



# THE UPDATE

## AUTUMN 2011

### Howell v. Hamilton Meats & Provisions, Inc.: Supreme Court Limits Recovery of Damages for Past Medical Expense

By Alan E. Greenberg

On August 18, 2011 the California Supreme Court rendered its long-awaited decision in the closely-watched decision in *Howell v. Hamilton Meats & Provisions, Inc.* matter. In a 6-1 opinion authored by Justice Kathryn Werdegar, the Court summarized the issue presented and the Court’s rationale as follows:

“When a tortiously injured person receives medical care for his or her injuries the provider of that care often accepts as full payment, pursuant to a preexisting contract with the injured person’s health insurer, an amount less than that stated in the provider’s bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider’s bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer an economic loss in that amount. (See Civ. Code §§ 3281 [damages are awarded to compensate for detriment suffered]. 3282 [detriment is a loss or harm to person or property].)”

The Court emphasized in its opinion that it was not abrogating but simply correctly applying the collateral source rule, which precludes deduction of compensation the plaintiff has received from sources independent of the tortfeasor, from the damages the plaintiff “would otherwise collect from the tortfeasor.” *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 6. The Court noted that the rule ensures that the plaintiff in *Howell* would recover in damages the amount her insurer paid for her medical care. In the Court’s view, however, the rule had no bearing on amounts that were included in a provider’s bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment. The Court stated:

“Such sums are not damages the plaintiff would otherwise have col-

lected from the defendant. They are neither paid to the providers on the plaintiff’s behalf nor paid to the plaintiff in indemnity of his or her expenses. Because they do not represent an economic loss for the plaintiff, they are not recoverable in the first instance. The collateral source rule precludes certain deductions against otherwise recoverable damages, but does not expand the scope of economic damages to include expenses the plaintiff never incurred.”

The *Howell* case involved Rebecca Howell, a San Diego woman who was injured when a truck driven by an employee of Hamilton Meats made an illegal U-turn and hit her car in Encinitas, California. She subsequently underwent numerous surgeries, accruing medical bills totaling nearly \$190,000. Her health insurance company settled with the hospital for payment of \$59,691. The jury awarded that amount as damages for past medical expenses. The judgment was appealed and reversed by the appellate court, which found Howell was entitled to the entire \$190,000.

#### History of the Legal Issue

The California history of the substantive question at issue- whether recovery of medical damages is limited to the amounts providers actually are paid or extends to the amount of their undiscounted bills- begins with *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635. The injured plaintiff in *Hanif* was a Medi-Cal recipient, and the amounts Medi-Cal paid for his medical care were, according to his evidence, substantially lower than the “reasonable value” of his treatment (apparently the same as the hospital bill). Although there was no evidence the plaintiff was liable for the difference, the court in a bench trial awarded the plaintiff the larger, “reasonable value” amount. The appellate court held the trial court had over compensated the plaintiff for his past medical expenses: recovery should have been

See *Howell* on page 7

### IN THIS ISSUE

President’s Message	2	<i>Sullivan v. Oracle Corporation</i> : Obligations to Pay Nonresident Employees Overtime for Work in California	12
The Bottom Line	3, 4, 6, 8, 10	Litigation Tips and Considerations: Perfecting a Claim for Attorney’s Fees Pursuant to California Code of Civil Procedure section 1021.6 in Multi-party Litigation	14
Brown Bags	3-5	The Court of Appeal Expands Statute of Limitation Protection Afforded Attorneys	15
Changes in the California Rules of Court	5	Construction Litigation: SB-800 is a Plaintiff’s Exclusive Remedy	16
The Court of Appeal Addresses When an Insured’s Responsibility to Reimburse an Insurer for Settlement Costs in <i>American Modern Home Insurance Co. v. Faithman</i>	6	On the Move	18
Class Action Waivers After The U.S. Supreme Court Decision In <i>AT&amp;T v. Concepcion</i>	8	In Memoriam: Bonnie Beauman	18

# PRESIDENT'S MESSAGE



## Members:

Much has happened since the last edition of the Update was published. The annual SDDL golf outing was a rousing success thanks to the efforts of our many sponsors and the inimitable Matt Souther. A slate of excellent MCLE programs were held over the summer. The year is moving by quickly, much more quickly than I had expected. And we're already planning our Installation Dinner to be held on January 28, 2012 at the San Diego Children's Museum. Our incoming President, Victoria Stairs, has been working hard to top even last year's excellent program. Our venue this year promises to add a new element of pizzazz to what is always a great night, and I hope to see you all there.

I also want to take a moment to congratulate Robert Tyson, Mark Peterson, and Kristi Blackwell, of Tyson & Mendes, on their victory in the *Howell v. Hamilton Meats & Provisions, Inc.* matter, our cover story in this edition of the Update. The SDDL is proud that a decision with such sweeping, state-wide effect came at the hands of longtime SDDL members. Certainly we all had days during law school during which we thought of how we might make our marks on the law. The good folks at Tyson & Mendes have the *Howell* decision to point at and say, "I moved the whole world a few inches today." Congratulations again.

Finally, I'd like to announce that we have several open positions on the SDDL board for terms commencing in January. Please consider submitting a nominee, or expressing your own interest, to me via email. Serving on the board is both a worthwhile and enjoyable experience.

I hope all of our members enjoy the coming autumn here in San Diego, and hopefully by the time of the next Update our Chargers will be heading into a long playoff run.

Cheers,

Jim

## SDDL Officers

**President:** Jim Wallace  
LaFollette Johnson Dehass Fesler & Ames

**Vice-President/President-Elect:** Victoria Stairs  
Lotz Doggett & Rawers

**Treasurer:** Ben Howard  
Neil, Dymott, Frank, McFall & Trexler

**Secretary:** Tracey VanSteenhouse  
Wilson Elser Moskowitz Edelman & Dicker

## SDDL Directors

David Cardone  
Butz Dunn & DeSantis

Tamara Glaser  
Neil, Dymott, Frank, McFall & Trexler

Alan Greenberg  
Retired

Rita Kanno  
Lewis Brisbois Bisgaard & Smith

David Roper  
Lorber, Greenfield & Polito, LLP

Alexandra Selfridge  
Law Offices of Kenneth N. Greenfield

Matt Souther  
Neil, Dymott, Frank, McFall & Trexler

## 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 31, 2011. Applications can be downloaded at: [www.sddl.org](http://www.sddl.org)

## The Update

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 or its leadership.

The SDDL welcomes the submission of articles by our members on topics of general interest to its membership. Please submit material to:

David Cardone, Editor  
Butz Dunn & DeSantis  
101 West Broadway  
Suite 1700  
San Diego, CA 92101-8289  
p 619-233-4777  
[dcardone@butzdunn.com](mailto:dcardone@butzdunn.com)

### Please SAVE THE DATE

for the San Diego Defense Lawyers Annual Installation Dinner at the New Children's Museum. This year promises to be the most unique, fun (open bar all night) and delicious Installation Dinner yet. Come out to meet and mingle with your fellow defense attorneys. The Board of Directors cannot wait to see you all there. Please contact me if you have any questions!



### Location:

The New Children's Museum @ 200 West Island Avenue, San Diego, CA 92101

### Cost:

\$125 per person / \$1250 per table  
hors d'ouvres, drinks, dinner and dessert included in cost)

**BROWN BAG PROGRAMS****“How to Avoid Looking Foolish in Federal Court”***By David B. Roper*

Practicing law out of your comfort zone, off your home turf, is an uncomfortable feeling even for the most seasoned attorney. Even with years of experience in state court, entering the hushed corridors and imposing courtrooms of the U.S. District Court still fills many attorneys with trepidation. The SDDL Brownbag Seminar in June, “How to Avoid Looking Foolish in Federal Court” sought to alleviate some of this discomfort with practical advice from The Honorable Janice Sammartino, and attorney Robert Brewer.

Judge Sammartino served on the bench of both the Municipal and Superior Courts in San Diego before her appointment to the Federal bench in 2007. Her experience gives her a comprehensive understanding of the unique nature of practice in federal court. Robert Brewer, Partner-in-Charge of the San Diego office of Jones Day, is a former Assistant U.S. Attorney, and a Fellow of the American College of Trial Lawyers. He has extensive experience handling federal criminal and civil matters and has been named one of the Top 10 Lawyers in San Diego for the past 5 years.

Considerations the state court practitioner should keep in mind when crossing the street to Federal court include:

- Cases in Federal court are assigned to the handling judge and magistrate randomly. All judges handle both civil and criminal cases. Civil practitioners must be sensitive to the time constraints placed on the Federal court by the priority demanded by the rules of criminal procedure.
- Something that surprises and dismays some state court practitioners when assigned to a judge in Federal court is the lack of any Federal equivalent of California C.C.P. section 170.6. There is no peremptory challenge of an assigned judge!
- Every judge has his own rules of court. Check the court’s website ([www.casd.uscourts.gov](http://www.casd.uscourts.gov)) to determine your judge’s policies and procedures.
- The early neutral evaluation conference is taken very seriously. Have your client present and be prepared for substantive settlement discussions.
- Motions are ruled upon when the court deems it appropriate. Unlike state court, no date certain for a ruling will be given. Don’t be a nag about when you might expect a ruling. Inquiries about pending motions or other rulings should be made to the judge’s law clerk, and be courteous.
- The court may rule on motions without oral argument. Local rules provide that a matter may be deemed submitted on the moving papers at the discretion of the judge. Some judges never hear oral argument.
- It is considered the judge’s obligation to select a fair and impartial jury. Not all judges permit voir dire.
- Everything done in court is on the record, either stenographically or electronically.
- Magistrates hear all discovery motions. The parties may stipulate that the magistrate may handle the case for all purposes. Having the magistrate handle the case can be the most expeditious way of disposing of the matter. Liberal use of the magistrate is encouraged in that it frees up the court’s already crowded calendar.

Both Judge Sammartino and Mr. Brewer encouraged attorneys to visit the Federal courthouse before their matter is to be heard. Familiarize yourself with the courtroom procedures and the preferences of your particular judge. Make use of the court’s law clerk. They are an invaluable resource, but treat them with respect. The judges consider their law clerk to be family; if you disrespect the clerk, you disrespect the judge.

SDDL thanks Judge Sammartino and Mr. Brewer for taking the time to share their experience and insight with our members.

