THE UPDATE

SAN DIEGO
DEFENSE LAWYERS

WINTER 2009

In this Issue

THE BOTTOM LINE:

Case Title: Todd Harker ; Donna Harker v. Mike Lackey dba Mike Lackey Construction

Case Number: 37-2007-00077586-CU-BU-CTL

Judge: Hon. Charles R. Hayes

Plaintiff's Counsel: Phillip Dyson, Esq.

Defense Counsel: Bonnie M. Simonek, Esq.

Type of Incident/Causes of action: Fraud, Breach of Contract, Delay.

The case involved construction of custom home. Plaintiffs' alleged Defendant committed fraud when he bid the job and caused delays which cost Plaintiff's approximately $600,000.

Trial Type: Bench

Length: 6 months

Verdict: Defense

THE BOTTOM LINE:

Case Title: Jocelyn Martinez v. Andrew Skog, Rachel Skog, Tomas Salas & Wendy Salas

Case Number: 37-2009-00081130-CL-PO-CTL

Judge: Hon. Ronald S. Prager

Plaintiff's Counsel: Scott S. Harris

Defendant's Counsel: Blake J. Woodhall of The Roth Law Firm

Type of Incident/Causes of Action: Dog Bite against owners of the dog and owners of the property where dog was kept. The Skogs were not the owner of the dog but the owner of the property where the dog was kept. They leased their property to their son and daughter-in-law (Tomas and Wendy Salas), who later allowed their dog to escape and bite the plaintiff. A MSJ was prepared and Plaintiff agreed to dismiss for a waiver of costs. The basis for the Motion for Summary Judgment was primarily based on precedent ruling that an owner of the property, or even a "keeper" of a dog, is not an insurer of a dog's good behavior, but must have knowledge of the animal's vicious propensities to be liable for injuries inflicted by the dog. Declarations, as well as deposition testimony, provided the evidence that my clients had no prior knowledge of the dog's dangerous propensities (no prior incidents/bites).

Settlement Demand: None

Settlement Offer: Zero

Verdict/outcome: Case dismissed for waiver of costs with Motion for Summary Judgment pending

THE BOTTOM LINE:

Case Title: Jassim vs. Village Builders

Case Number: 06CC00095

Judge: Hon. Nancy Stock (Orange County Superior Court)

Plaintiff's Counsel: Andrew D. Weiss, Esq. of

PRESIDENT'S ★★★ MESSAGE

Here we are . . . it is already the end of the year. As they say, time flies when you are having fun, which has certainly been the case during the past year as the SDDL president. First, let me thank the SDDL Board of Directors for their dedication and hard work, which made my tenure so enjoyable.

There have been many special moments, such as when I delivered the $5,000 check from the golf tournament proceeds to the Juvenile Diabetes Research Foundation (JDRF). SDDL has had a special connection with JDRF for many years, particularly given our own former member, Tom Dymott's, life long battle with diabetes. During this time frame, SDDL has donated more than $50,000. JDRF was thrilled with SDDL's continued support.

We branched out to assist another charity this year. The highlight of one of my days was presenting a $4,000 check to the American Cancer Society (ACS) from the funds raised through the silent auction at the installation dinner. The ACS was very excited about our generous support.

Despite these challenging economic times, we saw enthusiastic support from our members with record attendance at our brownbag MCLE seminars.

The *Hanif* and Lien programs were particularly timely. We have seen the Fourth District issue a new opinion on *Hanif* and new regulations go into effect with respect to MediCare, both of which give birth to new topical ideas for 2010.

Our evening seminars were also well received. At the December substance abuse seminar, "Assume the Position: The Designated Driver DUI and other DUI's," speakers Brian McCarthy, Esq., and SDPD Officer Blake Cheary brought to life the dangers of DUI's and substance abuse. Just 48 hours before, Officer Cheary responded to a fiery crash on Torrey Pines which involved an alleged intoxicated DUI Designated Driver.

While not only timely, the example hammered home the need to do what we actually say we are going to do, whether it be a designated driver, an aggressive advocate or a dedicated member of your family. The time has come and gone for those who say they will do something but fail to deliver.

We saw some exciting new talent at the Mock Trial Competition, which suggests our profession will be in good hands for generations to come. As with The Update, golf tournament, seminars and Mock trial, our Board and membership stepped up with enthusiasm to make all of these a success.

Whatever it maybe, do it with commitment and heart, and no matter how fast time travels, you will be better for it. Enjoy the holiday season with your family and friends!

Maggie Hannegan with the American Cancer Society received a check in the amount of $4,000 from SDDL President Darin Boles from proceeds raised in the silent auction at the installation dinner.

