak with Allen to determine if there was anything wrong with him or if he needed assistance. Allen made a brief aggressive gesture toward Officer Rodrigues and then, eventually, lay down on his back on the asphalt in a place where police cars would drive to get gas. The two Officers called for another officer and Agent Horst arrived. The three officers decided to leave the area because he had not committed any crimes and there was not enough to place him in a Welfare and Institutions Code Section 5150 hold. They all filled their cars with gas, but kept an eye on Allen, who never moved. When Agent Horst saw another car approaching the area, he decided that Allen was unable to care for himself, and the decision was made to remove him from the area and take him to County Mental Health on a 5150 hold. The officers returned to Allen's location and attempted to cuff him. He violently resisted, was tased, rolled out of the taser, charged Miranda, jumped on top of the retreating Miranda, and beat him severely about the head area. Agent Horst approached Allen with his gun drawn, and Allen charged Horst. Retreating, Agent Horst shot Allen three times, after which Allen punched Agent Horst in the face. Rodrigues shot Allen once more, and Allen collapsed. It turns out that Allen was in a psychotic state and was off his prescribed medications for bipolar disorder. Plaintiff sued for Federal civil rights violations, state law battery and wrongful death.

Damages claimed: Death of father.

Settlement Demand: The only formal demand was in the amount of $125,000.

Settlement Offer: $25,000

Trial Type: Jury

Trial Length: 7 days, then jury out 2 days.

Verdict: Defense (11-1 for shots fired by Horst and 10-2 for shot fired by Rodrigues)

PRESIDENT'S ★★★ MESSAGE

Decisions Decisions

One once said, "An octopus may be able to reach many items, but it still only has one brain." How many decisions do we face each day?

How often are we asked to multi-task in a given day? Too many to count. In the end, we still can only get one thing done at a time.

So as we hit the proverbial fall rush to finish matters by the end of the year, we need to maintain focus. Distractions abound, both on the business end and on the fun side. Cases are gearing up for trials in November and December. One deposition seems to begat another at times.

Football is back not only on Sundays, but on Saturdays and Mondays.

Baseball is hitting its stride toward home as the playoffs begin. Pro basketball will start shortly so it can linger until almost the start of summer next June. The fall television premieres now stretch to Halloween.

So with so much to choose, what do we do? We focus. We all do this in different ways with some employing long written lists, others utilizing their iPhones/Blackberries and many other methods. Either way, this enhances our organization and efficiency, enabling us to celebrate a little once we knock another off the "To Do" lists.

When it seems like too much, we must remember we are not writing healthcare legislation, implementing sanctions on a rogue state with nuclear ambitions or brokering peace in the Middle East.

Yet, each decision we make does impact us, our clients, their carriers and outcomes. Each deserves our very best and each should receive our focus. So if you need to, step back, take a moment, check the list and press forward. Like football, you usually have several attempts to reach the next marker, and a first down is a first down.

UPCOMING BROWN BAG SEMINARS

Peterson Reporting
530 "B" Street, Suite 350, San Diego, CA 92101
with lunch included

October 13 - Crawford's Friends and Foes

November 10 - It's Big and It's Bad Faith

December 8 - Introduction of Evidence at trial - Avoiding Pitfalls

EVENING SEMINARS

Date to be Announed - Mastering Opening Statements and Closing Arguments

December - Assume the Position: Avoiding a DUI

Major v. Western Home Insurance Company, (2009) 169 C.A. 4th 1197 - Bad Law for all?

By Kenneth N. Greenfield Esq.
Law Offices of Kenneth N. Greenfield

There are two things in life you do not want to see being made; the first is sausage and then second is bad law. I have now been involved in the making of both. Let me explain.

Mr. and Mrs. Major's home in East County burned to the ground in the October 2003 wildfires. Their homeowner insurance policy had been issued by my client, Western Home Insurance Company (WHIC). In order to be eligible for coverage, WHIC had required that the Majors, under their HO-3 policy, to insure their home at the then current replacement cost amount. Both the Majors and their insurance agent, however, had failed to request the correct amount of coverage. Thus, their total policy limit of approximately $480,000 fell far short of the more than $600,000 they needed to rebuild the home and replace their belongings and live elsewhere while the reconstruction was underway.

To make a very long story short, WHIC paid the policy limits, the Majors protested that it was too little, and then hired a lawyer. In response, this tiny insurance company's President and Vice-President met to consider how best to resolve the matter for their policy holder. They calculated the amount of policy limits the insurance agent and the Majors *should* have originally asked for, and this amounted to additional coverage of approximately $128,000. Out of true heart-felt concern for the Majors (believe me, I know these two men personally), they decided and told the Majors that upon proof of loss an additional $128,000 would be made available to them. At the same time, there was no requirement for the Majors to pay any additional amount in premiums for this increase in policy benefits. At trial, we referred to this as a courtesy increase in benefits on the part of WHIC.

As time went on, however, WHIC's independent adjuster unreasonably (according to the jury) delayed payment of these additional courtesy benefits. At trial, the plaintiffs contended that this delay was both a breach of contract and insurance bad faith. After a 2-week trial and 6 hours of deliberation, the jury agreed and awarded a total of $1.3 million dollars. ($31,000 in unpaid policy benefits, $450,000 for emotional distress, $189,000 in Brandt (attorney) fees, and nearly $650,000 in punitive damages. We cried foul and, with the help of the preeminent appellate law firm of Horovitz and Levy; took the matter up on appeal to the 4th District. Our complaint - How can breach of contract and insurance bad faith ever be found where there was never a contract for these additional gratuitous amounts of coverage? We argued that there had been no modification of the contract. Basically, there was just a gesture by the insurer to help the insureds.

The 4th District Court of Appeal disagreed with us and upheld the jury verdict. Where an insurance company requires the policy holder to insure the home to its full replacement cost value, it is the insurance company, not the insured or his/her insurance agent, who has the obligation to make sure full value has been achieved in policy limits. We appealed further to the California Supreme Court, who denied review. My client satisfied judgment in the sum of more than $1 million.

California law had long been abundantly clear before this decision. It was the *policy holder*, not the insurer, who had the responsibility to determine the adequacy of his/her insurance coverage amount. We now have new law in the 4th District saying just the opposite. It is now up to the homeowner insurer, under this type of policy form, to assure that the insured has requested the proper amount of coverage. What a great decision for the California consumer, right? Or is it? The plaintiffs' attorney in the Major case won a grand victory for his clients' interests. And, as a brethren in the law, I congratulate him. The problem, however, is this - - the battle was won to the severe detriment of millions of California homeowners. Now that insurers, arguably, must assure full coverage for the homeowner, they must also raise premium rates accordingly. As a result, insurers in California have been greatly benefited by the Major case, while the consumer has been economically thrashed.

After practicing law through three decades, I have learned a very important moral and ethical lesson in *all* of this. Sometimes, for the benefit of all of our citizens, cases should be settled even after the jury returns with a verdict, and sometimes even while on appeal. We, as lawyers, have the power to avoid making bad law. We hold the public's trust. Thus, we should look further than the defense or prosecution of our own individual case. Lawyers need to look out not only for their own clients, but for society as well. We do have the power to make a difference, and should. Sometimes the appellate courts should be avoided. Bad law need not be made.