**Bottom line**

**Title of Case:** Colter Rios v. Grossmont Union High School District

**Case No.:** SDSC Case No. 37-2008-00093763-CU-PO-EC

**Judge:** Hon. Eddie C. Sturgeon

**Type of Action:** High school student football player injured in football game.

**Type of Trial:** Jury

**Trial Length:** 8-weeks

**Verdict:** Defense verdict

**Attorney(s) for Plaintiff(s):** Mark Clayton Choate; Sonia Chaisson

**Attorney(s) for Defendant(s):** Daniel R. Shinoff; Gil Abed

**Damages and/or Injuries:** Serious neck injury

**Settlement Demand:** \$3 million

**Settlement Offer:** \$150,000

**Plaintiff Attorney Asked Jury for:** \$28 million

**Bottom line**

**Title of Case:** Schwaia v. Lakeside Union School District, et al.

**Case No.:** SDSC Case No. 37-2008-00065857-CU-OE-EC

**Judge:** Hon. Eddie C. Sturgeon

**Type of Action:** Employment Disability discrimination; failure to engage in the interactive process; failure to provide reasonable accommodation; Ordering a prohibited Medical Examination; Harassment; Retaliation and failure to prevent discrimination and harassment, under FEHA

**Type of Trial:** Bench

**Trial Length:** 3 weeks

**Verdict:** Defense

**Attorney(s) for Plaintiff(s):** Marilyn Mika Spencer, David Greenberg, Art Skola

**Attorney(s) for Defendant(s):** Daniel R. Shinoff, Jeanne Blumenfeld

**Damages and/or Injuries:** Damages were sought for back pay, front pay, medical expenses, and emotional distress

**Settlement Demand:** None

**Settlement Offer:**

**Plaintiff Asked the Court for:** None

\$500,000 plus lodestar and attorney fees

**Bottom line**

**Title of Case:** Eric Lopez, v. Cajon Valley Union School District; Sandra L. Peterson; and Joann Kennedy

**Case No.:** SDSC Case No. GIC871766

**Judge:** Honorable William R. Nevitt, Jr.

**Type of Action:** Personal Injury action of minor Plaintiff for a dart-out auto accident. Plaintiff claimed that he was negligently supervised on campus which led to his off-campus injuries.

*Continued on page 4*

*Continued from page 3*

Plaintiff also claimed that the school district failed to implement its own transportation policies.

**Type of Trial:** Bench

**Trial Length:** 2 weeks

**Verdict:** Defense: Motion for Judgment granted in favor of school district.

**Attorney(s) for Plaintiff(s):** Thomas Castonguay of the Law Offices of Thomas Castonguay

**Attorney(s) for Defendant(s):** Daniel R. Shinoff and Jeffrey P. Wade, Jr. of Stutz Artiano Shinoff & Holtz APC

**Damages and/or Injuries:** Alleged closed head injury and internal injuries

**Settlement Demand:** \$350,000

**Settlement Offer:** \$75,000

**Plaintiff Attorney Asked for:** In excess of \$400,000.

#### Bottom line

**Title of Case:** Vigeant v. Anaheim Union High School District

**Case No.:** OCSC Case No. 30-2010-00336685

**Judge:** Hon. Derek W. Hunt

**Type of Action:** Student wood shop injury involving partial amputation of a finger; against the school District.

**Type of Trial:** Bench

**Trial Length:** 3 days

**Verdict:** Defense

**Attorney(s) for Plaintiff(s):** Yoshiaki C. Kubota Chambers, Noronha & Kubota

**Attorney(s) for Defendant(s):** Daniel R. Shinoff, Patrice M. Coady

**Damages and/or Injuries:** Amputated finger, medical specials of \$5,000

**Settlement Demand:** \$120,000

**Settlement Offer:** \$7,000

#### Bottom line

**Case Title:** Rhonda Murphy v. BP West Coast Products LLC, et al.

**Case Number:** San Diego County Sup. Ct. No. 37-2007-00052584 CL-PO-NC

**Judge:** Steven R. Denton

**Plaintiff's Counsel:** Charles A. Viviano, Esq. of The Viviano Law Firm; Thomas C. Nelson, Esq. of the Law Offices of Thomas C. Nelson; John W. Houts, Esq. of Houts & Houts

**Defendant's Counsel:** Kenyon M. Young, Esq. of Bragg & Kuluva; Robert W. Harrison, Esq. of Wilson, Elser, Moskowitz, Edelman & Dicker LLP; Kelly A. Van Nort, Esq. of Wilson, Elser, Moskowitz, Edelman & Dicker LLP

**Type of Incident/Causes of Action:** Strict Products Liability, Negligence, Premises Liability and Battery

*Continued on page 6*

## BROWN BAG PROGRAMS

# Benefits from the Strategic Use of Visuals in Litigation

Alan E. Greenberg, Esq.



On Tuesday, July 12, 2011 the San Diego Defense Lawyers presented its monthly "Brown Bag" MCLE seminar. July's speaker was William Tubis, Executive Vice President and Lead Consultant for Visual Evidence, a San Diego provider of demonstrative evidence.

Visual Evidence is a recent spin-off of Legal Arts, a provider which has served the San Diego legal community since 1979. While Legal Arts focuses on the "tough nut," bet-the-company cases, Visual Evidence was created to provide demonstrative exhibits in smaller cases with lower litigation budgets. Mr. Tubis has been in the field of litigation graphics consulting for almost 30 years.

Mr. Tubis noted that jurors at trial expect a visual presentation and should not be disappointed. He described his multi-stage analytical approach which he calls "Visual Strategy." Stage 1 asks, "What outcome do you hope to achieve?" Stage 2 asks, "What must the fact finder believe to deliver a favorable outcome?" Stage 3 asks, "How will you prove your case?" Stage 4 asks, "For each proof point, what demonstrative exhibit(s) will you need/want?" Stage 5 asks, "Which of your concepts are essential, which are important, and which are desirable?" In Stage 6, the "Visual Strategy" technique requires the litigation team, including the graphics consultant, to prioritize production, putting the essential concepts first. In Stage 7, the litigation attorney uses the demonstratives to prove his or her case. In Stages 8 and 9, the hoped for fact-finder "takeaway" evidentiary objectives are achieved and the hoped for outcome at trial or ADR is obtained.

Mr. Tubis indicated that "Visual Strategy" ensures that every demonstrative exhibit satisfies two primary objectives: The first is to establish the purpose of the exhibit. Why must this demonstrative be presented? What is the negative if it's not presented? What objective will this demonstrative achieve? How will a proper foundation be laid for it? The second objective is to determine the expected fact-finder "takeaway" of the demonstrative. What is the demonstrative's emotional "hook"? How will the demonstrative help the client's case? How will it hurt the opponent's case?

The majority of the luncheon seminar involved presenting examples of effective demonstrative exhibits in a variety of litigation settings, including personal injury cases, automobile accident cases, product liability cases, construction defect and mold litigation. Mr. Tubis' examples included an animation he created in an automobile accident cases which used Plaintiff's own animation as a starting point. In one particularly useful example, Mr. Tubis incorporated the posted speed limit into Plaintiff's animation, and the resulting animation established that Plaintiff would have avoided the collision with Defendant's truck by almost 100 feet if he had not been speeding.

Mr. Tubis' examples also included an interactive PowerPoint exhibit created in a CD case where a condominium complex was built from "scratch" on the computer using twelve different contractor categories and a 3-D animation of a bathroom scale used in a products liability case which effectively showed that given the operation of the locking mechanism, the weight of the scale and the distance between the bottom of the scale and the floor a "button battery" could not have simply fallen out onto the floor where it was ingested by an infant. Mr. Tubis also showed how time-lines could be created where each critical event was linked to supporting documentary evidence where portions of the documents were highlighted for maximum fact-finder impact.

In conclusion, Mr. Tubis discussed how costs for litigation graphics can be controlled, including planning ahead, requesting estimates from the graphics consultant of work in phases, and establishing a budget. SDDL thanks Mr. Tubis for his informative and useful presentation.



## BROWN BAG PROGRAMS

### “Avoiding Five Scary Words: Put your Carrier on Notice”

#### Kevin DeSantis and Dan Stanford Address Legal Malpractice Claims

On May 5, 2011 the SDDL hosted a Brown Bag CLE luncheon featuring two of two of San Diego's most prominent legal malpractice litigators, solo plaintiff's advocate Dan Stanford and defense counsel Kevin DeSantis, of Butz Dunn & DeSantis. Both Mr. DeSantis and Mr. Stanford are certified by the State bar as legal malpractice specialists.

With an emphasis on how to identify pitfalls in practice, and a series of both amusing and shocking anecdotal stories of malpractice suits, Mr. Stanford and Mr. DeSantis entertained a crowd of nearly fifty SDDL members. Mr. DeSantis explained the importance of the basics, including always making sure the identity of the attorney's client is clear, sending communications regarding engagement *and* non-engagement, and how to draft effective conflict waivers. Mr. Stanford related why it is important to frequently remind both attorneys and staff about confidentiality, inside and outside the office, and offered how claims easily arise from staff members casually discussing confidential details during elevator rides, or over lunch in a busy restaurant. Both Mr. DeSantis and Mr. Stanford offered tips on how to structure engagements to avoid the costs and negative publicity that follow legal malpractice claims, including the usefulness of arbitration clauses.

## Changes in the California Rules of Court

By Rita R. Kanno, Esq.,  
Lewis Brisbois Bisgaard & Smith LLP

Please note that effective July 1, 2011, California Rule of Court 3.1113(I) was modified as follows regarding memorandums of points and authorities:

1. Do not lodge copies of non-California authorities with the court unless the judge requests you to do so.
2. Do not serve non-California authorities on opposing counsel unless they request same.
3. If you cite a California case that is not yet published in the official advance sheets, include the title, case number, date of decision, and court of appeal district. The judge may require a copy to be lodged.

It is my understanding that these changes were initiated by the courts, not by any attorneys group, so I don't think you get "brownie points" by voluntarily lodging these papers.

Please also note - especially those who try cases - subtle but important changes to Rule 2.1040 Cal. Rules of Court effective July 2011:

Before a party may present or offer into evidence of an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a [written] transcript of same. When the recording is played, the party **must identify on the record the page and line citations to the portions of the testimony played.** Then (unless the court reporter takes down the content of all portions of the recording that were presented or offered into evidence), at the close of evidence, or within 5 days after the recording is presented or offered into evidence, whichever is later, the party presenting or offering the recording must serve and file a copy of the cover page of the transcript showing the witness' name and the pages containing the testimony presented or offered, marked to identify same, **which partial transcript must be marked for identification like other evidence.**

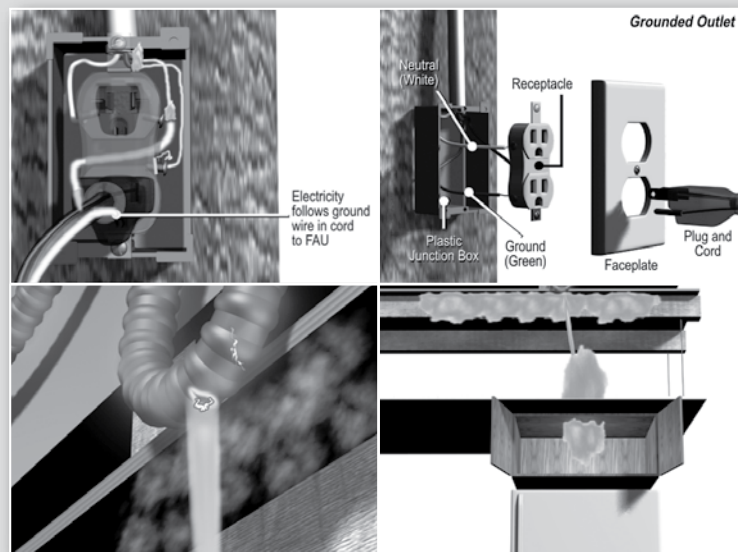
## Visual Evidence Archive: Demonstratives That Made a Difference

### Practice Area: Property Damage, Fire Causation

**Background:** Plaintiff homeowner experienced an electrical short that caused a house fire concurrently with the catastrophic Cedar Fire that downed a powerline a couple of miles away. Plaintiff alleged that the powerline failure caused a strong electrical surge that contributed to causing the house fire. The utility defendant countered that the two incidents were unrelated, that such a surge would have affected several hundred other homes, and that a short due to faulty wiring in the home was the proximate cause.