NEIL DYMOTT ATTORNEYS COMPETE IN MARINE CORPS CHALLENGE

Andrew R. Chivinski
Neil Dymott Frank McFall & Trexler, APLC

From left to right - Alan B. Graves, Molly L. Fletcher and Andrew R. Chivinski

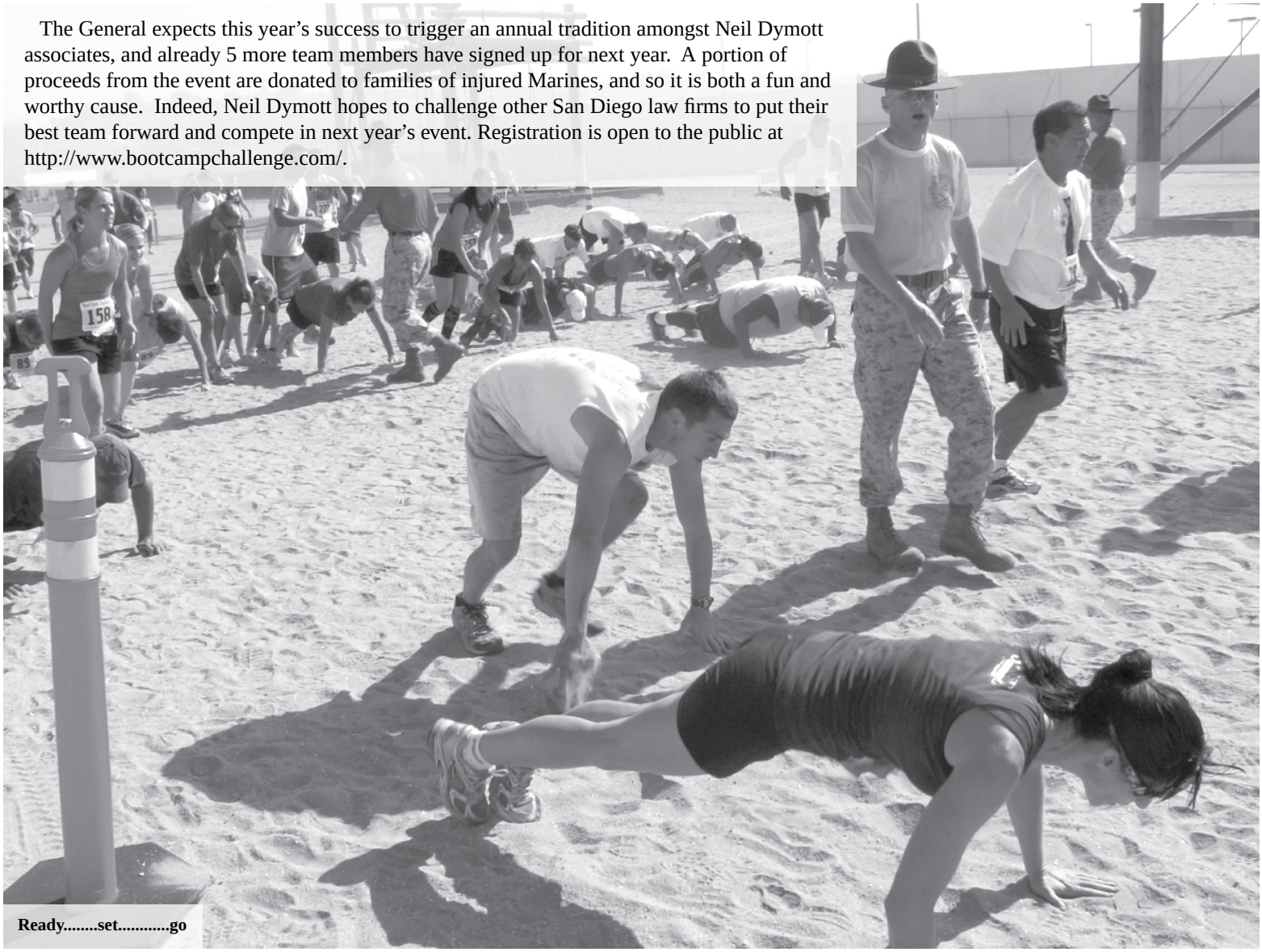
Over the years, the values of the United States Marine Corps have been well-represented at Neil, Dymott, Frank, McFall & Trexler, APLC. Many partners, current and former, and associates have served valuable time in the Marine Corps and other branches of the United States Armed Forces. This is a tradition Neil Dymott is always proud to honor.

This summer, Neil Dymott attorneys were given a new task: Compete in the 2009 Marine Corps Boot Camp Challenge; a grueling 3 mile run filled with over 50 obstacles inspired by Marine Corps Basic Training. In addition to the obstacles, real Marine Corps Drill Instructors are positioned at various locations to provide "encouragement" to the participants. The event occurs at the Marine Corps Recruit Depot, drawing several thousand contestants and spectators.

Neil Dymott entered a team of 3 attorneys into the "mixed" division: Alan B. Graves, Molly L. Fletcher and Andrew R. Chivinski. These candidates were hand-selected by senior partner Mike "The General" Neil as possessing the qualities of grit, determination and sheer physical strength that the Marine Corps is so well-known for.

Team Neil Dymott trained under the watchful eye of The General for several months prior to the event. Early morning runs and afternoon "pep-talks" were employed to instill fierceness and stamina. On race day, the 2009 "mixed" division consisted of 101 teams. By day's end, Team Neil Dymott finished 16th out of the 101 teams, logging in an impressive a time of 25:12.

The General expects this year's success to trigger an annual tradition amongst Neil Dymott associates, and already 5 more team members have signed up for next year. A portion of proceeds from the event are donated to families of injured Marines, and so it is both a fun and worthy cause. Indeed, Neil Dymott hopes to challenge other San Diego law firms to put their best team forward and compete in next year's event. Registration is open to the public at http://www.bootcampchallenge.com/.



Ready.....set.....go

Law Office of Andrew D. Weiss

Defendant/Cross complainant: Nicholas A. Cipiti, Walsworth, Franklin, Bevins & Mccall (Village Builders, and Robert Carey & Michael Loge)

Cross- Defendant's Counsel: Elizabeth Skane of Zimet, Skane and Wilcox LLP

Type of Incident/Causes of Action: This was a construction defect trial involving defects in the new construction of a purported nine million dollar single family custom home located in Orange County California. At the time of trial, the only remaining defendants/cross defendants included the general contractor, Village Builders and cross defendants Orange County Landscaping, Antis Roofing and Waterproofing, the original architect, the tile subcontractor and the stucco subcontractor. Ms. Skane represented the roofer/ deck waterproofer, Antis Roofing and Waterproofing. There were verifiable leaks at the home related to the deck. Antis was both a direct defendant and a cross defendant of the general contractor. As to Plaintiff's direct action, Ms. Skane argued that the deck leaks were unrelated to the waterproofing. As to the alleged roof defects, we claimed an absence of damage.