SDDL'S 19TH ANNUAL MOCK TRIAL COMPETITION

Attention SDDL Members:

SDDL's 19th annual Mock Trial Competition will take place on October 22, 23 and 24. *We need members of SDDL to volunteer as judges.*

The Mock Trial Competition has become a hallmark for SDDL and has attracted teams from some of the best law schools in the nation. This year's Competition consists of teams from Washington D.C (American University), New York (Brooklyn Law School), Virginia (University of Richmond), Texas (Southern Methodist University) and California (California Western, Hastings, Thomas Jefferson, UC Berkeley (Boalt Hall), University of Pacific (McGeorge) and USD.)

The preliminary rounds of the Competition will take place at the San Diego Superior Court (Central Division) on the evenings of October 22 and 23. *We need 24 judges each night* (1 presiding judge and 2 scoring judges for each of the 8 individual trials). The semi-final and final rounds of the Competition will take place at USD the morning and afternoon of October 24. We require 9 judges that day.

Please contact Mock Trial Chair Randy Nunn (rnunn@hughes-nunn.com) or Co-Chair Scott Schabacker (schabacker@sbcglobal.net) for further information about how you can participate. You will not be disappointed. Members who volunteered to judge prior competitions were pleasantly surprised at how much they enjoyed the experience. Thank you for your support.

The Importance of Defining 'Defective' for Practitioners of Strict Products Liability

By Marc A. Altenbernt
Cassiday Schade LLP, Libertyville, Illinois

Perhaps no issue in strict products liability litigation has received more attention, and caused more debate, than the definition of "defective." One notable commentator found it to be "the most vexing and pressing problem of products liability" law. Wade, *On Product "Design Defects" And Their Actionability*, 33 VAND.L.REV. 551 (1980). This debate is reflected in the various methods formulated by courts to determine whether a product suffers from a design defect.

As a result of the sometimes significant differences among jurisdictions, there is potentially no issue of greater importance for the practitioner of strict products liability litigation, particularly those with multi-state practices, than recognizing specific tests used in respective jurisdictions. As pointed out by the Illinois Supreme Court in its recent *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516 (2008) decision, courts generally employ two tests to determine defectiveness: risk-utility and consumer expectations. However, many jurisdictions employ both tests as available alternatives, and several have developed variations of each.

Most courts utilize some form of the risk-utility, or risk-analysis test. Generally, under this test, the question asked is whether the "benefits of the challenged design…outweigh the risk of danger inherent in such design." *Dart v. Wiebe Mfg.*, 147 Ariz. 242, 245 (1985). Courts utilize a multitude of factors when weighing the benefits of the design against its risks, including the "availability and feasibility of alternate designs at the time of [the product's] manufacture, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation." *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 263-64 (2007). Other factors include the utility of the design, the likelihood of injury, and the user's ability to avoid injury by the exercise of care in using the product. *Id. at 264.*

The over-arching purpose of the risk-utility test, and really strict products liability generally, is the imputation of knowledge of the defect to the manufacturer, even though the manufacturer may not have actually possessed such knowledge at the time of manufacture. *Voss v. Black & Decker Mfg. Co.* 59 N.Y.2d 102, 107 (1983). This constructive knowledge reflects the theory that, in strict products liability, the product is the focus of inquiry, as opposed to the negligent acts or omissions of the manufacturer. However, at least one state considers the distinction between strict products liability and negligence to be one of semantics, at least in terms of the risk-utility test. The Michigan Supreme Court has reasoned that, as a common sense matter, "the jury weighs competing factors presented in evidence and reaches a conclusion about the judgment or decision of the manufacturer." *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 688 (1984). As a result, Michigan courts, in essence, use a fault-based risk-utility test in all design defect cases.

Rather than weighing risks and benefits, some courts simply define "defective" in terms of whether the product meets consumer expectations, or, in other words, whether it "failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner…." *Lamer v. McKee Indus.*, 721 P.2d 611, 613 (Alaska 1986). An "ordinary consumer" is defined as one who would be reasonably expected to purchase the product. *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988). Thus, a characteristic of a product that would cause the product to be less safe to the general public, may not render the product unreasonably dangerous to the foreseeable purchaser of the product. Id. Also, while applying it as a distinct test, some courts consider consumer expectations as a factor when applying the risk-utility test. *Mikolajczyk*, 231 Ill.2d 516 (2008).

Many jurisdictions employ a two-prong approach to determine whether a product was defectively designed. The "Barker" approach, referring to *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 432 (1978), uses both the consumer expectations and risk-utility tests, depending on the facts of a given case. Such an approach provides a plaintiff the best chance of recovering for damages caused by a defectively designed product. The California Supreme Court reasoned that the consumer expectations test is useful when an ordinary consumer can identify when a product does not operate as intended. However, oftentimes, a reasonable user would not know what to expect when using a more complex product. In those situations, the risk-utility test can be employed. *Id. at 429-430.*

The *Barker* court went further than simply adopting a two-prong approach, however. Of particular importance was the burden shift it created as part of the risk-utility test. Typically, a plaintiff has the burden of proving a product is defective, which necessarily includes producing evidence that the product was not as safe as it could have been. However, under the *Barker* risk-utility test, if a plaintiff can make a prima facie showing that his injury was proximately caused by the product's design, the burden then shifts to the defendant to, in essence, prove that the product's design was not defective. *Id.* at 431. The California Supreme Court reasoned that the policy behind strict product liability law was to "relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action." *Id.* In other words, the plaintiff should be absolved from providing "technical" evidence most likely in

THE BOTTOM LINE:

Case Title: McFann v. Elite Access Systems, et al.

Case Number: 37-2007-00068272-CU-PLAIN-TIFF-CTL

Judge: Hon. Jay M. Bloom

Plaintiff's Counsel: Thomas Tosdal

Defendant's Counsel: Randall Brownwood of Brownwood & Cannon for American Fence Company; Dinah McKean of Walsh McKean Furcolo LLP for House of Automation

Type of Incident/Causes of Action: Personal injury due to collapse of industrial gate/ Negligence.

Settlement Demand: $850,000

Settlement Offer: $225,000

Trial Type: Jury/Judge Jury Trial

Trial Length: 3 weeks

Verdict: Defense

the possession of the manufacturer.

While many jurisdictions have adopted the *Barker* two-prong approach, it is important to note that not all those jurisdictions have adopted its burden-shifting. In its recent *Mikolajczyk* opinion, the Illinois Supreme Court seemingly rejected the burden-shifting identified in the Barker decision. *Mikolajczyk*, 231 Ill.2d 516. The Supreme Courts of Colorado and Oregon had previously done the same. See *Armentrout v. FMC Corp.*, 842 P.2d 175, 183 (Colo. 1992) and *Wilson v. Piper Aircraft Corp.*, 282 Or. 411, 413 (1978).

While the risk-utility, consumer expectations, and *Barker* two-prong tests constitute the majority approaches used to determine whether or not a product is defectively designed, various corollaries are also employed. Examples include the "fit for intended purpose" and "reasonably prudent manufacturer" tests, both of which meld aspects of the foregoing tests with general negligence principles. Other jurisdictions have adopted the Restatement (Second) of Torts, which requires a plaintiff to prove that the product was both defectively designed and unreasonably dangerous. *Tisdale v. Teleflex, Inc.*, 612 F.Supp. 30, 33-34 (D.C.S.C. 1985) (applying South Carolina law).