**A Demonstrative That Made a Difference:** A highly detailed animated tutorial was produced that demonstrated how a short circuit combined with an improperly wired generator caused a gas leak and fire. A breakthrough moment occurred during storyboard planning of the animation that enabled the defense expert to definitely tie the physical evidence to true causation.

**Outcome:** Complete defense jury verdict.



**For Demonstrative Exhibits  
That Will Make a Difference  
in Your Next Case, Call Us.**



**VisualEvidence™**  
a Legal Arts, Company

619.231.1551 [www.visual-evidence.com](http://www.visual-evidence.com)  
2148 Broadway • San Diego, CA 92102

Continued from page 4

**Settlement Demand:** Last Settlement Demand \$1,200,000

**Settlement Offer:** Last Settlement Offer \$325,000

**Trial Type:** Jury trial

**Trial Length:** Two weeks

**Verdict/Ruling:** Defense Verdict

Plaintiffs, Rhonda Murphy and Ronnie Murphy brought this case against two defendants – the subsidiary of a multinational oil company that allegedly had a faulty gas pump at one of its gas stations and the company contracted to maintain the gas pump. Plaintiffs alleged the retractor pole attached to the side of the gas pump detached and fell over, striking Rhonda Murphy in the back and shoulder. Rhonda Murphy claimed to have sustained severe neurologic and orthopedic injuries as a result of the gas pump failure. Ronnie Murphy sought damages for loss of consortium. Plaintiffs' expert witnesses prepared a life care plan seeking more than \$10 million in future care and treatment for Rhonda Murphy.

After various motions, defendants were able to obtain a voluntary dismissal of the products liability and intentional tort causes of action, as well as plaintiffs' claim for punitive damages. The case ultimately proceeded to trial against the maintenance company only. After a two-week trial, the jury deliberated approximately 15 minutes and returned a verdict in favor of the maintenance company.

#### Bottom line

**Case Title:** Edith Silva and Irene Migel v. Dennis Tran, Bryan Tran, and CW Concepts, Inc.

**Case Number:** VS 020906

**Arbitrator:** Robert Dobbins

**Judges:** Hon. Yvonne T. Sanchez (for the Petition to Compel Arbitration and Motion for Attorney Fees) and Peter Espinoza (for Petition to Confirm Arbitration Award)

**Petitioners' Counsel:** Alexandra Selfridge and Kenneth Greenfield

**Respondents' Counsel:** John Goffin

**Type of Incident/Causes of Action:** Petitioners Edith Silva and Irene Migel agreed to purchase real property in Norwalk, California owned by Dennis Tran, Bryan Tran, and CW Concepts, Inc., but only on the condition that buyers were able to obtain financing in the form of an SBA loan within a specified period of time. Unbeknownst to the buyers, the sellers had grossly inflated the price of the property. Due to the extreme difference between the purchase price and the market value of the property, Petitioners were unable to obtain an SBA loan within the required time period despite their diligent efforts to do so. Thereafter, Respondents refused to renegotiate the price of the property, cancelled the purchase agreement, and wrongfully refused to return the buyers' \$15,000 earnest money deposit. The sellers then filed a Small Claims action against the buyers, seeking \$7,500 of the \$10,000 still held in escrow. In response, the buyers filed a Petition to Compel Arbitration.

**Settlement Demand:** Prior to the arbitration, the lowest demand was \$15,000.

**Settlement Offer:** The highest offer prior to the arbitration was \$2,500.

Continued on page 8

## The Court of Appeal Reiterates the Circumstance in Which an Insured May Be Required to Reimburse an Insurer for a Settlement: *American Modern Home Insurance Co. v. Fahmian*, 194 Cal.App.4th 162 (2011)

By Sarah A. McDonald

The Fourth District Court of Appeal recently issued a ruling restating that an insured may have to reimburse settlement costs to the carrier based in part on the California Supreme Court's 2001 holding in *Blue Ridge Insurance Co. v. Jacobsen*, 25 Cal.4th 489 (2001). In *American Modern Home Ins. Co. v. Fahmian*, 194 Cal.App.4th 162 (2011), the Court of Appeal reiterated the *Blue Ridge* holding and provided additional guidance regarding timing issues in connection with such settlements.

In *American Modern Home*, the insured was sued for bodily injury and tendered the matter to his homeowners insurance carrier, which accepted the defense subject to a reservation of rights. The insurer later determined that a policy limits settlement demand of \$300,000 was reasonable, and notified the insured in writing pursuant to *Blue Ridge* that it intended to accept the settlement demand unless the insured would either take over his own defense or waive any later bad faith claim based on the failure to settle the action. The insured did not respond to the offer. The carrier then settled the underlying action and sued the insured for reimbursement. A jury found that there was no coverage for the bodily injury action under the policy. The trial court denied the insurer's claim for reimbursement on the ground that the insured did not have reasonable time to reply to the insurer.

The appellate court, following the *Blue Ridge* case, held that an insurance company may obtain reimbursement from its insured for a settlement, when it is determined that the underlying claim is, at least in part, not covered by the policy, if the insurance company (1) made a timely and express reservation of its right to obtain reimbursement for the settlement amounts paid for uncovered claims, (2) provided express notification to the insured of the insurer's intent to accept the proposed settlement offer, (3) made an express offer that the insured could assume its own defense, or (4) requested an agreement from the insured to waive any future claim for bad faith for failure to settle. It is unclear whether the initial reservation of rights letter included a reference to the carrier's right to seek reimbursement for indemnity paid for uncovered claims, although the carrier did include it in the settlement letter it transmitted to the insured.

As noted above, the insured argued that he did not have sufficient time to review the settlement advisement letter, due to the complexity of the options presented and his lack of separate coverage counsel. The trial court agreed with the insured. The appellate court, however, found a glaring problem with this argument in that in the reservation of rights letter, the carrier's coverage counsel advised the insured that it was accepting the defense subject to a full reservation of rights and that the defense counsel appointed by the carrier would not be able to advise the insured regarding coverage issues. Thus, the appellate court found that the reservation of rights letter gave the insured ample notice of the insured's right to retain coverage counsel should he so desire. The appellate court found that this advisement is consistent with the *Blue Ridge* court's emphasis on the need for a timely reservation of rights letter.

Sarah A. McDonald, practices with Grimm, Vranjes, McCormick & Graham, LLP

**Howell** *continued from page 1*

limited to the amount Medi-Cal had actually paid on his behalf. (*Hanif, supra*, at pp. 639, 643-644.) The court ordered the judgment modified to reflect the proper reduction. (*Id.* at p. 646.)

*Hanif's* rationale was straightforward. While California courts have referenced the "reasonable value" of medical care in delineating the measure of recoverable damages for medical expenses, in this context "[r]easonable value" is a term of limitation, not of aggrandizement." (*Hanif, supra*, 200 Cal. App. 3d at p. 641.) The "detriment" the plaintiff suffered (Civ. Code, § 3281), his pecuniary "loss" (*id.*, § 3282) was only what Medi-Cal had paid on his behalf: to award more was to place him in a better financial position than before the tort was committed. (*Hanif, supra*, at pp. 640-641.) A tort plaintiff's recovery for medical expenses, the *Hanif* court opined, is limited to the amount "paid or incurred for past medical care and services, whether by the plaintiff or by an independent source..." (*Id.* at p. 641.)

In *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 248 the Court of Appeal applied *Hanif's* rationale to payments made by a private health insurer (Blue Cross). Relying on *Hanif's* holding that only the amount actually paid or incurred is recoverable as compensation for medical expenses, the *Nishihama* court ordered the trial court's judgment reduced to reflect only the amount that the hospital had received from Blue Cross under an agreement pursuant to which the hospital had accepted \$3,600 in full payment for its services to plaintiff. (*Nishihama, supra*, at pp. 306-309.)

*Hanif* and *Nishihama* were distinguished in *Katiuzhinsky v. Perry* (2007) 152 Cal. App. 4th 1288. There, the injured plaintiff's medical providers had sold some of their bills at a discount to a medical finance company but the plaintiff remained liable to the finance company for the original amounts of the bills. (*Katiuzhinsky, supra*, at pp. 1290-1291.)

More recently, the California courts have split on the application of *Hanif* to the private insurance context. The Second District, Division 8, followed the rationale of *Nishihama* in *Cabrera v. E. Rojas Properties, Inc.* (2011) 192 Cal. App. 4th 1319. Conversely, the First District, in *Yanez v. SOMA Environmental Engineering* (2010) 185 Cal. App. 4th 1313, the Third District, in *King v. Willmetts* (2010) 2010 WL 3096258, and the Fourth District, in *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal. App. 4th 686, rejected the rationale of *Nishihama* and refused to extend the holding of *Hanif* to the private insurance context. These courts viewed the "negotiated rate differential" as a benefit that injured plaintiffs should have the benefit of as a result of their prudence in procuring health insurance in the first place.

**The Big Mystery**

One of the surprising aspects of the *Howell* decision is that the majority opinion was joined in by Chief Justice Tani Gorre Cantil-Sakaue. Justice Cantil-Sakaue was the author of the Third District's opinion in *King v. Willmetts, supra*. Justice Cantil-Sakaue stated in that opinion that if the collateral source rule should confer a benefit on either tortfeasors or injury victims, for public policy considerations it would be best to side with the injury victims. Justice Cantil-Sakaue concluded in that opinion that *Hanif* (a case that came out of the same district) and two other cases that follow it, "do not provide governing authority for the question [involving private insurance] directly presented in this case."

The majority's Opinion in *Howell* does not address the *King* case, and there is no indication in the *Howell* as to what caused Chief Justice Cantil-Sakaue to change her mind on this issue.