The judge permitted negligence per se instruction to be given to the jury related to the roofer's construction of the roof. Despite the per se instruction, the jury found NO negligence in a 12 to zero finding as to Antis Roofing and awarded the Plaintiff zero damages as to Ms. Skane's client. On the cross complaint, the risk was due to the existence of a Crawford type indemnity provision. We argued at the time of trial, that the contract was forged by an employee, and therefore was an unenforceable contract. The general contractor claimed that the contractual terms had been ratified and/or that the employee was an ostensible agent. The court threw out the ostensible agency theory at the jury instruction stage. The case was bifurcated with the only issues in front of the jury related to Plaintiff's direct action. The judge was set to hear the issue of indemnity in a post jury bench trial. All parties stipulated that the allocations found by the jury on the underlying action would also apply to the later indemnity action. However it was insisted that the jury also decide our contract formation defenses, as we were the only cross defendant with those defenses. Ms. Skane also argued to the judge that the contract was unenforceable because the general contractor went unlicensed during a brief lapse of time while construction was ongoing. The judge found this to be an issue of first impression and ruled that because the general contractor was licensed at all times the work of the roofer was being performed, that the contract was not unenforceable for that reason. Nevertheless the jury found 12-0 no contract formation. Therefore, Antis Roofing did not proceed to a phase II trial, as there was no Crawford right of the general contractor to

Appellate Updates
The Attorney Client Privilege is Alive and Well

By Jeffry A. Miller
Lewis Brisbois Bisgaard & Smith LLP

On November 30, 2009, the California Supreme Court in *Costco Wholesale Corporation v. Superior Court* (Nov. 30, 2009; S163335) ___ Cal.4th ___ held that a trial court committed error when it directed a discovery referee to conduct an in camera review of a letter sent by outside counsel to a corporate client. According to the Court, the trial court order violated the attorney client privilege and the letter could not be reviewed by a judge or referee in order for the court to rule on the claim of privilege. (Slip opn., p. 1.)

Costco hired a well-known law firm to provide legal advice regarding whether warehouse managers were exempt from California's wage and overtime laws. The attorney assigned to the task interviewed a couple of warehouse managers and prepared a lengthy opinion letter on the subject. Several years later, several Costco employees sued Costco claiming Costco had misclassified certain employees as "exempt" from the wage and overtime laws. Plaintiffs sought the letter in discovery and moved to compel production after Costco asserted the attorney-client privilege and the work product doctrine. (Slip opn., pp. 1-2.) The trial court ordered that a discovery referee review the letter in camera to determine the merits of the privilege claims. The referee redacted several major portions of the letter and allowed disclosure of others, explaining that attorney interviews of corporate employees were not protected by the attorney-client privilege. The trial court adopted the conclusions of the referee and also found that Costco had waived the privilege by placing the contents of the letter in issue. The Court of Appeal later denied a writ petition brought by Costco concluding Costco had not shown the unredacted portions of the letter would cause it irreparable harm. (*Id.* at p. 3.)

The Supreme Court rejected the trial court's and appellate court's analyses relative to the attorney client privilege. First, it found that the attorney client-privilege applied to the letter in its entirety, irrespective of the letter's contents (whether or not the letter includes unprivileged material). (Slip opn., p. 4.) The privilege protects the transmission of information between attorney and client. The privilege protects the relationship -- the communication does not become "uprivileged" simply because it contains material that could have been discovered by other means. (*Id.* at p. 8.) The Court also stressed that Evidence Code section 915, subdivision (a), prohibits disclosure of information in order for a court to rule on a claim of privilege. While a court may require certain disclosures (in camera proceeding) to review the applicability of the work-product doctrine, it may not do so with regard to the attorney-client privilege. (*Id.* at pp. 10-11.) Finally, the court found that a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not show that its case will be harmed by the disclosure of the evidence. Again, the goal of the privilege is the preservation of the confidential relationship between attorney and client. (*Id.* at pp. 16-17.)

Corrections

The Editor apologizes for the following oversights:

Super Lawyers (pages 10-11) from the Summer Edition:

Robert W. Harrison and John R. Clifford are partners at Wilson Elser Moskowitz Edelman & Dicker LLP.

Elizabeth Smith-Chavez of Seltzer Caplan McMahon Vitek was recognized as one of the 2009 San Diego Super Lawyers. SDDL extends our congratulations to Ms. Smith-Chavez.

Congratulations to the Super Lawyers from Lewis Brisbois Bisgaard & Smith

The Juvenile Diabetes Research Foundation San Diego Chapter gives thanks to SDDL

By Sean McParland,
Executive Director of the Juvenile Diabetes Research Foundation's San Diego Chapter

The Juvenile Diabetes Research Foundation San Diego Chapter gratefully thanks the San Diego Defense Lawyers for there generous donation of $5,000 from the Annual Golf Tournament. JDRF San Diego raises monies to fund the best diabetes research in the world. We currently fund over $5 million in research here in San Diego at such outstanding institutions as University of California, San Diego the Salk Institute, the Burnham Institute of Medical Research and the La Jolla Institute of Allergy & Immunology among others. We also provide support and education to San Diego families dealing with a type 1 diabetes diagnosis. With 40 children being diagnosed each day in the United States, we rely on the generous support of community partners like the San Diego Defense Lawyers to help us move closer to a cure. Thank you and Happy Holidays.

SDDL welcomes our new members for 2009:

Gabrielle F. Bunker	Richard R. Sooy	Jim Gorman	Chris Freidstadt
Alliea Umoff	Tom E. Lotz	Stephen T. Pelletier	Tammara Tukloff
Carleigh L. Gold	Barry J. Schultz	Kathy Weadock	Kim Rawers
Teresa M. Beck	Kurt Campbell	Carolyn Taylor	Jeff Doggett

be ruled upon.

Settlement Demand: $425,000 was the lowest settlement demand from the general contractor.

Settlement Offer: $100,000 was the highest offer to the general contractor.