The test used to define the term "defective" can have a very real impact on the outcome of strict products liability litigation. A defendant faced with the burden-shifting illustrated in the *Barker* decision, for example, will be required to produce significantly more evidence than if faced with the typical risk-utility analysis, where the plaintiff carries the burden of proof on all issues. Thus, it is imperative that the defense attorney be keenly aware of the test employed in a particular jurisdiction.

Marc A. Altenbernt
Cassiday Schade LLP
Libertyville, Illinois
847-932-6922
ma@cassiday.com

This article has been republished with permission of the author and DRI – The Voice of the Defense Bar

BROWN BAG PROGRAMS

Brown Bag Series Evening Seminar Summary- June 25, 2009

Diffusing Damages – How to Respond to Plaintiffs' Most Compelling Arguments

By Pat Mendes, Esq.

Tyson & Mendes

The San Diego Defense Lawyers invited Bruce Bailey, Esq. and Bob Tyson, Esq. to speak at the June Evening Seminar about how to diffuse plaintiffs' damages at trial. Mr. Bailey is a member of ABOTA, a 30+ year defense attorney, and currently lead counsel for the City on the SDG&E Wildfire case. Bob Tyson of Tyson & Mendes is a 20 year trial lawyer who specializes in admitted liability trials. The presentation, entitled "Don't Let It Blow…Diffusing Damages," focused on winning at trial.

To win at trial, Mr. Bailey and Mr. Tyson stressed the importance of having a theme, Voir Dire, and Closing Argument.

Theme

Every defense must have a theme. You simply cannot win a trial without a theme.

A theme is composed of catch phrases that summarize key elements in the case. A great theme is like an advertising slogan that sticks with you long after the trial is over. According to Mr. Tyson, a theme must (1) be simple and catchy. Think of "Just Do it" and "You deserve a break today; it should also (2) "tug at the jurors' heartstrings, (3) incorporate the jurors' sense of fairness and justice, (4) be consistent with the evidence and (5) fit your capabilities.

It is critical to advance your theme at each stage of the litigation. For instance, you must incorporate your theme at every deposition. In this regard, you will want witnesses to answer questions that support your theme. Even with non-party witnesses, you should ask questions that will limit a plaintiff's damages. You also may want to ask questions that will show plaintiff is exaggerating his or her damages.

According to Mr. Bailey, it is often a good idea to have two themes. If, at the time of trial, you use a theme a jury does not understand, you want to have a theme you can fall back on, a theme that will stick with the jury.

Importance of Voir Dire

Voir Dire is the first time you get to address the jury. Mr. Bailey and Mr. Tyson discussed the two most important goals of Voir Dire. Simply stated, you must get the jury to like you. You must also weed out the jurors who do not advance your theme. For example, if your goal is to limit damages, you must discuss the value of money with the prospective jurors. If a prospective juror does not understand the value of money, you are not interested in having that juror on your jury. Along these lines, both Mr. Bailey and Mr. Tyson discussed the dangers of youthful jurors, including their lack of life experiences and absence of any prior, meaningful decision-making.

Closing Argument

As a defense lawyer, you only have one chance to address the jury at the end of trial. You better make it count. You must hit your themes again. You must support everything you said in your opening with the law. You must go over the evidence and witnesses. Most importantly, you must tell them what you want. Both men recited examples of effective arguments which included analogies to their personal experiences or referencing something a juror said during Voir Dire.

Insurance Update

The Assault And Battery Committed By An Insured Was Not An "Accident" Within The Meaning Of The Insuring Clause Within A Homeowner's Insurance Policy.

By James M. Roth
The Roth Law Firm

In an opinion styled Delgado v. Interinsurance Exchange of the Automobile Club of Southern California (August 3, 2009) 97 Cal.Rptr.3d 298, the Supreme Court of California held that the assault and battery committed by an insured was not an "accident" within the meaning of the insuring clause within a homeowner's insurance policy.

Factually, Delgado sued Reid, alleging in part that Reid "in an unprovoked fashion and without any justification physically struck, battered and kicked" Delgado and that Reid "negligently and unreasonably believed" he was engaging in self-defense "and unreasonably acted in self defense when [Reid] negligently and unreasonably physically and violently struck and kicked Delgado repeatedly causing serious and permanent injuries." Reid tendered to the Automobile Club of Southern California ("ACSC") the defense of Delgado's lawsuit. ACSC denied coverage and refused to provide Reid a defense, asserting that the assault was not covered because it was not an "occurrence," which was defined in the policy as an "accident," and that the complaint's allegations arose out of Reid's intentional acts, which came within the policy's intentional acts exclusion. After the trial court, at Delgado's request, dismissed the intentional tort claim, Delgado and Reid settled the action by stipulating that Reid's use of force occurred because he negligently believed he was acting in self-defense, and by stipulating to entry of a $150,000 judgment against Reid. Thereafter, Reid agreed to pay Delgado $25,000 and pursuant to California Insurance Code section 11580(b) (2), assigned to Delgado his claims against ACSC; Delgado in turn agreed to give Reid a partial satisfaction of judgment and a covenant not to execute on the remainder of the judgment. Delgado then brought suit against ACSC. The trial court sustained ACSC's demurrer without leave to amend. The Court of Appeal reversed.

In reversing the Court of Appeal, the California Supreme Court found that under California law, the word "accident" in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured. An injury-producing event, noted the Supreme Court, is not an "accident" within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor. Consequently, Reid's assault and battery on Delgado were acts done with the intent to cause injury; there was no allegation in the complaint that the acts themselves were merely shielding or the result of a reflex action. Therefore, the injuries were not as a matter of law accidental, and there was no potential for coverage under the policy. It was further noted that in a number of contexts other than those involving claims pertaining to assault and battery, courts have in insurance cases rejected the notion that an insured's mistake of fact or law transforms a knowingly and purposefully inflicted harm into an accidental injury.

In An Excess Workers' Compensation Insurance Policy Providing Indemnification To An Employer For Losses In Excess Of A Self-Insured Retention "Resulting From An Occurrence," An "Occurrence" Was An Event, Either An Accident Or Occupational Disease, Which Caused Damage To An Employee And, In The Case Of An Accident, The Number Of Employees Injured Was Irrelevant.

Note: In the spirit of disclosure, The Roth Law Firm, APLC was trial counsel for TIG Insurance Company in this matter.

In an opinion styled Supervalu, Inc. V. Wexford Underwriting Managers, Inc., et al. (June 3, 2009; as modified June 24, 2009) 175 Cal.App.4th 64, 96 Cal.Rptr.3d 316, the Court of Appeal, Second District, Division 2, California, held that in an excess workers' compensation insurance policy providing indemnification to an employer for losses in excess of a self-insured retention "resulting from an occurrence," an "occurrence" was an event, either an accident or occupational disease, which caused damage to an employee and, in the case of an accident, the number of employees injured was irrelevant.