**The Big Open Question**

The *Howell* Court concluded that when a medical care provider has, by agreement with plaintiff's private health insurer, accepted as full payment for the plaintiff's medical care an amount less than the provider's full bill, evidence of that discounted amount is relevant to prove the plaintiff's damages for past medical expenses. Assuming that such evidence satisfies other rules of the evidence, such evidence is admissible at trial. Of course, evidence that such payments were made, in whole or in part, by an insurer remains generally inadmissible under the evidentiary aspect of the collateral source rule.

Conversely, evidence of the full amount billed by the injured plaintiff's medical care provider is not relevant on the issue of past medical expenses. The Court expressed no opinion as to the possible relevance of evidence of the full billed amount on other issues, such as noneconomic damages or future medical expenses. This will be a major issue in subsequent litigation since plaintiffs will try to introduce evidence of the full amount of their medical bills in order to try to curry sympathy from jurors and inflate their damages for pain and suffering.

While the full effects of the *Howell* decision may not be immediately apparent, Robert F. Tyson of Tyson & Mendes, who argued the case to the Supreme Court on behalf of Hamilton Meats, stated: "I think it's safe to say there will be no more post-trial *Hanif* motions." The *Howell* Court instructed that when a trial jury has heard evidence of the amount accepted as full payment by the medical provider but has awarded a greater sum for past medical expenses, the defendant may move for a new trial on grounds of excessive damages. (Code Civ. Proc., § 657, subd. 5.) The trial court, if it grants the new trial motion, may permit the plaintiff to choose between accepting reduced damages or undertaking a new trial. (*Id.*, § 662.5, subd. (b).)

**Conclusion**

The payment of medical services is a key component of virtually every personal injury case in California. According to Mr. Tyson, if the Supreme Court had affirmed the lower court's ruling, "insurance costs could have skyrocketed and the effect on California consumers could have been devastating." According to insurance companies, payments for judgments and settlements could have increased by \$3 billion annually since the full amount of medical bills are often five times greater than the amount negotiated by the health insurance companies. The plaintiffs' bar, which was the big loser in the *Howell* case, stood to recover approximately a third of that increased amount of payments.

David Ettinger, an attorney with the appellate firm of Horvitz & Levy who authored an *amicus* brief in *Howell* on behalf of numerous insurers and insurance organizations, was also pleased with the result. "The *Howell* decision is a comprehensive, well-reasoned, and reasonable opinion," he stated. "I particularly like that the Supreme Court recognized that negotiated healthcare rates are not an insurance benefit to the plaintiffs, but if anything, they are benefits to the insurer and the healthcare provider who negotiated the rates."

The San Diego defense community expresses its congratulations to Robert Tyson, Mark Peterson and Kristi Blackwell of Tyson & Mendes for their work on behalf of Hamilton Meats which resulted in this victory.

Continued from page 6

**Trial Type:** Arbitration

**Trial Length:** 2 days

**Verdict/Ruling:** Award in favor of Petitioners in the amount of \$44,901.80, representing the earnest money deposit, pre-judgment interest, arbitration fees, costs, and \$23,375.00 in attorney fees.

#### Bottom line

**Case Title:** McFann v. House of Automation

**Case Number:** Case #: 37-2007-00068272-CU-PL-CTL; Appellate Case #: D056601

**Judge:**

**Presiding Judge:** Hon. Patricia Benke; **Assistant Justices:** Hon. Judith Haller and Hon. James McIntyre

**Plaintiff's Counsel:** Thomas Tosdal, Esq. TOSDAL, SMITH STEINER & WAX

**Appellate Specialist:** Jon R. Williams, Esq. BOUDREAU WILLIAMS LLP

**Defendant's Counsel:** Dinah McKean, Steve Kerins, WALSH MCKEAN FURCOLO LLP

**Type of Incident/Causes of Action:** Personal injury, industrial gate collapse Plaintiff Appeal from Defense Verdict

**Verdict/Ruling:** Verdict affirmed in full (non-published opinion).

#### Bottom line

**Title of Case:** J. Robert O'Connor v. Glassman, M.D.

**Case No.:** 37-2010-00085422

**Judge:** Honorable Judith Hayes

**Type of Action:** Alleged Medical Malpractice in the Diagnosis and Treatment of an Arterial Clot following Cardiac Stenting

**Type of Trial:** Jury

**Trial Length:** 6 days

**Attorneys for Plaintiff:** John Girardi and David Bigelow of Girardi and Keese

**Attorneys for Defense:** Clark Hudson and Ben Howard of Neil Dymott Frank McFall & Trexler

**Injuries:** Blocked Popliteal Artery requiring bypass surgery instead of an percutaneous intervention, residual numbness.

**Settlement Demands:** None.

**Settlement Offer:** Waiver of costs.

**Plaintiff asked the Jury For:** Special Damages totaling \$30,000 to \$85,000; For Non-Economic Damages no specific amount was requested - other than "It should be Substantial".

**Verdict:** Defense 12-0

#### Bottom line

**Title of Case:** Hein v. Kahn, M.D.

**Case No.:** 37-2009-0010147

**Judge:** Honorable John Meyer

Continued on page 10

## Plaintiff and Defense Perspective on: Class Action Waivers After The U.S. Supreme Court Decision In *AT&T v. Concepcion*<sup>1</sup>

By Shannon Petersen, Esq. and Alan Mansfield, Esq.

On April 27, 2011, the U.S. Supreme Court held, in *AT&T v. Concepcion*, that the Federal Arbitration Act "preempts California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable."<sup>2</sup> The Court referred to this rule as the "*Discover Bank* rule," after *Discover Bank v. Superior Court*.<sup>3</sup>

In *Concepcion*, the Ninth Circuit Court of Appeals affirmed a trial court's finding, based on *Discover Bank*, that a class action waiver in a form arbitration agreement was unconscionable because 1) the contract was a contract of adhesion, 2) the damages at issue were small (averaging \$30 per class member), and 3) the plaintiff alleged a scheme to cheat consumers out of small sums of money.

The U.S. Supreme Court reversed. Writing for a 5-4 majority (Justice Thomas wrote a concurrence), Justice Scalia concluded state laws that undermine the enforceability of class action waivers in consumer arbitration agreements improperly obstruct the FAA. The following is a defense and plaintiff perspective on the impact of *Concepcion*.

### *Discover Bank* Is Dead: A View From The Defense

*Concepcion* fundamentally alters the law in California and elsewhere. In addition to *Discover Bank*, the Court's decision also necessarily overturns a host of California cases limiting the enforceability of class action waivers and restricting arbitration agreements on public policy grounds. While the Court's decision applies only to arbitration agreements written under the FAA, it is only a matter of time before form contracts across the country are re-written to provide for arbitration under the FAA and thus benefit from this decision.

According to the Court, the "overarching purpose" of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."<sup>4</sup> This purpose trumps any state law designed to protect class action rights. The Court was unpersuaded by the rationale of *Discover Bank* that enforcing class action waivers in cases involving small sums of money will essentially kill such claims. As the dissent argued: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."<sup>5</sup> The majority was untroubled: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."<sup>6</sup>

As Justice Thomas explained in his concurring opinion, "Contract defenses unrelated to the making of an agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause."<sup>7</sup>

Under *Concepcion*, many other seminal California cases refusing to enforce arbitration clauses now share *Discover Bank*'s death, including *Gentry v. Superior Court*,<sup>8</sup> *Cruz v. Pacific Health Systems, Inc.*,<sup>9</sup> *Broughton v. Cigna Healthplans*,<sup>10</sup> and *Fisher v. DCH Temecula Imports LLC*,<sup>11</sup> among others.

In *Gentry*, the California Supreme Court held that in most cases an arbitration clause cannot be used to waive a statutory right. In *Fisher*, the court relied on *Gentry* and held that there is an unwaivable statutory right to a class action under the Consumers Legal Remedies Act (the CLRA). Both decisions are grounded in state public policy favoring class actions rights over a parties' agreement. Both are now out the window in light of *Concepcion*.

Similarly, in *Broughton* and *Cruz*, the California Supreme Court held that claims for a public injunction under the CLRA and the Unfair Competition Law (the UCL) are not subject to arbitration. The Court in *Concepcion* rejected this approach as well. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."<sup>12</sup> Indeed, so far, federal district courts applying *Concepcion* have held that the FAA "preempts California's preclusion of public injunctive relief claims from arbitration ...."<sup>13</sup>

See *Concepcion* on page 9



## Concepcion *continued from page 8*

Plaintiffs will try to work around *Concepcion*, but they have little room to maneuver. Though the FAA does not preempt “generally applicable contract defenses,” such as fraud, duress, or unconscionability, a plaintiff can no longer argue that the class action waiver itself is unconscionable. Plaintiffs will continue to argue procedural unconscionability, but the Supreme Court did not think much of this argument either, holding that “the times in which consumer contracts were anything other than adhesive are long past.”<sup>14</sup> Non-negotiable form contracts remain enforceable. For plaintiffs’ class action counsel, the sky is indeed falling.

### The Sky Is Not Falling: A Plaintiff’s Perspective

Public interest groups, business associations and plaintiffs’ attorneys have either rejoiced or lamented, depending on their point of view, regarding how *Concepcion* either protects businesses from predatory lawsuits or makes it impossible for consumers to obtain redress from predatory practices. While *Concepcion* holds it is a violation of the FAA to find an arbitration clause with a class action waiver provision in certain types of arbitration clauses per se unconscionable, as the dissent observed, the California Supreme Court had already held as much in *Discover Bank*: “[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses .... We do not hold that all class action waivers are necessarily unconscionable.”<sup>15</sup> Thus, the U.S. Supreme Court may have only overruled that which the California Supreme Court did not say.

The *Concepcion* ruling is also limited in that it focused primarily on attacking class action arbitrations under the FAA, not class action waivers generally. The Court conceded if such a clause had other unconscionable elements or defenses that did not apply only to arbitration, such a clause could be stricken without offending the FAA under its savings clause, which “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>16</sup> *Concepcion* leaves open whether a class action waiver provision in a non-interstate commerce case, or when combined with other unconscionable elements or defenses that are not solely arbitration-related, could still be invalidated, or whether a claim for violation of a federal statute can be preempted by another federal law, since by definition preemption applies to restrict state claims, not federal claims.<sup>17</sup>

The Court also recognized that, “Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class action-waiver provisions in adhesive arbitration agreements to be highlighted.”<sup>18</sup> While this may be an avenue of pursuit in some cases, defendants will counter that this only applies to laws created by legislation, and not judges, and that any such law cannot interfere with arbitration. Defendants will also argue that this footnote must be reconciled with the Court’s own precedent in *Doctor’s Associates, Inc. v. Casarotto*,<sup>19</sup> holding that the FAA preempted a Montana statute requiring all contracts containing arbitration provisions to provide notice of such on the first page in underlined and capitalized letters.