Trial Type: Jury/Judge

Trial Length: 12 weeks

Verdict: Defense

THE BOTTOM LINE:

Case Title: Donald Pitchers as Personal Representative and Successor in interest to Patricia Pitchers (deceased); Donald Pitchers, an individual v. Mary C. Murphy, M.D.; Alan C. Wittgrove, M.D., an individual; and Alvarado Surgical Associates, A Medical Group, Inc., a California Corporation doing business as Wittgrove Bariatric Center; and does 1-25

Case Number: 37-2008-00077589-CU-MM-CTL

Judge: Hon. David B. Oberholtzer

Plaintiff's Counsel: Gordon R. Levinson of Levinson Law Group and Sean Simpson of Simpson-Moore LLP

Defendant's Counsel: Sheila S. Trexler of Neil, Dymott, Frank, Mcfall & Trexler APLC

Type of Incident/Causes of Action: Husband of Decedent, a 48-year old woman brought a wrongful death and survival action alleging negligence against Defendant physician. Plaintiff contacted Defendant physician who was covering for her surgeon for complaints of nausea, dry heaves and a sensation of fullness. Defendant physician recommended plaintiff drink hot tea, lie down and call within an hour or two. She did not call and Defendant physician followed up. Reportedly, she was feeling better and sleeping. The husband was instructed to contact Defendant's physician if she had any further symptoms or problems. She never heard from the couple again. The Defendant was driven by her husband to the hospital early the next morning, instead of calling the paramedics. She had a strangulated bowel and lactic acidosis which led to full cardiac arrest. She was taken off life support after three days as Defendant was brain dead as a result of the cardiac arrest although the surgery was successful in removing the necrotic bowel.

Plaintiff expert testified the doctor should have sent the patient to the emergency department as she had a "developing" bowel obstruction in the early evening, many hours before her arrest. Defendant's expert opined the standard of care did not require the physician to send her to the emergency department and most likely suffered an acute bowel obstruction that could not have been predicted. Further, the couple never advised Defendant physician that she had previously suffered a small bowel obstruction which was not previously surgically repaired. Defendant's expert

Insurance Update
Challenge to the Pleadings

By James M. Roth
The Roth Law Firm

The common thread among each of the cases discussed below is that all have been reviewed following a challenge to the pleadings, rather than final adjudication.

Although the Made-Whole Rule Applies in the Med-Pay Insurance Context, and the Insured must Be Made Whole as to All Damages Proximately Caused by the Injury, Liability for Attorney Fees Is Not Included under the Made-Whole Rule; Rather, Those Fees Instead Are Subject to a Separate Equitable Apportionment Rule (Or Pro Rata Sharing) That Is Analogous to the Common Fund Doctrine.

In 21st Century Insurance Company v. Superior Court (2009) 47 Cal.4th 511, 98 Cal.Rptr.3d 516 (August 24, 2009), the Supreme Court of California held that although the made-whole rule applies in the med-pay insurance context, and the insured must be made whole as to all damages proximately caused by the injury, liability for attorney fees is not included under the made-whole rule; rather, those fees instead are subject to a separate equitable apportionment rule (or pro rata sharing) that is analogous to the common fund doctrine.

Factually, Silvia Quintana ("Quintana") was injured in an automobile accident with a third party. She maintained an auto insurance policy with 21st Century Insurance Company ("21st Century") that included first party, no-fault medical payment ("med-pay") insurance coverage in case of an accident. 21st Century paid Quintana $1,000 under her insurance policy's med-pay provision. Quintana then separately pursued a damages claim against the third party and settled the action for $6,000, which sum represented her total damages. In obtaining the settlement, she incurred approximately $2,000 in attorney fees and costs (collectively "attorney fees"). Under its interpretation of the insurance policy's reimbursement provision, 21st Century requested that Quintana repay the $1,000 it had paid her. Quintana paid 21st Century $600, an amount arrived at by taking the $1,000 med-pay benefits disbursed to her by 21st Century and subtracting attorney fees of $400 (approximately one-sixth of Quintana's total attorney fees of $2,106.50, one-sixth being the relationship between the $1,000 she received from 21st Century and her $6,000 settlement). 21st Century eventually agreed that amount fully satisfied its reimbursement claim, because it accounted for 21st Century's pro rata share of the attorney fees Quintana expended in collecting the damages from the third party tortfeasor. Quintana subsequently filed a class action lawsuit against 21st Century, alleging that 21st Century could not lawfully require any reimbursement under its policy terms because she had not been made whole by the third party damages settlement ($6,000) and medical payments received from the insurer ($1,000) when her attorney fees of $2,106.50 were included as part of her made whole recovery.

The narrow issue before the court was whether the made-whole rule includes liability for all the attorney fees insureds must pay in order to obtain medical payment compensation from a third party tortfeasor.

The court began its analysis noting that med-pay insurers must seek recovery for personal injury claims through contractual reimbursement rights against their insureds, because they are not allowed to assert subrogation claims directly against third party tortfeasors. This is so because insurance policies typically have, and her policy did have, a provision requiring her to reimburse her insurer for monies she recovered from a third person that duplicated her recovery under her policy. Underlying these provisions is the basic idea that insureds should not recover the same amount twice, once from their insurance company and again from a third party. In sum, insureds are entitled to be "made whole" from the insurance proceeds and tort recovery, but they are not entitled to a double recovery. Although the made-whole

rule applies in the context of first party, no-fault medical payment coverage in an automobile insurance policy, and the insured must be made whole as to all damages proximately caused by the injury before the insurer may recover reimbursement from the insured's recovery from the tortfeasor, liability for attorney fees is not included under the made-whole rule.

Noting that this was a case of first impression, the court limited its analysis to auto insurance med-pay cases because automobile insurance coverage may differ in scope from coverage under other liability policies or homeowner's property insurance that may or may not have reimbursement provisions, insurer participation requirements, or definitions that apply only to the particular insurance policy terms.

After an Automobile Insurer Allegedly Destroyed a Tire Intended for Use as Evidence in the Insured's Products Liability Action Against the Tire Manufacturer, the Insured Could Add His Insurer as a Defendant in the Products Liability Suit, Alleging "Breach of Implied Covenant of Good Faith and Fair Dealing" and "Negligent Destruction of Evidence."

In Cooper v. State Farm Mutual Automobile Insurance Company (2009) 177 Cal.App.4th 876, 99 Cal.Rptr.3d 870 (September 17, 2009), the Court of Appeal, Fourth District, Division 2, held that after an automobile insurer allegedly destroyed a tire intended for use as evidence in the insured's products liability action against the tire manufacturer, the insured could add his insurer as a defendant in the products liability suit, alleging "breach of implied covenant of good faith and fair dealing" and "negligent destruction of evidence."