Factually, Supervalu, Inc. doing business as Albertson's Inc. ("Supervalu") was permissibly self-insured for workers' compensation coverage in California. From 1989 to 1994, TIG Insurance Company ("TIG") provided Supervalu with excess workers' compensation insurance. Supervalu's self-insured retention for each occurrence was $500,000. Subject to certain policy conditions, TIG would indemnify Supervalu "for loss resulting from an occurrence during the contract period on account of [Supervalu's] liability for damage because of bodily injury or occupational disease sustained by employees." The policies further provided that "loss" "shall mean only such amounts as are actually paid by [Supervalu] in payment of benefits ... in settlement of claims, or in satisfaction of awards or judgments." Occurrence, as applied to bodily injury, was defined to mean an "accident." Occupational disease sustained

by an employee was deemed to be a separate occurrence taking place on the last date of the employee's exposure to deleterious work conditions. Thereafter, Continental Casualty Company ("Continental") issued several consecutive excess policies to Supervalu. The self-insured retention and coverage were essentially the same as in the TIG policies. Supervalu alleged that the excess policies provided that TIG and Continental would indemnify Supervalu for loss in excess of the self-insured retention "resulting from an occurrence," and that for the past fifteen years the carriers interpreted "occurrence" to mean a single, overall disability rating until they changed their interpretation to assert that when multiple injuries led to a single, overall disability rating, each injury was an occurrence subject to the self-insured retention. As such, the carriers thereafter refused to reimburse Supervalu for certain disputed claims based on the theory that the self-insured retention had not been reached. The carriers successfully moved for summary adjudication on several issues including the interpretation of the "occurrence" language found in the excess policies.

In affirming the trial court's granting of summary adjudication, the Court explained that the definition of an occurrence does not distinguish between situations in which single employees or multiple employees are injured. This is because an occurrence is an event – either an accident or occupational disease. In the case of an accident, the number of employees injured is irrelevant. It could be one or many and it would still be one occurrence. In contrast, there are as many occurrences – singular or plural – as there are employees who suffer occupational disease.

In rejecting Supervalu's argument that waiver and estoppel were triggered because the carriers paid past claims and settlements without requiring apportionment between events causing damage to employees, the Court found that Supervalu did not identify any evidence that the carriers intentionally waived their rights as to current claims. Further, the policy language did not cover any risks except liability for benefits above the self-insured retention for each accident and occupational disease. As a consequence, Supervalu was asserting estoppel to expand coverage under the policies, which is impermissible, rather than to simply avoid a forfeiture of benefits.

An Insurer May Rescind A Homeowner's Policy When The Insured's Policy Application Executed After Purchased Of The Property Contained Material Misrepresentations.

In an unpublished opinion styled Shokrian v. Pacific Specialty Insurance Company (August 17, 2009) 2009 WL 2488881 (Cal.App. 2 Dist.), the Court of Appeal, Second District, Division 4, California, held that an insurer may rescind a homeowner's policy when the insured's policy application executed after purchase of the property contained material misrepresentations.

Cont'd on pg 8

Cont'd from pg 7

Factually, Shokrian was in the business of buying and managing real property. In December 2004, Shokrian bought property with two occupied residential units: the former owner lived in one of the units and the former owner's tenants lived in the remaining unit. After the purchase, the former owner and his tenants continued to reside on the property. Shokrian never had written rental agreements regarding the units, and he received no rental payments from anyone living on the property. After purchasing the property, Shokrian applied for a policy of homeowner's insurance from Pacific Specialty Insurance Company ("Pacific"). The application forms contained the following question: "15. Is the dwelling presently occupied? If not occupied, risk prohibited." Shokrian answered the question by checking the accompanying box marked "Yes." The forms also asked: "16. If dwelling is tenant occupied, is tenant current with rent payment? If no, risk prohibited...." Shokrian answered the question by checking the accompanying box marked "Yes." Pacific thereafter issued a policy to Shokrian. Sometime later, Shokrian submitted a claim under the policy for damage to the units due to vandalism. After taking Shokrian's recorded statement, Pacific rescinded the policy. As grounds for the rescission, Pacific pointed to Shokrian's answers to questions 15 and 16 on his application. In filing suit for breach of contract and "bad faith," Shokrian alleged that the property had been vandalized by the prior tenants or other parties.

In rescinding the policy, Pacific relied on the following policy provision: "Misrepresentation and Fraud[:] If the insured has concealed any material fact or circumstance concerning this insurance, ... this insurance shall become void and all claims hereunder shall be forfeited." The Court agreed with Pacific that the rescission was authorized under several provisions of the California Insurance Code, including sections 331 and 359, which govern the right to rescind an insurance policy for concealment or misrepresentation. Section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." Section 359 provides: "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."

In affirming the trial court's granting of summary judgment to Pacific, the Court found that Shokrian was in the business of buying and managing real property, owning the property at issue at the time he filled out the application and aware the former owner was occupying the property in the absence of any rental agreement. Moreover, Shokrian acknowledged in his deposition that he completed the application without determining whether there were other tenants on the property and, if so, whether they were paying rent. Shokrian nonetheless affirmed that all tenants in the units were current on their rent. He thus misrepresented what he knew about the former owner's status, and otherwise made the affirmations knowing that he had not inquired about the existence of other tenants on his own property.

An Insurer Which Denied Coverage And Refused To Defend The Action On Behalf Of Its Insured Did Not Have A Direct And Immediate Interest To Warrant Intervention In The Litigation.

In an unpublished opinion styled Hinton v. Beck, et al. (August 11, 2009) 2009 WL 2438415 (Cal.App. 3 Dist.), the Court of Appeal, Third District, California, held that an insurer which denied coverage and refused to defend the action on behalf of its insured did not have a direct and immediate interest to warrant intervention in the litigation.

Factually, Hinton commenced a personal injury action against Beck. When Beck's insurance carrier, Grange Insurance Group ("Grange") denied coverage for Hinton's loss and refused to defend, Hinton entered into an agreement pursuant to California Insurance Code section 11580(b)(2) with Beck not to execute any judgment against Beck in exchange for an assignment of Beck's rights against the insurance company. The trial court thereafter entered a default judgment against Beck for approximately $2 million. As assignee, Hinton then filed a separate action against Grange alleging breach of contract, breach of the duty of good faith and fair dealing, and negligent procurement of insurance. Thereafter, the trial court granted Hinton's motion to strike Grange's complaint in intervention.

In affirming the trial court, the Court found that Grange was in is in no position to complain about lack of standing when it consistently denied coverage and refused to provide Beck with any defense. When an insurer denies coverage and a defense, the insured is entitled to make a reasonable non-collusive settlement without the insurer's consent and may seek reimbursement for the settlement amount and for any breaches of the covenant of good faith and fair dealing.

JOIN SDDL FOR $75

Enjoy the benefits of membership for less!!!!

Attend brown bag lunch seminars and evening seminars with free food as one of the many benefits each month (you will obtain 5 MCLE credits,including substance abuse)

This discounted membership is from July 1, 2009 through December 31, 2009

We look forward to having you join this organization

To join, visit our website www.sddl.org and download a membership application





Photos listed in alphabetical order around the page clockwise and start with Steve Amundson's photo.