The U. S. Supreme Court also did not address a number of other key issues, such that significant questions over *Concepcion*’s scope remain. For example, despite the defense’s claim to the contrary, *Concepcion* does not alter the rule of *Broughton* or *Cruz* that claims for injunctions under the CLRA or UCL cannot be arbitrated. The decision is not based on unconscionability, but rather because of the need for judicial oversight over a public injunction. In fact, the majority in *Concepcion* cited the same lack

of judicial oversight over a class action as one of the reasons for its holding, indicating such reasoning is consistent, rather than in conflict, with those California Supreme Court decisions. Nor did the Court address the holdings of *Gentry*, *Fischer*, *Gutierrez*, and other California cases that an unwaivable statutory right to proceed as a class action exists under certain California statutes. Indeed, the U.S. Supreme Court specifically denied a *certiorari* request in *Gentry* back in 2008. As one California Court of Appeal has recently held (in sidestepping the question of *Gentry*’s continued viability), in *Concepcion* the Court “did not specifically address whether California state law applicable to waivers of statutory representative actions . . . was preempted by the FAA.”<sup>20</sup> As further noted in the concurring and dissenting opinion, “With the reasoning of *Discover Bank* having been rejected as being in conflict with the FAA, the same fate may be in store for *Gentry*. Nonetheless . . . *Gentry* remains the binding law of this state which we must follow.”<sup>21</sup> The U.S. Supreme Court may address this issue in the next term.<sup>22</sup>

Nor did the Court address class action waivers outside the context of arbitration agreements. California precedent remains unaltered in such circumstances. The Court also did not address the so-called “poison pill” provision contained in many arbitration agreements—that if a class action waiver is found to be unenforceable for any reason, the entire arbitration clause is unenforceable. While arguably such provisions are not enforceable since the focus is on the separate class action waiver provision and not the arbitration provision, it remains to be seen how courts will address these issues. In addition, there is always looming the fundamental question whether the arbitration agreement was induced by fraud, whether a defendant can establish the plaintiff or group of plaintiffs actually agreed to arbitrate the claims at issue in the particular litigation in terms of the scope of the arbitration clause itself, or whether the arbitration clause at issue is contained in all the relevant contracts. In a recent decision, despite *Concepcion*, the court denied a motion to compel arbitration with respect to the claims of one of the plaintiffs on the ground that there was no evidence that plaintiff agreed to arbitrate his claim.<sup>23</sup>

Finally, there is the possibility *Concepcion* will be short-lived. In an ironic twist, since 2002 car dealers have been exempt from arbitration clauses altogether for claims by and against car manufacturers under the “Motor Vehicle Franchise Contract Arbitration Fairness Act.”<sup>24</sup> The Act was necessary, according to the legislative history, because of “the disparity in bargaining power between motor vehicle dealers and manufacturers,” and because motor vehicle franchise agreements “are inherently coercive and one-sided contracts of adhesion.” An argument is being advanced that, if this was the justification for imposing a legislative exemption under the FAA for car dealers, the same protections should apply to all consumers. On May 17, 2011, a trio of Democratic Senators introduced a bill in Congress called the “Federal Arbitration Fairness Act” that would eliminate forced arbitration clauses in consumer and employment contracts. Twin bills were co-sponsored by 62 other Congresspersons and 12 other senators, and are presently in the House and Senate Judiciary Committees awaiting hearing. There are other arbitration exemptions as well that may apply depending on the particular circumstances, such as in the insurance, banking and residential mortgage loan contexts.

Has the sky fallen, just as pundits claimed with passage of the PSLRA,

Continued from page 8

**Type of Action:** Alleged Medical Malpractice, retained foreign body following GYN surgery (Supracervical Hysterectomy).

**Trial Length:** 4 days

**Attorney for Plaintiff:** Koorosh Shahrokh

**Attorney for Defense:** Clark Hudson of Neil Dymott Frank McFall & Trexler

**Injuries:** Alleged infection due to retained foreign body, development of pelvic inflammatory disease requiring subsequent surgery to remove tubes and ovaries.

**Settlement Demands:** \$59,999, lowered to \$29,999 and then lowered to \$15,000

**Settlement Offer:** \$8,000

**Plaintiff asked the Jury For:** "Whatever they believed was reasonable"

**Verdict:** Defense (1-11 on SOC; 11-1 on causation)

### Bottom line

**Case Title:** Emma Fernandez v. Dennis Eriksen, et al.

**Case Number:** CIVVS907234

**Judge:** Hon. Gilbert Ochoa

**Plaintiff's Counsel:** Jerold Sullivan, Sullivan & Sullivan, Manhattan Beach

**Defense Counsel:** John T. Farmer, Farmer Case Hack & Fedor

**Type of Incident/Claims:** Plaintiff contended she had been travelling in the #1 lane of the freeway for several miles and was slowing for traffic ahead, when her vehicle was rear-ended by the defendant's vehicle. The defendant contended plaintiff made an abrupt lane change in front of his vehicle, then braked hard, giving him insufficient time to slow or stop to avoid the collision. Plaintiff had extensive medical treatment, including multiple MRI's, three epidurals and two "percutaneous disc decompression (PDD)" surgeries performed by Dr. Van Vu. Plaintiff's expert, neurosurgeon Jeffrey Gross, MD, testified plaintiff's medicals of approximately \$120,000 were reasonable, necessary and related to the accident, and that plaintiff was a candidate for future cervical and lumbar fusions, due to the accident, at a projected cost of \$350-400,000. A loss of present and future earnings from a job as a forklift operator at Home Depot, was also alleged. Defense expert, orthopedist Steven Nagleberg, MD, testified that plaintiff should have had medical treatment for a few weeks, valued at around \$4,000.

**Settlement Demand:** CCP Sec. 998 demand for \$99,999 before trial; demand of high/low of \$500,000/250,000 during trial.

**Settlement Offer:** CCP Sec. 998 offer of \$15,000 before trial.

**Trial Type:** Jury Trial

**Trial Length:** 7 days

**Verdict:** 9-3 defense

## Concepcion continued from page 9

CAFA and Proposition 64? Likely no—just tell plaintiffs the height of the bar and they'll adjust to hurdle it. Nevertheless, it will likely take years for plaintiffs, defendants, and the courts to sort out the limits of *Concepcion* and its application to established California authority.

*Mr. Petersen is a business litigation partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP, where he specializes in class action defense.*

*Mr. Mansfield is the founder of the Consumer Law Group of California, where he specializes in national consumer class action and public interest litigation.*

### (Endnotes)

- <sup>1</sup> A prior version of this article was published by the Association of Business Trial Lawyers San Diego in the summer 2011 edition of its quarterly report and is being re-printed in part with the permission of the ABTL.
- <sup>2</sup> 563 U.S. \_\_\_, 131 S.Ct. 1740, 1746 (Apr. 27, 2011)
- <sup>3</sup> 36 Cal.4th 148 (2005)
- <sup>4</sup> *Id.* at 1748.
- <sup>5</sup> *Id.* at 1761.
- <sup>6</sup> *Id.* at 1753.
- <sup>7</sup> *Id.* at 1755.
- <sup>8</sup> 42 Cal. 4th 443 (2007) (*cert. den.* 128 S. Ct. 1743, Mar. 31, 2008)
- <sup>9</sup> 30 Cal. 4th 303, 316 (2003)
- <sup>10</sup> 21 Cal. 4th 1066, 1082 (1999)
- <sup>11</sup> 187 Cal. App. 4th 601 (2010)
- <sup>12</sup> *Concepcion*, 131 S.Ct. at 1747
- <sup>13</sup> See *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at \*1-\*2 (N.D. Cal. May 16, 2011); *Zarandi v. Alliance Data Systems Corp.*, 2011 WL 1827228, \*1-\*2 (C.D. Cal. May 9, 2011) (same); *In re Apple*, 2011 WL 2886407, \*4 (N.D. Cal. Jul. 19, 2011) (same).
- <sup>14</sup> *Id.* at 1750.
- <sup>15</sup> 36 Cal.4th at 161-62
- <sup>16</sup> *Concepcion* at 1746.
- <sup>17</sup> See n. xxii, *infra*.
- <sup>18</sup> *Id.* at 1750, n.6
- <sup>19</sup> 517 U.S. 681 (1996)
- <sup>20</sup> *Brown v. Ralphs Grocery Co.*, ---Cal.Rptr.3d---, 2011 WL 2685959, \*7 (Cal.App. 2 Dist., July 20, 2011).
- <sup>21</sup> *Id.* at 8 (concurring and dissenting).
- <sup>22</sup> *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010)(*cert. granted* May 2, 2011)(waiver of statutory right to bring suit that is specifically protected by statute precludes arbitration of claims, disagreeing with two other circuits).
- <sup>23</sup> *In re Apple*, 2011 WL 2886407, \*5 (N.D. Cal. Jul. 19, 2011); see also *Aho v. AmeriCredit Financial*, 2011 U.S. Dist. LEXIS 80246, \*15 (S.D. Cal. Jul. 25, 2011) ("certifying a class, in part, with respect to those who do not have arbitration clauses, but excluding from the class those who do").
- <sup>24</sup> 15 U.S.C. § 1221 *et seq.*

WEST COAST RESOLUTION GROUP

EXCEPTIONAL SERVICES



**Our Resolve,  
Your Resolution.**

**You know us.** We're lawyers just like you, and we know the challenges confronting you in litigation. You can count on us to bring our experience, skill and tenacity to the table to ensure an effective process. It's our singular purpose and we achieve it with exceptional results.

**Dispute Resolution. It's what we do and we take it personally.**

Call someone you know.  
**denise ashler + doug barker**  
**+ jim chodzko + john edwards**



Our Resolve. Your Resolution.

[westcoastresolution.com](http://westcoastresolution.com) 619.238.7282

## West Coast Resolution Group Celebrates its One-Year Mark

Last year, the National Conflict Resolution Center (NCRC) launched West Coast Resolution Group, an exclusive division—consisting of four elite mediators: Denise Asher, Doug Barker, Jim Chodzko and John Edwards. With extensive experience in litigation, they are well known and respected for their expertise in Medical Malpractice, Personal Injury, Construction Defect, and Real Estate and more. West Coast Resolution Group was created with one purpose: to provide exceptional mediation and dispute resolution services to the legal community. Because of our mediators' diverse and extensive expertise, we continue to achieve that goal.

The team began at an unbelievable pace. West Coast Resolution Group quickly gained a dynamic reputation as a high-quality mediation center. Within the past year, the West Coast team has solidified their name in the legal community by addressing complex disputes with unparalleled skill and professionalism.

With unmatched dedication to clients, strong work ethics, and a wide variety of practice areas, West Coast Resolution Group continues to provide first-class alternative dispute resolution services, from start to finish.