Factually, Bryan Cooper ("Cooper") was an insured of State Farm. He was involved in a single car accident allegedly caused by a tread separation of the right rear tire. As part of the collision damage settlement with Cooper, State Farm acquired possession of the vehicle, including the right rear tire. State Farm had the tire examined by an expert, who opined that it was defectively manufactured. State Farm notified Cooper of its expert's opinion. Cooper thereafter sued the tire manufacturer, Continental Tire North America, Inc. ("Continental Tire"). After Cooper's counsel notified State Farm of the importance of the tire to Cooper's case against Continental Tire, and after State Farm informed Cooper that it would retain the tire, State Farm disposed of the car and the allegedly defective tire. Cooper then sued State Farm for damages allegedly caused by State Farm's destruction of the tire, contending that as a result of State Farm's conduct, he was unable to prove his product defect case against Continental Tire.

The issue before the appellate court was whether an insured may legally recover damages against his automobile insurer for injuries sustained in the underlying automobile accident when the insurer allegedly destroyed a tire intended for use as evidence in the insured's products liability action against the tire manufacturer, or whether said recovery is, by its very nature, too speculative.

The appellate court began its analysis noting that a volunteer who, having no initial duty to do so, undertakes to come to the aid of another is under a duty to exercise due care in performance and is liable if the harm is suffered because of the other's reliance upon the undertaking. While there may be no general tort duty to preserve evidence, this does not preclude the existence of a duty based on contract, created by mutual agreement or promissory estoppel. Thus, when an insurer enters upon an affirmative course of conduct affecting the interests of another, it is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions. The insured's damages for his automobile insurer's destruction of a tire that the insured intended to use as evidence in a products liability action against tire manufacturer, on a theory of promissory estoppel based on the insurer's promise not to destroy tire, would be the damages the insured would have been entitled to recover in the underlying products liability action against tire manufacturer if the tire had been available as evidence, less the amount that the insured actually received in settlement from the tire manufacturer. Because the insurer was aware of the value of the tire and the value range of personal injury actions, the damages were ascertainable in both their nature and origin.

When the Trial Court Finds That the Factual Issues to Be Resolved in a Declaratory Relief Action Brought by a Liability Insurer Regarding its Duty to Defend Overlap with Issues to Be Resolved in the Underlying Litigation, the Trial Court must Stay the Insurer's Declaratory Relief Action.

In Great American Insurance Company v. Superior Court (2009) 178 Cal.App.4th 221, 100 Cal.Rptr.3d 258 (October 2009), the Court of Appeal, Second District, Division 3, held that when the trial court finds that the factual issues to be resolved in a declaratory relief action brought by a liability insurer regarding its duty to defend overlap with issues to be resolved in the underlying litigation, the trial court must stay the insurer's declaratory relief action.

Factually, Great American Insurance Company ("GAIC") insured Angeles Chemical Company ("Angeles") and its officers and directors. Angeles and a neighboring property owner, McKesson Corporation ("McKesson"), sued each other for cleanup costs relating to environmental contamination of the groundwater beneath both sites. The complaints also named officers and directors of each company. Various cross-complaints were filed; the subsequent owner of the Angeles site sued some, but not all, of the Angeles owners and directors; those owners and directors sued Angeles. GAIC settled the lawsuits filed against its insureds by McKesson and McKesson-related individuals, leaving actions among the Angeles-related parties still pending. GAIC then brought a declaratory relief action, seeking a declaration that those settlements had exhausted its policy limits and that it was therefore no longer obligated to defend its insureds in the then still-pending litigation. The insureds sought a stay of the declaratory relief action, on the basis that resolution of the issues raised in the declaratory relief action would prejudice it in the still pending underlying litigation.

The issue before the appellate court was under what circumstances must the trial court grant a stay requested by an insured to a declaratory relief action filed by an insured which believes there is no longer a potential for coverage and, therefore, it is no longer required to defend. The appellate court began its analysis noting well-settled law that in determining whether a duty to defend exists under a liability policy, courts compare the allegations of the underlying complaint with the terms of the policy, and facts extrinsic to the complaint

Cont'd on pg 9

testified that the previous bowel obstruction could have contributed to the development of the acute condition.

Settlement Demand: None

Settlement Offer: $499,000

Trial Type: Jury

Trial Length: 4.5 days

Verdict: Defense (The case was about patient responsibility. The jury concluded the physician had responded appropriately to the information provided to her. She encouraged Decedent to contact her if her condition changed. Decedent and her husband chose to delay treatment and arrange for their own travel to the hospital as opposed to calling the physician.

SAVE THE DATE

San Diego Defense Lawyers 2010 Installation Dinner will be held on January 30, 2010 at the Manchester Grand Hyatt located at 1 Market Place, San Diego, California 92101

Sheila S. Trexler of Neil, Dymott, Frank, McFall & Trexler will be honored as the Lawyer of the Year

We look forward to seeing you at this event. Invitation to follow.

Does the Collateral Source Rule Preclude Limitation of Damages to the Amounts Paid by Private Health Insurance?

By Lisa Willhelm Cooney
Lewis Brisbois Bisgaard & Smith

A recent Court of Appeal decision answered this question "yes" despite other Court of Appeal decisions that imply the answer is no.