Law & Politics magazine publishes Super Lawyers of San Diego 2009

Congratulations to the following 25 San Diego Defense Lawyers who were recognized:

Steven G. Amundson, White & Oliver

Daniel A. Bacalski, Jr., Bacalski Ottoson & Dube

Harvey C. Berger, Pope, Berger & Williams*

Douglas M. Butz, Butz, Dunn DeSantis & Bingham*

Robert C. Carlson, Jr., Koeller, Nebeker, Carlson & Haluck

John R. Clifford, Drath, Clifford, Murphy & Hagen

Peter S. Doody, Higgs, Fletcher & Mack

Robert W. Frank, Neil, Dymott, Frank, McFall & Trexler

Charles R. Grebing, Wingert, Grebing, Brubaker & Goodwin*

Robert W. Harrison, Koeller, Nebeker, Carlson & Haluck*

Karen A. Holmes, Balestreri, Pendleton & Potocki

Clark R. Hudson, Neil, Dymott, Frank, McFall & Trexler

Bruce W. Lorber, Lorber, Greenfield & Polito

Thomas E. Lotz, Lotz Doggett & Rawers *(not pictured)*

Hugh A. McCabe, Neil, Dymott, Frank, McFall & Trexler

James A. McFall, Neil, Dymott, Frank, McFall & Trexler

Marilyn Moriarty, Lewis Brisboois Bisgaard & Smith

Michael I. Neil, Neil, Dymott, Frank, McFall & Trexler*

Timothy S. Noon, Noon & Associates

Mary B. Pendleton, Balestreri, Pendleton & Potocki

Brian Rawers, Lewis Brisboois Bisgaard & Smith

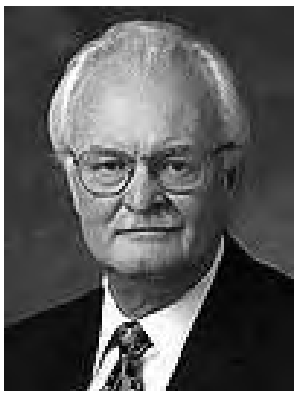
Dick A. Semerdjian,
Schwartz Semerdjian Haile Ballard & Cauley

Sheila S. Trexler, Neil, Dymott, Frank, McFall & Trexler**

James Wallace, Lewis Brisboois Bisgaard & Smith

Daniel M. White, White & Oliver

**Top 50; **Top 25 women*









From the Superlawyers website:

"The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel.

In December 2006, Key Professional Media, Inc. hired Global Strategy Group (GSG), one of the nation's leading market research and consulting firms, to provide an independent assessment of the Super Lawyers selection process. The GSG report concluded that the process is scientific and objective. It stated: "the broad range of sources used to obtain a large and representative nominee pool, the comprehensive data search on each candidate, the protocols used to evaluate nominees, the expert panel system, and the meticulous checks and balances built into the process … leave little to chance or idiosyncratic influence."

No other legal publisher goes through the unique multi-step process that Super Lawyers employs to find evidence of peer recognition and professional achievement.

To learn more visit their website: www.superlawyers.com








GOT GOLF?

By Victoria Stairs, Esq.
Lotz Doggett & Rawers LLP

A fine day was had by all who attended the San Diego Defense Lawyers' 2009 Juvenile Diabetes Research Foundation Golf Benefit at the beautiful Crossings Golf Course in Carlsbad on June 12, 2009. With temperature highs of 72 degrees, Mother Nature certainly provided perfect weather conditions for a great tournament.

Voted by Golf Magazine as one of the "Top 10 New Courses You Can Play," The Crossings boasted sparkling views of the Pacific. Due to the Crossings' commitment to habitat preservation and some strong winds, the course layout provided numerous challenging holes for all. Although play moved a little slowly at times due to the great turnout, Players enjoyed a variety of libations and snacks, including frozen margaritas from our generous sponsors at each hole.

Despite the wind factor, Tournament winners, Hon. Herbert B. Hoffman, Ret., Danny Aiken, Doug Guy and Link Ladutko managed to capture the first place trophy.

Participants and sponsors alike enjoyed the post Tournament celebration at the Crossings Clubhouse, where all partook in the filling and delicious barbeque dinner. This year, raffle ticket holders had a chance to win fantastic prizes such as a brand new TaylorMade putter, 26" flat screen LCD TV and gift certificates to local food establishments such as Dobson's and Buca di Beppo! Auction prizes included a Callaway FT driver, Scotty Cameron putter, magnums of wine, two nights at Ken Greenfield's Julian/Cuyamaca house and golf at the Rancho Santa Fe Golf Club.

Thanks to the support of our members, sponsors and friends, the San Diego Defense Lawyers raised a significant donation to support the Juvenile Diabetes Research Foundation which funds research to find a cure for type I diabetes and its complications. The San Diego Chapter of JDRF serves all of San Diego County and Orange County by providing information and support to children and their families afflicted with diabetes.

If you missed the tournament this year, be sure to show up in 2010 for what promises to be a bigger and better Tournament! See you on the greens!

Ready, set...go!

Ken Greenfield (past president) and Ken Medel.

Dino Buzunis

Hon. Herbert Hoffman's (Ret.) dinner table

Virginia Price

Jim Wallace

Victoria Stairs

SPECIAL THANKS TO OUR SPONSORS of The SDDL 2009 Golf Benefit!

PRESENTING SPONSORS:
Asher Mediation
Knox Services

DELICIOUS LUNCH SPONSOR
Rimkus Consulting Group, Inc.

GOLD SPONSORS
Esquire
Hon. Herbert B. Hoffman (Ret.)
Mark A. Kalish, M.D.
Sarnoff Court Reporters
Tim Valine Construction

GOLF BALL SPONSOR
Peterson Reporting

HOLE / BEVERAGE SPONSORS
Continental Interpreting
Judicate West
Hon. Wayne Peterson (Ret.)
NovaPro Risk Solutions, LP
RGL Forensic Accountants & Consultants
Ringler Associates
Second Image
Stephen L. Plourd Investigations
Teris
Thorsnes Litigation Services, LLC
Veritext Court Reporting
Vital Services

Many THANKS to the Contributing Sponsors
Athens Market Tavern
Beach City Market
Buca di Beppo
Dobson's
Dominick Addario, M.D
Golf Galaxy
Golfsmith
Hughes & Nunn
Kenneth N. Greenfield, Esq.
LECG
Lomas Santa Fe Country Club
Olde City Grille
Submarina—Downtown
The Crossings at Carlsbad
Tyson & Mendes
World Wide Golf Shops

Enforcement of Arbitration Agreements for Medical Services

By Lisa Willhelm Cooney
Lewis Brisbois Bisgaard and Smith LLP

For those of you who follow the developing law regarding enforcement of arbitration agreements for medical services in California, two recent cases are of interest.

Ruiz v. Podolsky (2009) 175 Cal.App.4th 227 involved a wrongful death action brought by the decedent's wife and adult children. The physician defendant petitioned to compel arbitration based on an agreement signed by the decedent. The spouse conceded her claim was bound by the arbitration agreement, but the trial court denied the petition to compel arbitration of the claims by the adult children. On appeal, the physician argued that arbitration should be compelled as to all claims because the spouse conceded the agreement governed her claim the wrongful death statutes require litigation of wrongful death claims in one forum.

Division Three of the Fourth Appellate District (Santa Ana), discussed the split of authority regarding the scope of a patient's authority to bind his or her spouse and adult children to an arbitration agreement. "One line of cases beginning with *Rhodes v. California Hospital Medical Center* (1978) (*Rhodes*) 76 Cal.App.3d 606, holds wrongful death is not a derivative cause of action and therefore a patient cannot bind nonsignatory heirs bringing a wrongful death claim absent a preexisting agency-type relationship. Another line of cases following *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 (*Herbert*), suggests there are important public policy reasons to infer patients being treated have the broad authority to bind nonsignatory heirs to a medical arbitration agreement, especially in cases of wrongful death." (*Ruiz, supra*, 175 Cal.App.4th at p. 232.)