# *Sullivan v. Oracle Corporation*: California-based Employers Must Pay Nonresident Employees Overtime for Work in California

By Paula M. Weber, Esq., Laura K. Latham, Esq., and Karen M. Harkins, Esq.

*On certification from the Ninth Circuit Court of Appeals, the California Supreme Court held that California's overtime provisions apply to nonresident employees of California-based employers who work in California for full days or weeks, and that a violation of these provisions forms the basis of an Unfair Competition Law claim.*

On June 30, 2011, the California Supreme Court issued a groundbreaking opinion which extended the application of California wage-hour law to the overtime claims of non-California employees of California-based employers. In *Sullivan v. Oracle*, 51 Cal.4th 1191, 254 P.3d 237, 2011 WL 2569530, the three specific questions the Court addressed were:

(1) Does the California Labor Code apply to overtime work performed in California by nonresident employees?

(2) Does Business and Professions Code section 17200 (also known as the Unfair Competition Law or "UCL") apply to the overtime worked in California by non-resident employees for California-based employers? and

(3) Does the UCL apply to overtime worked by out-of-state employees outside of California for a California-based employer if the employer failed to comply with the overtime provisions of the Fair Labor Standards Act ("FLSA")?

The Court expressly limited its questions to the stipulated circumstances set forth in the *Sullivan v. Oracle* case, as certified by the Ninth Circuit.

The *Sullivan* Court unanimously held that California Labor Code's overtime provisions apply to nonresident employees who work in California for full days or weeks for "California-based" employers. The Court then held that any California Labor Code-based overtime claims raised by such non-residents may also serve as a basis for claims under the UCL, thus extending the statute of limitations for such claims to 4 years. Finally, California's high court concluded that work performed in states other than California for which overtime is allegedly due under the FLSA cannot be the basis for claims under California's UCL if the only foundation for application of the UCL is the fact that the decision to classify the employee as exempt was made in California.

## Background

The lawsuit was brought by three Oracle Corporation employees who worked as instructors, teaching customers how to use the company's products. The employees, residents of Arizona and Colorado, primarily worked in their home states, but occasionally traveled to California to conduct trainings. These named plaintiffs worked in California between 20 and 110 days during the three-year period preceding their lawsuit. Oracle's headquarters is located in California.

Oracle originally argued that its instructors were properly classified as exempt employees because they were teachers, and so no overtime pay was required. Oracle later reclassified the instructors and began paying overtime based on the laws of the employees' states of residence. Generally, this meant paying employees time-and-one-half when they worked more than 40 hours in a week, as required by the Fair Labor Standards Act ("FLSA"). Neither Arizona, Colorado, nor federal law require payment of double-time

for hours worked over 12 in a day, and none of those jurisdictions require payment of time-and-one-half when employees work more than 8 hours in a single workday.

While the *Oracle* lawsuit was pending in federal court, the Ninth Circuit initially held that California's Labor Code and the Unfair Competition Law applied to nonresident employees who worked days and weeks entirely in California. Then, however, the Ninth Circuit withdrew its opinion and requested that the California Supreme Court address those underlying state law questions.

## The California Supreme Court Ruling

The California Supreme Court concluded that California's overtime laws apply to all employees working in California for a full day or week for California-based employers, regardless of their residence or principal place of work. Emphasizing the important public policy goals of "protecting the health and safety of workers and the general public," and commenting that California could have excepted nonresidents from its Labor Code had that been the Legislature's intention, the Court explained that excluding "non-residents from the overtime laws' protection would tend to defeat their purpose by encouraging employers to import unprotected workers from other states." Slip opn. at 6-7.

The Court rejected arguments that application of California wage law to visiting, non-resident employees would create impractical burdens on employers. According to the Court, this argument was primarily based on the assumption that if out-of-state employers must pay overtime under California law they would also be required to comply with every other technical aspect of California wage law. However, the Court expressly limited its holding to California's overtime provisions, refusing to extend its ruling in this matter to the entire Labor Code. The Court specifically stated that treatment of an employee's vacation time or the content of an out-of-state business's pay stubs may not justify applying California law to the question at issue, but issued no holding as to what other provisions of the Labor Code may or may not be applicable to non-resident employees who temporarily work in California. (The Court also expressly limited its decision to California-based employers, asserting that the burden on out-of-state businesses would be entirely conjectural because no out-of-state employer was a party to the litigation). Once the Court determined that the California overtime laws did apply to California-based employers under the circumstances of the case, it easily determined that the UCL would apply to these violations, thus extending the statute of limitations to 4 years.

Finally, in the one portion of the case that is favorable to employers, the Court ruled that the UCL does not apply to claims under the FLSA for overtime work performed by nonresidents in other states. In the *Oracle*

*See Sullivan on page 13*



Sullivan *continued from page 12*

matter, the only tether to California law was the fact that the decision-making process to classify the plaintiffs as exempt from overtime under the FLSA occurred primarily at Oracle headquarters in California. The Court held that this was not a basis for allowing application of the UCL: the unlawful conduct was not the decision to adopt an erroneous classification policy, it is the alleged failure to pay overtime when due. The stipulated facts in *Oracle* did not provide a basis for finding that this occurred in California.

### The Practical Effects of the California Supreme Court Decision

Despite the Court's rejection of arguments that application of California overtime laws to nonresident employees who sometimes work in California creates impractical burdens on employers, the decision will require California-based employers with out-of-state employees to rethink some of their compensation practices. The most obvious issue – and the one easiest to resolve – is that employers must establish a mechanism to track daily overtime for non-exempt employees who sometimes work in California.

What is much more complicated is the treatment of employees who are exempt under the FLSA, but who may not be exempt under California law. California determines the exempt status of employees differently than federal law, using a quantitative as well as qualitative measure of job duties, among other things. An employee who, by way of example, is properly classified as exempt in Colorado may not be exempt under California law. Under this new ruling, plaintiffs are sure to argue that California-based employers are liable for payment of overtime wages, as well as for violation of California's unfair competition law, if non-California employees com-

plete a day or more of work in California but do not meet the more rigorous requirements for exempt classification under California law. In addition, if the employer chooses to treat these employees as hourly workers when in California – paying them only for hours worked including overtime hours – this could arguably undermine their exempt status under the FLSA. Thus, employers should consider paying such employees on a salaried basis, and then pay them overtime for any hours over 8 in a day or 40 in a week, with-out offset for weeks in which they work less than 40 hours.

While the Court's decision in *Oracle* is very narrow, it also leaves many questions unanswered. For example, the Court did not determine (1) whether non-California-based employers are required to pay their non-California employees according to the California Labor Code overtime provisions for time they work in California; (2) what other California Labor Code provisions, if any, will apply to non-California employees who work in California; (3) whether the UCL applies to out-of-state workers if the alleged underpayment of wages is made in California (i.e., the checks are cut in California); or (4) what constitutes a "California-based" employer—is it an employer like Oracle, which is headquartered in California, or does it extend to any entity licensed to do business in California? Given these unanswered questions, will "California-based" employers consider issuing paychecks for their out-of-state employees from a non-California location? Such legal and practical questions follow from the interesting *Oracle* holding.

*The SDDL thanks the authors, who all practice in the San Diego office of Pillsbury Winthrop, for this submission.*

## SAN DIEGO'S FINEST MEDIATORS & ARBITRATORS



Hon. Mac Amos (Ret.)



Robert Coviello, Esq.



Hon. Patricia Cowett (Ret.)



Hon. Jobi Halper (Ret.)



Hon. Charles Hayes (Ret.)



Hon. Yuri Hofmann (Ret.)



Hon. Anthony Joseph (Ret.)



Hon. Edward Kolker (Ret.)



Hon. Gerald Lewis (Ret.)



Hon. Wayne Peterson (Ret.)



Hon. Sheridan Reed (Ret.)



Michael Roberts (Ret.)



225 Broadway, Ste. 1400  
San Diego, CA 92101  
619.233.1323 gen@adrservices.org

WWW.ADRSERVICES.ORG

Scan with a smartphone  
to view **Our Panel**



## Litigation Tips and Considerations: What to say when your client asks, “Why don’t they have to pay your fees when it’s all their fault?” Perfecting a claim for attorney’s fees pursuant to California Code of Civil Procedure section 1021.6 in multi-party litigation.

By Zachariah Rowland, Esq.

Is there a more frequent - or unpleasant - question from a client who is not experienced in litigation than, “Why doesn’t the other side pay your fees when this is all their fault?” Of course, the general rule in California is that attorney’s fees are left to the agreement of the parties, unless specifically provided for by statute. (C.C.P. § 1021)<sup>1</sup> (*Trope v. Katz* (1995) 11 Cal.4th 274, 278) (“California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees.”) As a practical matter, this means there are usually only two bases for an attorney’s fees award: (1) a contractual provision providing for the prevailing party’s recovery of fees or (2) prevailing on some statutory basis that provides for the recovery, or award, of fees.

Numerous California statutes authorize the recovery, or award, of attorney’s fees in various instances. In particular, Title 14, Chapter 6, of the C.C.P. contains a few provisions that authorize the recovery of fees. For example, Chapter 6 contains provisions authorizing the recovery of attorney’s fees in an action “based on defendant’s commission of a felony offense for which the defendant has been convicted” (§ 1021.4) and an action resulting in the enforcement of an important right affecting the public interest. (§ 1021.5) Additionally, Chapter 6 curiously authorizes an attorney’s fees award on a successful action for damages resulting from trespass on land “under cultivation or intended or used for the raising of livestock.” (§ 1021.9)<sup>2</sup> However, the practical reality about the provisions authorizing an award of attorney’s fees in Chapter 6 is that they are few and fairly particularized. Without resort to a practice guide or treatise, one could easily forget they exist at all. One provision, however, is worth remembering, especially for those practicing civil litigation.

Section 1021.6 of the C.C.P. provides that the court may award attorney’s fees on noticed motion “to a person who prevails on a claim for implied indemnity” where the court finds certain conditions precedent have been satisfied. (§ 1021.6) First, the court must find that the indemnitee was forced to bring, or defend, an action against a third person “through the tort of the indemnitor.” (§ 1021.6) Second, the court must be satisfied that “the indemnitor was properly notified of the demand to bring the action or provide the defense” and failed to do so. (§ 1021.6) Finally, the court must hold “that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a non-suit, or a directed verdict.” (§ 1021.6.)

1 All references to statute hereinafter refer to the California Code of Civil Procedure (hereinafter “C.C.P.”) unless otherwise indicated.

2 But the dog’s romp through the neighbor’s tomato garden will probably not support an award of attorney’s fees pursuant to section 1021.9. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1375) (“We hold only that in our view, the phrase ‘lands either under cultivation or intended or used for the raising of livestock’ does not encompass the urban backyard garden owned by the Quartermans in this case.”) Even more curiously, section 1021.9 is the only section in Chapter 6 which provides for an entitlement to attorney’s fees to a “prevailing plaintiff” as opposed to an “award.” (Compare § 1021.9 with §§ 1021.4, 1021.5, 1021.6, 1021.7 & 1021.8)

(emphasis added.)