In *Howell v. Hamilton Meats & Provisions, Inc.* (Nov. 23, 2009) 179 Cal.App.4th 686 the Fourth Appellate District, Division One took on the *Hanif/Nishihama* line of cases and found the collateral source rule precludes post-verdict reduction of damages to the negotiated or discount rate actually paid by a private health insurer to a health care provider. The *Howell* court held that in a personal injury case in which the plaintiff has private health care insurance, the negotiated rate differential (the difference between the full amount of the medical provider's bills and the lesser amount paid by a *private* health insurer under the terms of its agreements with providers) "is a benefit within the meaning of the collateral source rule, and thus the plaintiff may recover the amount of that differential as part of her recovery for economic damages. . . ." (*Id.*)

Howell signed financial responsibility agreements with her medical providers and submitted private insurance information. The court found that extinguishment of Howell's personal debt to the medical providers based on the amounts paid by her private insurer was "a collateral source benefit within the meaning of the collateral source rule because it was conferred upon her as a direct result of her own thrift and foresight in procuring private health care insurance . . . ." (*Id.*)

The court distinguished *Hanif v. Housing Authority* (1988) 200 Cal. App.3d 635 on the basis that *Hanif* involved a Medi-Cal beneficiary who incurred no personal liability for the charges billed to Medi-Cal. (*Id.*)

The *Howell* court disagreed with the decision in *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 in which the First Appellate District held that it was error to allow a jury to award in excess of amounts paid by private insurance for medical services. The *Nishihama* court determined the provider had no lien rights against the plaintiff's recovery because the provider agreed to accept private insurance payments as payment in full. The *Howell* court commented that *Nishihama* should have used a collateral source rule analysis, not a lien rights analysis. (*Id.*)

The *Howell* court agreed with the observations expressed in Justice Moore's concurring opinion in the case of *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 204 in which she stated, "'[w]ithout statutory authority or the Supreme Court's blessing, the Hanif/*Nishihama* line of cases divorced the collateral source rule from the complicated area of medical insurance,' and '[a]bsent such approval, *Hanif/Nishihama* simply goes too far.'" (*Id.*) The *Howell* court also expressed its believe that any changes to the collateral source rule should be made by the Legislature.

The *Howell* case sets the stage for review by the Supreme Court because there is now a split of authority among the intermediate courts regarding the important issue of whether or not plaintiffs may recover damages in excess of the amounts paid by private insurers. *Howell* apparently does not impact the damage analysis for Medi-Cal patients who incur no financial responsibility above and beyond the amounts paid by Medi-Cal.

Until the Supreme Court or the Legislature makes a decision on this issue, defense lawyers may continue to argue the *Hanif/Nishihama* rationale for post-judgment reductions because trial courts may choose among any appellate court decision on a particular issue, even one from a district different from its own. "Where California intermediate appellate court cases conflict, any trial court may choose the decision it finds most persuasive." (*Sears v. Morrison* (1999) 76 Cal.App.4th 577, 587 citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) There will likely be some inherent pressure to follow the appellate court opinion from the local appellate district, but it is not mandatory for the superior court to follow the local appellate court opinion just because the superior court is located within the realm of that appellate district. As such, a superior court may decide the *Howell* analysis is more persuasive and deny the reduction.

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.

Cont'd from pg 7

may also be considered. If a potential for coverage exists under a liability policy, there is a duty to defend. Normally, a liability insurer with a duty to defend must defend until the underlying action is resolved by settlement or judgment. A liability insurer that withdraws a defense does so at its own risk. Thus, an insurer may protect itself from "bad faith" exposure by engaging a declaratory relief action to obtain a judicial declaration that it need no longer do so. To prevail in a declaratory relief action, where the issue cannot be resolved as a matter of law, the insured must prove the existence of a potential for coverage, while the liability insurer must establish the absence of any such potential. When the declaratory relief action depends on coverage issues, and the resolution of those issues might prejudice the insured in the underlying litigation, the proper course of action is to stay the declaratory relief action until resolution of the underlying action. However, when the declaratory relief action can be resolved without prejudice to the insured in the underlying action – by means of undisputed facts, issues of law, or factual issues unrelated to the issues in the underlying action – the declaratory relief action need not be stayed pending resolution of the underlying action. If the factual issues to be resolved in a declaratory relief action regarding a liability insurer's duty to defend overlap with issues to be resolved in the underlying litigation, the trial court must stay the declaratory relief action. Any prejudice to the insured, noted the court, in being compelled to fight a two-front war, doing battle with the plaintiffs in the third party litigation while at the same time devoting its money and its human resources to litigating coverage issues with its carriers, does not depend on the existence of factual overlap with the underlying action, and will be an issue for the trial court to consider every time an insured seeks to stay a declaratory relief action while the underlying action is still pending. In considering an insured's motion to stay the declaratory relief action, the court must consider possible prejudice to the insurer which may be caused by staying the declaratory relief action.

Fraudulent Conduct by an Insurer, Which Is Connected with Conduct That Would Violate Insurance Code Section 790.03 *et Seq*. – Sometimes Referred to as the "Unfair Insurance Practices Act" – Could Also Give Rise to a Private Civil Cause of Action under the Unfair Competition Law, Business and Professions Code Section 17200 *et Seq.*

In Zhang v. Superior Court (2009) 178 Cal.App.4th 1081, 100 Cal.Rptr.3d 803, the Court of Appeal, Fourth District, Division 2, held that the alleged acts by California Capital Insurance Company of making fraudulent misrepresentations and promulgating misleading advertising with respect to its intention to pay proper coverage in the event the insured suffered a covered loss, while it allegedly had a policy or regular practice of "lowballing," delaying, or taking unfair advantage, were a proper basis for insured's civil cause of action under the Unfair Competition Law ("UCL").

Factually, Yanting Zhang ("Zhang") sued her insurer, California Capital Insurance Company, over a dispute following a fire at Zhang's commercial premises. In the complaint's "Factual Background" and first two causes of action – based on the legal theories of breach of contract and breach of the covenant of good faith – Zhang set out a litany of misconduct relating generally to California Capital's handling of her loss claim and its refusal to authorize adequate payment under the policy for the repair and restoration of the premises. In the third cause of action, based on the UCL, Zhang alleged that California Capital "engaged in unfair, deceptive, untrue, and/or misleading advertising.... [California Capital] promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss.... However ... [California Capital] in fact has no intention of properly paying the true value of its insureds' covered claims. [¶] ... [California Capital] had and has no intention of honoring such advertised promises." California Capital demurred to that third cause of action on the basis that the conduct alleged in the third cause of action was prohibited by the Unfair Insurance Practices Act (i.e., Insurance Code section 790.03 *et seq.*), and it was therefore impermissible for Zhang to plead a private cause of action thereto.