The *Ruiz* court concluded that California's wrongful death statute does not create a derivative action and therefore a patient lacks authority to bind a spouse or adult children to a physician-patient arbitration agreement signed for his own treatment. "Principles of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration. Accordingly, we hold the trial court correctly concluded the adult children cannot be compelled to arbitrate their wrongful death claims." (*Ruiz, supr*a, 175 Cal.App.4th at p. 232.)

A petition for review and request for depublication of the *Ruiz* decision is currently pending in the Supreme Court (Sup. Ct. No. S175204).

In *Rodriguez v. Superior Court* (Aug. 25, 2009, B212603) 176 Cal.App.4th 1461, the Second Appellate District, Division Seven (LA) found a physician could not meet his burden of proving an enforceable arbitration agreement because the patient died before the expiration of the 30-day recission period required by Code of Civil Procedure section 1295.

The patient signed an arbitration agreement four days prior to her scheduled gallbladder surgery. During the course of the surgery, it is alleged the physician nicked the patient's liver resulting in her death during the recovery period. The patient's minor child sued for wrongful death through a guardian ad litem. The parties briefs focused on whether or not a parent can bind a minor child to arbitration for wrongful death. The court commented in dicta that California law "establishes the right of a parent to bind a minor child to an arbitration agreement, under some circumstances, when it is the parent, not the child, who is the patient, even though the effect of such an agreement is ultimately to require arbitration of the child's wrongful death action." (*Rodriguez, supra,* 176 Cal.App.4th at p. 1471 citing *Ruiz v. Podolsky, supra*, 175 Cal. App.4th at pp. 241-246.)

However, the holding of the court was that the agreement itself was unenforceable because the patient died before she had an opportunity to rescind her agreement during the 30-day period. (*Ruiz v. Podolsky, supra*, 175 Cal.App.4th at pp. 1469-1470, 1472.) The court held that section 1295 does not appear to contemplate a situation such as this when a consenting patient dies during the recission period. Subdivision (c) permits recission by someone on behalf of a patient only when the patient becomes incapacitated or when the patient is a minor. (Id. at p. 1471.)

The court commented that an agreement could be drafted to protect against this outcome. "Our reading of 1295 leaves the door open for enforceability of a physician-patient arbitration agreement which expressly provides a procedure for rescission on behalf of a non-patient minor child covered by the agreement, in the event the patient dies within the rescission period. For example, if the agreement expressly states a guardian appointed for a minor child following the death of the child's parent may exercise the right to rescind set forth in section 1295, subdivision (c), and otherwise satisfies the section's requirements, then we believe the arbitration agreement would be enforceable in the event the guardian did not timely exercise the right to rescind." (*Ruiz v. Podolsky, supra*, 175 Cal.App.4th at p. 1472.) The court cautioned however, that equitable tolling may apply to any delay surrounding the appointment of a guardian ad litem or the when the guardian learns of the arbitration agreement. "In determining whether an attempted rescission was timely. . . the court could apply the equitable tolling doctrine to extend the time for the guardian to act to exclude any period before the guardian was appointed, as well as any additional time between appointment and the time the guardian knew (or reasonably should have known) of the arbitration agreement." (*Ibid*.)

Ms. Cooney, a partner with Lewis Brisbois Bisgaard and Smith LLP, is a Certified Specialist in Appellate Law as recognized by the State Bar of California Board of Legal Specialization. Her practice focuses on civil appeals, writs and administrative mandamus matters. Her e-mail is cooney@lbbslaw.com.

Appellate Updates

By Jeffry A. Miller
Lewis, Brisboois, Bisgaard and Smith

Court of Appeal Reconciles MICRA and Government Claims Statutes of Limitations

Division Three of the Second Appellate District Court of Appeal addressed seemingly competing statutes of limitations found in MICRA and the Government Claims Act that often intersect with government owned hospitals and health care centers. In *Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474 the court held that the two statutes of limitations can be reconciled -- the three-year period in Code of Civil Procedure section 340.5 establishes the outside date by which actions may be brought against public entity health-care providers.

The facts in *Roberts* are not complicated. Plaintiff filed an application for leave to file a late claim under Government Code section 911.4, which the trial court eventually denied. The parties, plaintiff and the County of Los Angeles (UCLA Medical Center) later stipulated that the County had rescinded its denial of plaintiff's application for leave to file a late claim so that is was deemed timely. However, by the time this occurred, more than four years had gone by. The County moved for summary judgment arguing plaintiff's complaint was filed more than three years after the medical negligence cause of action accrued and therefore was barred by the MICRA statute of limitations. (Code Civ. Proc. 340.5.) The trial court granted summary judgment.

The Court of Appeal affirmed. The court recognized that no published case had decided whether the limitations period of the Government Claims Act supplanted the three-year provision in MICRA when the defendant is a public entity health-care provider. Using principles of statutory construction, the court reconciled the statutes. According to the court, Government Code section 945.6 and Code of Civil Procedure section 340.5 are not mutually exclusive and may be read to give effect to both. The court construed the three-year MICRA limitations period as the "outer limit by which a lawsuit must be filed against a public health care provider."

FEHA Agrees With Title VII on Meaning of "Severe and Pervasive" Sexual Harassment

On July 2, 2009, the California Supreme Court in *Hughes v. Pair* (2009) 46 Cal.4th 1035 held that the phrase "pervasive or severe" found in Civil Code section 51.9, subdivision (a)(2) (which deals with sexual harassment in certain professional relationships outside the workplace) has the same meaning that federal and California courts have given to the same terms in the context of sexual harassment in the workplace.

The plaintiff in Hughes sued a trustee of her minor son's trust after the trustee made sexually suggestive remarks to her (to say the least) during a telephone call and later in person at a museum private showing. She alleged causes of action for sexual harassment under Civil Code section 51.9 and intentional infliction of emotional distress. The trial court granted the defendant trustee's summary judgment motion finding, inter alia, that the complained-of conduct was neither "pervasive" nor "severe" as required under the statute. A divided Court of Appeal (2nd/Div. 5) affirmed concluding the defendant's statements were not "persuasive" or "severe" within the meaning of either federal or California employment discrimination law so were therefore insufficient to meet Civil Code section 51.9's express requirement that the complained-of conduct be "pervasive" or "severe" before liability for sexual harassment can be imposed.

The Supreme Court affirmed the judgment of the Court of Appeal. Reviewing the statutory language and legislative history of section 51.9 and its amendments, the court found the Legislature intended to conform the requirements governing liability for sexual harassment in professional relationships outside the workplace to those of the federal law under Title VII and California's FEHA (both of which pertain to liability for sexual harassment in the workplace). According to the Court, the defendant's two questionable encounters with plaintiff were not "pervasive" because sexually harassing conduct must consist of "more than a few isolated incidents." Nor was the defendant's alleged conduct "severe" where it did not consist of "a physical assault or the threat thereof." The Court also concluded that the defendant's inappropriate remarks to plaintiff were neither sufficiently "outrageous" nor the cause of plaintiff suffering "severe or extreme emotional distress" to support a cause of action for intentional infliction of emotional distress.

The "No-Duty-to-Aid Rule" is Alive and Well

Division Eight of the Second Appellate District Court of Appeal (LA) in *Williams v. Southern California Gas Company* (2009) 176 Cal.App.4th 591 affirmed a demurrer on the ground of lack of duty, which was not a ground relied upon by the trial court in sustaining the demurrer. The Court of Appeal held that utility company personnel whose job it was to inspect and/or repair a gas water heater did not have a duty to warn of a discolored and dangerous gas wall heater that was in plain view.