The plain language of section 1021.6 makes clear that in order to perfect the right to move for an award, the indemnitee must first put the proposed indemnitor on “proper” notice of the demand. (§ 1021.6) While there does not appear to be any published decision explaining what will satisfy the notice requirement, sending a tender letter in advance of filing suit against the indemnitor, which includes citation to the statute and explains why the defense should be provided, or action prosecuted, is probably the safest route.<sup>3</sup> Second, the proposed indemnitee must have either tried the underlying action to verdict and been found to be without fault or, where the proposed indemnitor has been joined in the case involving the third party, prevailed on a dispositive motion that involved an evaluation of the evidence. Based on the language of the statute, then, it does not appear that winning a dispositive motion at the pleading stage, including a motion for judgment on the pleadings, will support a claim for attorney’s fees pursuant to section 1021.6.

Case law provides a few more caveats regarding the statute’s application. A claim pursuant to section 1021.6 is derivative of the underlying claim for implied indemnity; the statute does not create a wholly separate cause of action. (*John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1531) (“[S]ection 1021.6 does not on its face create a right to indemnity. . . [it] is merely a fee-shifting statute which codifies an exception [sic] the so-called ‘American Rule.’”) Thus, it appears that facts supporting a claim for attorney’s fees pursuant to section 1021.6 must be affirmatively pled by way of cross-complaint (after the tender letter is sent). Put another way, asserting facts which would perfect the right to move for an award under section 1021.6 in an affirmative defense, or including a claim for attorney’s fees pursuant to the statute in the prayer of an answer, may be insufficient. (§ 431.30(c)) (“Affirmative relief may not be claimed in the answer.”) (*Cf. Wilson, McCall & Daoro v. American Qualified Plans* (1999) 70 Cal.App.4th 1030) (granting motion for attorney’s fees pursuant to section 1021.6 where moving party prevailed on cross-complaint.)

Next, a party relying upon section 1021.6 must remember that a good faith settlement determination made pursuant to C.C.P. § 877.6 extinguishes the possibility of an attorney’s fees award pursuant to section 1021.6. (*John Hancock, supra*, at 1534) (“Of course, an equitable indemnity claim –

*See Code on page 15*

3 The danger with a sue first and tender later strategy is it is unclear whether ordering litigation in that fashion would extinguish the proposed indemnitee’s right to tender defense or prosecution of the action or, assuming the indemnitor refuses tender, the claim for an attorney’s fees award pursuant to section 1021.6. Although not directly on point with regard to application of section 1021.6, the California Supreme Court seemed to imply in *Crawford v. Weather Shield Mfg., Inc.*, (2008) 44 Cal.4th 541, that such an argument can be made. (*Id.* at fn.2.) (“The record is silent as to whether JMP had previously tendered defense of the homeowners’ actions to the cross-defendant subcontractors, or any of them. Weather Shield does not urge on appeal that it was absolved of any duty to defend by reason of JMP’s failure to timely tender the defense of the homeowners’ actions.”) (emphasis added.) *Crawford*, for its part, dealt with a contractual duty to defend and did not analyze - or cite - section 1021.6.

Code continued from page 14

including its attorneys fees component under section 1021.6 – would be barred under the express terms of section 877.6 if, as of the time the good faith was made, it was a ‘further claim[]’ of a ‘joint tortfeasor’ against the settling defendants.”<sup>4</sup> Further, the statute’s reference to the “principal case” does not limit its application to “the original action filed by the plaintiff.” (*Wilson, McCall, supra* at 1036) To the contrary, case law indicates that “‘principal’ refers to the action which caused the innocent indemnitee to defend itself and thereby incur attorney fees, as distinguished from the indemnitee’s action for indemnity in which the section 1021.6 fees are sought.” (*Id.*)

Further still, and where the cross-complaint for indemnity itself is warranted, there is little, if any, downside to begin perfecting the client’s right to move for an award pursuant to section 1021.6 at the outset of the case. Unlike contractual attorney’s fees provisions which are read to be recipro-

<sup>4</sup> But whether or not a cross-complainant’s claim for attorney’s fees pursuant to section 1021.6 affects the size of the “ballpark” under the California Supreme Court’s analysis of good faith settlement in *Tech-Bilt v. Woodward-Clyde & Associates*, (1985) 38 Cal.3d 488, appears to be undecided.

cal regardless of their wording (Cal. Civ. C. § 1717(a)), statutory attorney’s fees provisions do not automatically create a reciprocal right to fees. (*Cf. Wood v Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186) (holding that an elder abuse statute which expressly provides for recovery of attorney’s fees by a successful plaintiff does not create a reciprocal right for a successful defendant.) In other words, putting the claim “in play” does not expose the client to an attorney’s fees claim from the opponent unless the opponent takes the same affirmative steps to perfect its right to move for an award pursuant to section 1021.6.

Finally, the genesis of section 1021.6 provides some insight into a separate, but related, avenue for the recovery of attorney’s fees – the tort-of-another doctrine. (*See John Hancock, supra* at 1532-1533; *Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618) In the next Update, this space will include a discussion of the tort-of-another doctrine and delve into the nuanced question of how a party can recover attorney’s fees in a California civil action even in the absence of a contractual right or statutory provision.

*-The author, Zachariah Rowland, is an attorney in practice with Balistreri, Pendleton & Potacki*

## Court Expands Statute of Limitation Protection Afforded Attorneys

By James A. McFaul, Esq.

It is all too common for a plaintiff to sue a defendant’s attorney along with that defendant. The factual predicate for claims raised against such an attorney-defendant typically involves attorney conduct undertaken while representing his or her client,

and the alleged effect of such conduct on the non-client and future plaintiff. Claims range from interference with contractual relations or prospective economic advantage, to fraud, unfair competition, and misappropriation. Difficult as it may be to imagine, actions for wrongful eviction, trespass and even assault have been postulated against attorneys for their roles in representing clients. Assessing which statute of limitations applies to such claims - which do not arise from legal malpractice - has been an open question.

In the first published decision on an aspect of this question, the California Court of Appeal, Second District, recently ruled that the one-year limitations period set forth in Code of Civil Procedure § 340.6 applies to claims for malicious prosecution brought against attorneys. *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874. Consistent with prior rulings applying Section 340.6 to claims for breach of fiduciary duty and breach of contract (and lockstep with an earlier but unpublished Second District decision addressing an identical issue (*Anderson v. West Marine, Inc.* (2009) 2009 WL 3808341)), the *Vafi* Court held that the plain language of Section 340.6 applies to all actions brought against an attorney “for a wrongful act or omission” which arise “in the performance of professional services” except for actual fraud.

Importantly, the *Vafi* Court further held that Section 340.6 applies to malicious prosecution claims asserted against attorneys regardless of whether the plaintiff was a client of the attorney. While the limitation period for bringing a civil claim other than legal malpractice is almost always longer than one year, *Vafi* now provides grounds to seek dismissal when an action is even arguably based on the attorney’s conduct while rendering professional services and the complaint is filed beyond the one-year limitations period fixed by Section 340.6. Thus, *Vafi* is a decision to keep in mind as you conduct an initial analysis of any legal malpractice matter.

*The author, James A. McFaul, is a senior associate at Butz Dunn & DeSantis, where his practice focuses on professional liability defense.*

### Managing complex or out-of-area cases doesn't have to be overwhelming.

Let Hutchings help you put it all together.

- ✓ Local and worldwide services
- ✓ 24-hour online scheduling and calendar review
- ✓ Court reporters, interpreters, and video
- ✓ Videoconferencing and conference rooms
- ✓ Imaging and online depositories
- ✓ Email transcript delivery
- ✓ Realtime and remote access services



**24-Hour Scheduling**  
**800.697.3210**  
**www.hutchings.com**  
 fax 323.888.6333  
 email: hutchcal@hutchings.com

**HUTCHINGS**<sup>SM</sup>  
**COURT REPORTERS**  
*since 1953*

# A Cause of Action for Violation of SB-800 is a Plaintiff's Exclusive Remedy

By Samir R. Patel & Todd E. Verbick

There has been a fair share of publicity about the SB-800 amendments to the Civil Code (Civil Code section 896, et seq.) that codified construction defect litigation in 2002. Most of the publicity is geared toward the pre-litigation standards allowing a builder the right to repair before litigation is commenced by a homeowner. Less focus and attention has been given to the fact that violation of the SB-800 performance standards is being used by plaintiff's counsel as an additional tool in the plaintiff's pleading tool box against builders. Closer scrutiny to SB-800 reveals that those provisions should in fact act as a limitation to the pleading tools available to plaintiffs and an additional tool for builders in the defense of cases governed by SB-800.

The typical construction defect complaint contains the boiler plate versions of numerous causes of action. These causes of action include Strict Liability, Negligence, Negligence Per Se, Breach of Contract, Breach of Contract – Third-Party Beneficiary, Breach of Express Warranties, Breach of Implied Warranties, among others. The wide array of causes of action leave a defendant “pinned to the wall” because they require a complex defense on a multitude of contract and tort related causes of action. The truth of the matter remains, no matter what the circumstances, if a construction defect matter ultimately goes to trial, it is inevitable that plaintiffs will obtain a judgment on at least one of these causes of action.

On its own, the Strict Liability cause of action can be a thorn in a defendant's side. A builder is obviously placing a product into the stream of commerce and strict liability is a tough standard to defend against, particularly when it concerns intricate homes comprised of multiple components that originally sold for hundreds of thousands of dollars. A Negligence cause of

action can also be difficult to defend because the duty of care for a builder is what a “reasonable” builder would have done under the circumstances. An interpretation of this duty of care can easily sway a jury that will almost always consist of sympathetic homeowners. A Negligence Per Se cause of action can also leave a defendant vulnerable to accusations that a builder violated the Uniform Building Code or a multitude of other obscure municipal construction-related code provisions during the construction of the home. Lastly, the Breach of Contract cause of action leaves a builder relying on dense and intricate purchase and sale agreements with dozens of addenda which leave the skeptical jurors turned off by what they view as one-side, boilerplate provisions. Ultimately, when a matter is about to go to trial, the complexity of these complaints can benefit a plaintiff and increase a plaintiff's bargaining power against a defendant who is attempting to avoid a potentially large judgment.

Enter the SB-800 statutes. The SB-800 statutes apply to all homes sold after January 1, 2003. Civil Code section 938 specifically states that “[t]his title applies only to new residential units where the purchase agreements with the buyer was signed by the seller on or after January 1, 2003.” (Civil Code §, 938.) As time progresses, more residential construction defect cases will exclusively fall under the purview of SB-800. Slowly but surely more SB-800 governed litigation is being filed, and its exclusive application is looming on the horizon.