The issue before the appellate was whether fraudulent conduct by an insurer, which is connected with conduct that would violate Insurance Code section 790.03 *et seq.* – sometimes referred to as the "Unfair Insurance Practices Act" – could also give rise to a private civil cause of action under the UCL, Business and Professions Code section 17200 *et seq.*

Because this was a pleadings appeal, the appellate court was not concerned with plaintiff's ability to prove the allegations, but only with the allegations' adequacy to state a cause of action. Noting that a violation of Unfair Insurance Practices Act does not create a private right of action under the statute in either the first- or third-party context against insurers who commit the unfair practices enumerated in that provision," a claim under the UCL is not based upon the Unfair Insurance Practices Act. The UCL, which on its face applies to all "businesses" and does not expressly except or exempt insurers, does authorize any injured person to sue for the violation of its requirements and/or prohibitions-that is, for "unfair competition." (Bus. & Prof. Code, § 17204.) "Unfair competition" is defined in Business and Professions Code section 17200 to "include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising...." "Undoubtedly," concluded the appellate court, an insurer is subject to suit under the UCL because there is no reason to treat insurers differently from other businesses when it comes to actions under the UCL except that insurers cannot be sued under the Unfair Insurance Practices Act.

Thank you!!!

On behalf of the San Diego Defense Lawyers, we extend our thanks to Thorsnes Litigation Services for sponsoring and providing dinner and beverages for our Evening Seminars. Please contact them for your litigation needs.

THE SDDL 19TH ANNUAL MOCK TRIAL COMPETITION WAS A SUCCESS

By Randall M. Nunn of Hughes and Nunn and Scott D.Schabacker of the Law Offices of Scott D. Schabacker

On October 22, 23 and 24, 16 teams from 10 law schools throughout the United States participated in SDDL's 19th Annual Mock Trial Competition. After surviving two preliminary rounds and a semi-final round, teams from the University of California, Berkeley (Boalt Hall) School of Law and University of the Pacific (McGeorge) School of Law squared off in the finals. The team from UC Berkeley prevailed by the narrowest of margins. Congratulations to students Chase W. Ensign (2010), Maeve Granzin (2011), Jerome Price (2011) and Jonah Lalas (2012).

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

SDDL's Mock Trial Competition is recognized as an extremely valuable experience for the competitors. Many students compete for a few coveted positions on each school's Mock Trial teams. Several of the team coaches related that their law schools currently place a higher percentage of Mock Trial team members in summer legal jobs than members of Law Review or the Moot Court Board. The feedback students receive from experienced lawyers and judges makes the competition a valuable teaching tool.

Naturally, this event could not be held without the support of SDDL and the many members, non-members and judges who volunteered to judge the Competition. We hope you found the experience to be personally enjoyable and rewarding. Thanks again and we look forward to your participation in next year's event.

Photo of the winning team from University of California, Berkley - Boalt Hall . The team members from left to right are: Chase W. Ensign (2010), Jerome Price (2011), Jonah Lalas (2012) and Maeve Granzin (2011).

From left to right - SDDL Members David P. Hall and Jackie M. Ni Mhairtin who volunteered and were Judges on Friday of the competition join others at the reception

SDDL members and competitors enjoy themselves at the reception

SDDL Thanks the Following Members and Judges for Volunteering their Time:

Thursday

Austin, Bruce
Benrubi, Gabriel
Brennan, Allasia
Cardone, David
Cohen, Robert
Cox, Kelly
Enge, Cherie
Kanno, Rita
McCurdy, Katie
Noland, Leslee
O'Neill, Dennis
Polito, Steve
Pope, Mark
Reinbold, Douglas
Roper, David
Rowland, Zachiariah
Savary, Scott
Selfridge, Alexandra
Simonek, Bonnie
Slavens, Vince
Smigliani, Suzanne
Teague, John
Verbick, Todd
White, Beth Obra
White, Scott
Winston, Roberta

Friday

Boles, Darin
Dixon, Deborah
Fallon, Daniel
Fedor, John
Greenfield, Ken
Hall, David
Kaufman, Eydith
Kersey, Jamahl
Lotz, Tom
Ni Mhairtin, Jackie
Oygar, Sezen
Rawers, Brian
Rodriguez, Robert
Shedlosky, Joy
Singer, Pete
Singer, Sarah
Smith, Kristin
Stairs, Victoria
Taylor, Steve
Tucker, Bill
Turner, J.D.
Umoff, Allie
Verne, Andrew
Wallace, Deanna
Wallace, Jim
Woodhall, Blake
Zuetel, Bryan

Saturday

SEMI-FINALS

Hon. Robert Dahlquist
Kathryn Meadows
Dan McCarthy
Doug Glass
Shannon Kitten
Randy Christison

FINALS

Judge DiFiglia
Liz Skane
Patrick Kearns

SDDL members and competitors mingle at the reception

SDDL Member List

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

2009

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

The Supreme Court's Recent Decisions on Pleading Standards Could Pave the Way for More Successful Rule 12(b)(6) Motions

By Charles Blanchard and Peter Rotolo
Chaffe McCall, L.L.P., New Orleans, Louisiana

Before the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), federal courts routinely applied a very liberal standard in determining whether plaintiff's allegations survived a Rule 12(b)(6) motion to dismiss. That standard found support in language from the Supreme Court's earlier decision in *Conley v. Gibson*, 355 U.S. 41 (1957), where the court stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle him to relief." 355 U.S. at 45-46. Based on this language, lower courts were understandably reluctant to dismiss complaints, even where they included threadbare allegations that merely stated the elements of the cause of action. But that has likely changed for the better for defendants since the Supreme Court's decision in *Twombly*, and the court's recent follow-up case of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

Twombly involved a class action by subscribers of local telephone and high-speed internet services, who alleged violations of anti-trust laws. The district court granted defendant's Rule 12(b)(6) motion to dismiss upon finding that plaintiffs had not alleged sufficient facts to establish a conspiracy in support of their anti-trust claims. The Second Circuit reversed, citing Conley, holding that the proper standard to be applied is whether there was "no set of facts" that would permit a plaintiff to establish a claim. The Supreme Court reversed the Second Circuit and firmly rejected the "no set of facts" language as establishing a pleading standard. 550 U.S. at 563. Although recognizing that a complaint attacked by Rule 12(b)(6) does not require detailed factual allegations, the *Twombly* court held that "labels and conclusions" and a "formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555.