Plaintiffs' complaint alleged that Gas Company repairmen visited plaintiff's residence twice in order to inspect and repair plaintiff's gas water heater. Shortly after the visits, a gas wall furnace near the water heater vented potentially lethal carbon monoxide fumes injuring plaintiffs. Plaintiff argued that the discoloration of the grate of the wall heater was a telltale sign to Gas Company personnel that the wall heater was venting toxious carbon monoxide fumes. According to plaintiffs, the repairmen necessarily had to see the discoloration of the grate on the wall heater so they had notice of the dangerous condition of the heater and a duty to warn plaintiffs of the dangerous condition.

Noting the general rule that one has no duty to come to the aid of another, the court rejected plaintiff's claim that the defendant repairmen owed a duty to plaintiff because of the obvious condition of the wall furnace, which was emitting carbon monoxide. Citing Restatement of Torts, section 314, the court recognized that even if defendant should have realized the wall furnace was defective, this was not enough to impose a duty. "Standing alone," knowledge of the dangerous condition did not impose a duty of care. According to the court, as far as the wall furnace was concerned, the defendant was a mere bystander who was not under a duty to act.

The court also wrote an informative discourse on the "truthful pleading" rule, which is interesting reading, although not relevant to the court affirming the judgment.

SDDL Member List

Gil Abed
Dennis Aiken
Christopher Allison
Steven Amundson
Michael Arkin
Ray Artiano
Bruce Austin
Judy Bae
Mark Bale
Thomas Balestreri
Steven Banner
Teresa M. Beck
Daniel Belsky
Gabriel Benrubi
Harvey Berger
Corinne Bertsche
Roger Bingham
Dane Bitterlin
Jeanne Blumenfeld
Bruce Boetter
Jeffrey Bogart
Darin Boles
James Boley
Eva Bonelli
Kelly Boruszewski
Renee Botham
Arthur Botham, Jr.
Kristen Boyle
Moira Brennan
Allasia Brennan
George Brewster
Lisa Bridgman
Gabrielle F. Bunker
Peter Burfening, Jr.
David Burke
Michael Buscemi
Douglas Butz
Constantine Buzunis
Sean Cahill
Stanley Calvert
Christina Cameron
Rachael Campbell
John Campbell
Kurt Campbell
Paul Cannon
David Cardone
Antonia Carney
Jeffrey Carvalho
Anthony Case
David Catalino
Ted Cercos
Rekha Chiruvolu
Andrew Chivinski
Sally Cho
Randall Christison
Ryan Church
Keith Ciceron
Erin Clancy
Kevin Clark
John Clifford
Patrice Coady
Philip Cohen
Steven Cologne
Thomas Correll
Thomas Cox
Jennifer Creighton
Lyndsay Crenshaw
Christina Cross
John Culver, Jr.
Deborah Cumba
Gregory Daniels
Michael Dea
Mitchell Dean
Kristi Deans
Negin Demehry
Kevin DeSantis
Dan Deuprey
Solveig Deuprey
Leslie Devaney
Jill Dickerson
Deborah Dixon
Jeffrey Doggett
Joyce Dondanville
Peter Doody
Martha Dorsey
Douglas Dubé
Prescilla Dugard
K. Dunn
Jennifer Duty
Roger Dyer
Jonathan Ehtessabian
Anita Eilert
Renata Elwardani
Cherie Enge
David Estes
John Everett
Ndubisi Ezeolu
Daniel Fallon
John Farmer
John Fedor
Jacob Felderman
J. Feldner
Ryan Fick
Jennifer Ford
John Fraher
Robert Frank
Christopher Freistedt
Lisa Freund
Darcie Frounfelter
Regan Furcolo
Todd Gabriel
Anthony Gaeta
Robert Gallagher
Jason Gallegos
Greg Garbacz
Joseph Gardner
Stephen Gentes
Michael Gibson
Susan Gilmore
Tamara Glaser
Carleigh L. Gold
Jorge Gonzalez
James Gorman
Kevin Graham
Danny Grant
Michelle Grant
Alan Graves
Peter Gravin
Charles Grebing
Alan Greenberg
Kenneth Greenfield
Joyia Greenfield
Jeffrey Greer
Gillian Gregory
W. Grimm
Richard Guido
Kevin Gupta
Molly Gutierrez
Philip Hack
Gregory Hagen
N. Halicioglu
David Hall
David Hallett
Aaron Hanes
Jocelyn Hannah
Cherrie Harris
Harry Harrison
Robert Harrison
Charles Haughey, Jr.
Julie Hazar
Kevin Healy
Robert Heft
Scott Hilberg
Karen Holmes
Jim Holtz
Sommer Horton
Benjamin Howard
Clark Hudson
Sharon Huerta
William Hughes
Conor Hulburt
Daniel Ikeri
Scott Ingold
Vince Iuliano
Michael Jacobs
Adrienne Johns
Holly Johnson
Megan Johnson
Allison Jones
Lee Jurewitz
Randall Kaler
Patrick Kearns
Thomas Kelleher
Eugene Kenny
Susan Kohn
Jennifer Kope
Ljubisa Kostic
Kimberly Lakin
Alexis Lalli
Kevin Landrith

2009

Ronald Lauter
Eric Leenerts
Larry Letofsky
Sandra Levine
Keith Liker
Rebecca Lillig
Arthur Lin
Michelle Lopez
Stephan Lopez
Bruce Lorber
Tom E. Lotz
Julie Lowell
Timothy Lucas
Gregory Lusitana
Susana Mahady
Robert Mahlowitz
Margaret Mangin
Jeffrey Manzi
Michael Martin
Vanessa Maync
Hugh McCabe
Robyn McClain
Carolyn McCormick
Kathleen McCormick
Sarah McDonald
James McFall
James McFaul
Dinah McKean
James McLaughlin
Shawn McMillan
Kenneth Medel
Michelle Meek
Lewis Melfi
Patrick Mendes
Marco Mercaldo
Beth Mercaldo
Leslie Mereminsky
Michael Mertens
Eric Miersma
Mina Miserlis
Vasko Mitzev
Melissa Mixer
Matthew Morache
Norma Morales
Marilyn Moriarty
Jamie Moriyama
Angela Mullins
Douglas Munro
Jason Murphy
Michael Neil
Danielle Nelson
Jackie NiMhairtin
Paul Nolan
Leslee Noland
Timothy Noon
Scott Noya
Randall Nunn
Kim Oberrecht
Bethsaida Obra
Susan Oliver
Thomas Olsen
Dennis O'Neill
Christine Padilla
Michael Paskowitz
Lee Patajo
William Pate
Kennett Patrick
Stephen T. Pelletier
Mary Pendleton
Mark Peterson
Charles Phillips
Andre Picciurro
Steven Polito
Steven Popko
Joseph Potocki
Cecilia Preciado
Virginia Price
E. Purviance
A. Ramirez
Jill Randall
Konrad Rasmussen
M. Ratay
Brian Rawers
Kimberlee Rawers
Douglas Reinbold
Sean Reynolds
Jane Rheinheimer
James Rij
Sarah Risso
Robert Rodriguez
Michael Rogaski
Richard Romero
David Roper
Heather Rosing
James Roth
Richard Roy
Greg Ryan
Norman Ryan
Anahita Sahba
Todd Samuels
Scott Schabacker
Barry J. Schultz
Alexandra Selfridge
Dick Semerdjian
Denise Serino
Joy Shedlosky
Robert Shields
Daniel Shinoff
Richard Shipley
Steven Siegel
Stephen Sigler
Scott Silber
Sarah Singer
Gary Sinkeldam
Elizabeth Skane
David Skyer
Jack Sleeth
Monica Slev
Paul Smigliani
Kristin Smith
Kathy Smith
Kevin Smith
Elizabeth Smith-Chavez
Julie Soden
Richard R. Sooy
Matthew Souther
Fredenk Spiess
Victoria Stairs
Kathy Steinman
Mark Stenson
Gregory Stephan
Sean Stephens
Matthew Stohl
Bruce Sulzner
Marichelle Tahimic
Elizabeth Terrill
Kent Thaeler
Gregory Thomas
Amanda Thompson
Kellie Thompson
Robert Titus
Christopher Todd
Giles Townsend
Paul Traficante
Sheila Trexler
Sara Triplett
Tammara Tukloff
J.D. Turner
Stephanie Tyson
Robert Tyson
Alliea Umoff
Kelly Van Nort
Tracey VanSteenhouse
Todd Verbick
Andrew Verne
Mark Vranjes
Jeffrey Wade
Deanna Wallace
Brandi Wallace
James Wallace, II
John Walsh
Merris Washington
Katherine Weadock
Michael Webb
Lane Webb
Craig Weeber
Michael Weinstein
Scott White
Timothy White
Daniel White
Justin Wieland
Timothy Williams
Lesa Wilson
Randall Winet
Blake Woodhall
Brian Woolfall
Brian Worthington
Annie Wu
A. Yaeckel
Monica Yoon
Fort Zackary
Robert Zickert

Member News

John R. Clifford

Gregory D. Hagen

Wilson Elser Moskowitz Edelman & Dicker LLP are pleased to announce that **John R. Clifford** and **Gregory D. Hagen** have joined the firm as partners in the San Diego office. **Allison L. Jones** has joined as Of Counsel.

Mr. Hagen is a trial attorney with more than 20 years in the profession. Maintaining a diverse trial practice, he has represented clients in professional liability matters, business litigation, construction and product liability cases, complex civil litigation and general liability matters. Mr. Clifford, a seasoned trial attorney represents clients in employment cases, construction accidents, complex civil litigation, as well as product liability, professional liability and general liability matters. He has represented clients in state and federal courts and before administrative agencies.

Allison L. Jones

Ms. Jones has more than 15 years of experience representing clients in professional liability matters, business litigation, construction and product liability cases, complex civil litigation and general liability matters. She has represented manufacturers and distributors of a wide variety of products, as well as contractors in multiple disciplines.

Mary B. Pendleton

Balestreri, Pendleton & Potocki is pleased to announce that two of their shareholders have been honored by being named Super Lawyers in Construction for San Diego. Only five percent of San Diego attorneys have been named to the Super Lawyers list.

Mary B. Pendleton, selected in the field of construction and real estate law as one of ten "Top Attorneys" in 2005 by the San Diego Daily Transcript and as the 2007 Attorney of the Year by San Diego Defense Lawyers, has focused her practice on professional counseling and advocating for companies on litigation, risk management and transactional disputes.

Karen A. Holmes

Karen A. Holmes is a successful litigator and trial attorney specializing in civil litigation and professional casualty defense matters. She is a former Director and Vice President on the Board of the San Diego County Bar Association and is a well-respected author, teacher and speaker.

Kevin Gupta, one of the recipients of SDDL's Outstanding Young New Lawyer Award for 2008, has joined the San Diego office of Wood Smith Henning & Berman, LLP. Kevin will continue his practice primarily in the areas of construction defect litigation, habitability, toxic torts, and environmental litigation. Mr. Gupta will work closely with partners Kevin Smith, Paul Nolan and Lane Webb.

Kevin Gupta

Balestreri Pendleton & Potocki is pleased to announce that **David Estes**, **Gabrielle Bunker** and **Carleigh Gold** have joined the firm as associates. Prior to joining the firm, Mr. Estes had several years of experience both in the public and private sectors. He has focused most recently on construction and business law as well handling personal injury cases.

Prior to joining the firm, Ms. Bunker was a successful sole practitioner that focused on civil rights and employment law. She will be focusing on the areas of construction law and litigation.

Prior to joining the firm, Ms. Gold worked in various areas of construction law at a smaller firm. She is a graduate of Golden Gate University School of law.

SDDL Board 2009-
Back Row (l to r): James J. Wallace; Tracey M. VanSteenhouse; Dennis S. O'Neill; Randall M. Nunn; Patrick J. Mendes; Brian A. Rawers
Front Row (l to r): Victoria G. Stairs, Darin J. Boles; J.D. Turner Note: Not pictured are James D. Boley and Scott D. Schabacker

SDDL Officers

President: Darin J. Boles,
Aiken & Boles

Vice-President/President Elect: James D. Boley

Treasurer: Brian A. Rawers,
Lewis Brisbois Bisgaard & Smith

Secretary: Jim Wallace,
Lewis, Brisbois, Bisgaard & Smith

Directors:

Randall M. Nunn,
Hughes & Nunn

Tracey Moss VanSteenhouse,
Wilson Elser Moskowitz Edelman & Dicker LLP

Victoria G. Stairs,
Lotz Doggett & Rawers

Dennis O'Neill,
Farmer Case & Fedor

Pat Mendes,
Tyson & Mendes

J.D. Turner,
Greenfield, & Polito

Scott Schabacker,
Law Offices of Scott D. Schabacker

Membership Information:

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are $145/year. The dues year runs from January to December. Applications can be downloaded at: www.sddl.org

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

All views, opinions, statements and conclusions expressed in this magazine are those of the authors and do not necessarily reflect the opinion and/or policy of San Diego Defense Lawyers and its leadership.

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

Tracey Moss VanSteenhouse, Editor
Wilson Elser Moskowitz Edelman & Dicker LLP
655 West Broadway - Suite 900
San Diego, CA 92101-8484
p 619-321-6200 x3184
f 619-321-6201
tracey.vansteenhouse@wilsonelser.com

Sousa Court Reporters is pleased to announce the newest addition to its staff, Karina Sousa.

Karina is a recent graduate from Santa Clara University. She received her Bachelor of Science degree in Business Marketing. During her time at school, she volunteered regularly and became a charter member of Kappa Kappa Gamma, and received the Santa Clara University Panhellenic Award of Distinction for her sorority.

Upon graduation, her parents, Manuel & Christine, granted her the opportunity to move down to sunny San Diego and take over their company office in Mission Valley. Ever since she was a child Karina has dreamed of living in San Diego and to experience all the wonderful things it has to offer. Besides growing their company, she is also becoming involved in the Kappa Kappa Gamma Alumnae Association, and Kiwanis International.

Are you ready for a change? Sousa Court Reporters is an agency you can trust. We offer the best service with a personal touch. We are a company you can depend on to stay up to date on the latest technologies and exceed all of your expectations. Sousa is the change you've been waiting for. Call us today!

2727 Camino Del Rio S
Suite 236
San Diego, CA 92108
619.717.2285

WWW.SOUSA.COM

HD Videoconferencing . Complimentary Conference Rooms . 24-hr Live Customer Service

San Diego Defense Lawyers
P.O. Box 927062
San Diego, CA 92192