The *Twombly* court also rejected the notion that courts should be hesitant to dismiss on the pleadings until a plaintiff is allowed the opportunity to conduct extensive discovery to further develop facts. Pleading deficiencies should be "exposed at the time of minimum expenditure of time and money by the parties and court." *Id*. at 558. Courts therefore must insist on "some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.*

The Supreme Court recently reaffirmed and arguably heightened *Twombly's* pleading requirements in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *Ashcroft* involved claims that government officials had violated a plaintiff's constitutional rights by discrimi-

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

nating against him based on his religion. In *Iqbal*, the court removed any doubt that *Twombly* was limited to complex or anti-trust cases and provided the "final nail-in-coffin" to the "no set of facts" standard. *See, e.g., Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3rd Cir. 2009).

The *Iqbal* court explained that while Rule 8(a) does not require detailed factual allegations, it requires more than "an unadorned, other-defendant-unlawfully-harmed-me accusation." 129 S.Ct. at 883. The court explained that two separate principles applied to whether a complaint may be dismissed under Rule 12(b)(6). First, the requirement that a court accept as true all allegations in a plaintiff's complaint does not apply to legal conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. 129 S.Ct. at 1949. A plaintiff must provide factual allegations in support of his claim that make them plausible, not merely conceivable. 129 S.Ct. at 1950. These determinations will be a context-specific task that requires the court to draw on its judicial experience and common sense. 129 S.Ct. at 1950.

Because *Twombly* and *Iqbal* are recent pronouncements from the Supreme Court, there is not yet a large body of lower court decisions analyzing them. But the guidance that exists recognizes that lower courts must more closely scrutinize initial pleadings. Courts should scrutinize the plaintiff's complaint to determine whether it states a plausible entitlement to relief, and if the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint should be dismissed. *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009).

Courts are also recognizing the need to address pleading deficiencies before discovery. One of the *Twombly* court's concerns was the burden of discovery imposed on a defendant by implausible allegations "perhaps intended merely to extort a settlement that could spare the defendant that burden." *Cooney v. Rossiter,* 583 F.3d 967, 2009 U.S. App. LEXIS 21468 *7 (7th Cir. 2009). Nonetheless, a plaintiff post-*Twombly*/*Iqbal* is still not required to establish the elements of a prima facie case; instead he need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element. *UPMC Shadyside*, 578 F.3d at 213.

A review of recent product-liability cases reveals several successful motions to dismiss in the wake of *Twombly*/*Iqbal*. For example, in *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, 2009 WL 3762972, *5 (W.D. Mo. Nov. 9, 2009), the court dismissed plaintiff's breach of an express warranty claim under *Iqbal* where the plaintiff did not identify the content of any alleged warranty. The court also rejected plaintiff's argument that whether a warranty was made was a question of fact.

Courts have likewise dismissed manufacturing and design defect claims where the plaintiff's complaint did not give rise to the plausibility of success. In *Burks v. Abbott Laboratories*, 639 F. Supp. 2d 1006, 1016 (D. Minn. 2009), the court dismissed a plaintiff's composition and design defect product liability claims because the plaintiff had failed to state a plausible claim where it did not allege facts that the defendant deviated from its own manufacturing specifications on the composition claims, and did not allege an alternative design that would reduce the risk of harm in support of its design claim. In *Frey v. Novartis Pharmaceuticals Corp.*, 642 F. Supp. 2d 787, 792, 794 (S.D. Ohio 2009), the court dismissed plaintiff's product manufacturing and design defect claims where the complaint merely alleged a formulaic recitation of the elements of the claims. The court rejected the argument that plaintiff could not allege specific product defects without first conducting discovery. In *Provencio v. Armor Holdings, Inc.*, 2007 WL 2814650, *2 (E.D. Cal. September 25, 2007), the court dismissed plaintiff's product-liability claim for design and manufacturing defects relating to a rifle where plaintiff offered only conclusory allegations and a formulaic recitation of the elements of the claim. In *Sherman v. Stryker Corp.*, 2009 WL 2241664 (W.D. Cal. March 30, 2009), the court dismissed products-liability claims where plaintiff alleged that the defendant's medications could have been one of the many different types of medication that might have been administered to the plaintiff, but plaintiff did not allege sufficient facts that the defendants had actually produced the medication that caused the injury.

Of course, each case requires a context-specific inquiry, and relying upon the heightened pleading standards of *Twombly*/*Iqbal* will not always succeed. For example, in *Carrigan v. K2M, Inc.*, 2009 U.S. Dist. LEXIS 99225 (C.D. Ill. Oct. 23, 2009), the plaintiff alleged that screws that the defendant manufactured and that surgeons inserted into plaintiff's back during surgery were defective. The court held that plaintiff's allegations that the screws fractured while implanted satisfied *Iqbal*, even though plaintiff did not plead the model number or lot number of the screws. The court found that such information "can be gleaned" in discovery. 2009 U.S. Dist. LEXIS 99225, *5.

Nonetheless, it is clear that *Twombly*/*Iqbal* has substantially affected the analysis for deciding Rule 12(b)(6) motions to dismiss. Plaintiffs should no longer be able to escape dismissal under Rule 12(b)(6) simply by alleging the legal elements of a claim, with the promise that they will deliver those facts after discovery. Defense counsel should consider being aggressive in pursuing Rule 12(b)(6) motions to dismiss when faced with complaints lacking factual specificity.

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

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