On its surface, this “right to repair” regime has left developers with a lot to be desired despite the fact that it is supposed to allow the developer the opportunity to cure any deficiencies in their product before litigation can be filed by potential plaintiffs. However, the application of the time line for repair has shown to be impractical for anything but the

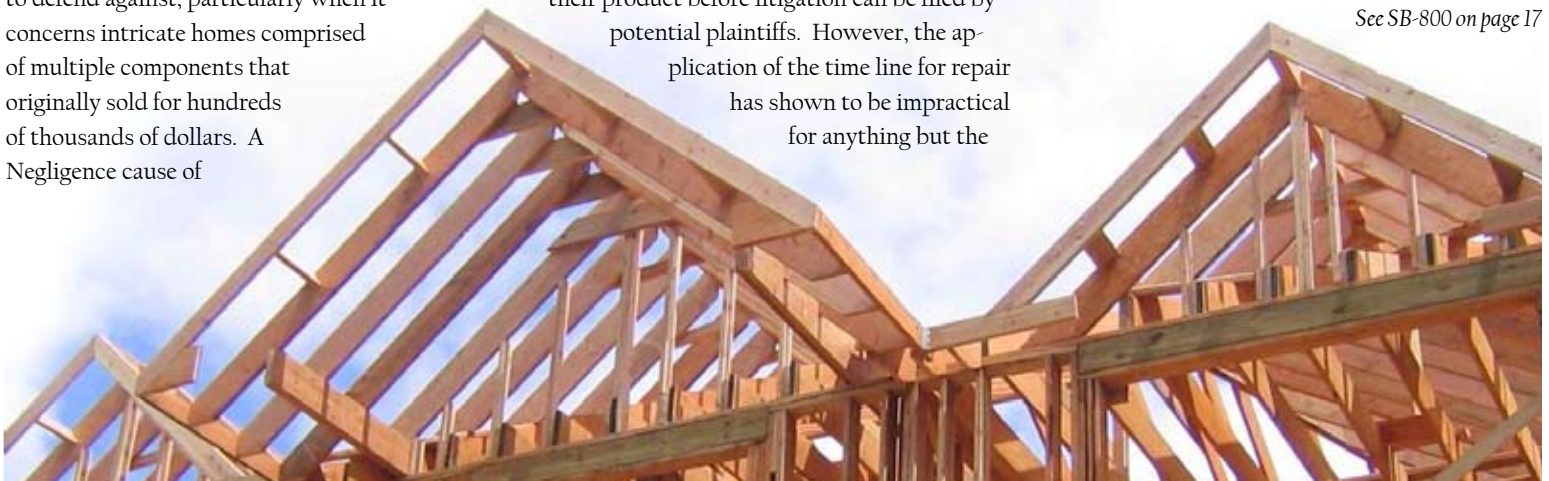
most minor problems involving only small numbers of residential units. Moreover, the fact that the fruits of the developer's investigation into the claimed defects in the pre-litigation context can freely be used as evidence against it in litigation, makes developers proceed with trepidation in responding with a repair. For these reasons, more SB-800 litigation can be expected to result due to the shortcomings of the pre-litigation procedures, and savvy defense counsel should anticipate the issues to be dealt with in presenting the defense of such cases at trial.

This fact should not necessarily be met with fear or disdain. Within the SB-800 statutes, the legislature made it clear that they were creating a new cause of action for construction defect claims, but it further made it clear that this cause of action is a plaintiff's exclusive remedy. The legislature giveth, but at the same time, the legislature taketh away. Throughout numerous provisions within the SB-800 statutes, the Civil Code states that claims for construction defects as to residential construction are exclusively governed by the Civil Code, and that the Civil Code governs any and all litigation arising under breaches of these provisions. Civil Code section 896 specifically states:

In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction ... the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. (Civil Code, § 896.)

Civil Code section 896 then provides approximately fifty-plus standards by which a construction defect claim is assessed under that provi-

See SB-800 on page 17





**SB-800** *continued from page 16*

sion. Civil Code section 896 covers everything from plumbing to windows, and from foundations to decks, and in several instances expressly dictates statutes of limitations as to specific areas of construction that severely truncate the 10-year latent damage limitations period. As for any construction deficiencies that are not enumerated within Civil Code section 896, Civil Code section 897 explicitly defines the intent of the standards and provides a method to assess deficiencies that are not addressed in Civil Code section 896. Civil Code section 897 states:

**Intent of Standards.**

The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage. (Civil Code, § 897.)

Therefore, Civil Code section 897 acts as a catch-all by which defects that are not covered within Civil Code section 896 can be evaluated on a damage standard mirroring Aas. The result of sections 896 and 897 being read in combination is a comprehensive, all-inclusive set of performance standards by which any defect raised by Plaintiffs can be evaluated and resolved under a single SB-800 based cause of action. However, making plaintiff's counsel adhere to this pleading limitation is another issue altogether.

Civil Code section 943 makes clear that a cause of action for violation of SB-800 performance standards is a plaintiff's sole remedy for a residential construction defect action. Specifically, Civil Code section 943 states:

Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute. (Civil Code, § 943.)

Civil Code section 944 provides the method for computing damages within a construction defect action, as follows:

If a claim for damages is made under this title, the homeowner is only entitled to damages for the reasonable value of repairing any violation of the standards set forth in this title, [and] the reasonable cost of repairing any damages caused by the repair efforts... (Civil Code, § 944.)

A cursory review of these statutes yields the conclusion that the legislature was attempting to create an exclusive cause of action that trumps all other causes of action where SB-800 applies. The remedy available to plaintiffs is limited to that allowed by the Civil Code. As noted above, “[n]o other cause of action for a claim covered by this title...is allowed.” (Civil Code, § 943.) Therefore, Civil Code sections 896, 897, 943, and 944 specifically prohibit the contract-based and tort-based causes of action typically pled by plaintiffs.

Plaintiff's counsel has seized upon the language of section 943 to advance the argument that SB-800 still allows a plaintiff to advance typical contract and tort based causes of action. On the surface, this argument may seem compelling, but a minimum of scrutiny of the express language of section 943 dispels this notion. Section 943 says that it provides rights “[i]n addition” to those under the SB-800 Civil Code provisions. Clearly, the language in section 943 is intended to expressly underscore the fact that

a plaintiff is not precluded from seeking relief in addition to that allowed under SB-800 for damages *not arising from* a breach of the SB-800 standards or for damages in addition to those recoverable under Section 944. This language does not provide an unfettered license to bring a Strict Liability, Negligence or other cause of action against a developer where SB-800 applies. In fact, this language only keeps the door open for plaintiffs to pursue such causes of action *not arising from* a breach of the SB-800 standards should there be such supporting allegations. For example, if a plaintiff alleges that a developer breached an “express contractual provision” related to the timing of the completion of the home and close of escrow, and the contract specifies damages in this regard, a plaintiff may have a viable separate cause of action for Breach of Contract for recovery of those damages precisely because that is not an issue expressly dealt with in SB-800 in the performance standards under sections 896 and 897, or in the damage recovery terms under 944. As it stands, the vast majority of complaints are seeking redress for violation of the same primary right; that is, defects specifically outlined in Section 896 and 897 or which result in damages as stated in Section 944.

So, how does a builder defend against a complaint that contains multiple causes of action regarding construction defects for a home sold after January 1, 2003? There are numerous ways to approach this. First and foremost, these superfluous and improper causes of action can be attacked by Demurrer seeking dismissal of all causes of action other than the cause of action alleging violation of SB-800. If the the time period within which to file a Demurrer has passed already, a Motion for Judgment on the Pleadings can be utilized to attack the improper causes of action in the same way as a Demurrer can be used for this purpose.

The limitation to a Demurrer or Motion for Judgment on the Pleadings is that the judge is restricted to viewing only the four corners of the pleading when making a ruling. It is typical for plaintiffs' counsel to cleverly (or one might even say, disingenuously) leave the complaint purposely vague to avoid a successful defense attack on the pleadings by not including the original date the residence was sold. In that instance, a Motion for Summary Adjudication can be used to attack a plaintiff's complaint. By simply providing evidence that the homes were originally sold after January 1, 2003, the improper causes of action should be subject to dismissal by summary adjudication. If the plaintiff is a subsequent purchaser, the builder still has recourse to enforce the pleading limitations under SB-800. Civil Code section 945 states that “[t]he provisions, standards, rights, and obligations set forth in this title are binding upon all original purchasers and their successors-in-interest.” (Civil Code, § 945.)

Attacking a plaintiff's complaint to eliminate multiple causes of action can have numerous benefits. The practical result is that a plaintiff will only have one viable cause of action. The advantage is that the SB-800 performance standards include the defined performance standards and shortened statutes of limitations periods with regard to specific issues. Clearly, this can benefit a developer both during settlement negotiations and in presenting a defense at trial.

The Appellate Courts have yet to directly address and interpret these SB-800 provisions. The time for that is undoubtedly drawing near. For now, however, this SB-800 defense tool is ripe for the taking.

## ★ On the Move ★

Schwartz Semerdjian Ballard & Cauley, LLP is proud to announce that, at the American Bar Association (ABA) annual meeting in Toronto Canada, **Dick Semerdjian** was sworn in as the Chair-Elect of the ABA Tort Trial and Insurance Practice Section (TIPS). Mr. Semerdjian, who specializes in civil litigation and trial practice, has begun his one-year term as the Chair-Elect and will be sworn in as the Chair at the close of the ABA Annual Meeting in August 2012, in Chicago, Illinois. In the 80-year history of the ABA, Mr. Semerdjian will be the first Section Chair to practice in San Diego.

**Tracey M. VanSteenhouse** has been practicing at Morris Polich & Purdy LLP since May 16, 2011. Her practice focuses on the representation of pharmaceutical and medical device companies ranging from individual cases to multi-district litigation at the state and federal levels.

San Diego attorney **Kevin DeSantis** was recently certified by the State Bar as a Specialist in Legal Malpractice Law. Mr. DeSantis, a 1988 graduate of USD and a shareholder at Butz Dunn & DeSantis, has been involved in the defense of attorneys and law firms for over two decades.

### SDDL GOLF OUTING – JULY 18, 2011

SDDL hosted the annual Juvenile Diabetes Research Foundation Golf Tournament on Monday, July 18, 2011 at Lomas Santa Fe Country Club in Solana Beach. As with years past, this year's tournament was a very good time and a portion of the proceeds will benefit a very worthy cause - the Juvenile Diabetes Research Foundation. This event would have been impossible without the participating SDDL members and law firms as well as our very generous and supportive sponsors.

This year's sponsors included:

**Brinig & Company, Inc.**

**ESI Engineering & Scientific Investigation**

**Hon. Herbert B. Hoffman, Ret.**

**Private Dispute Resolution at Judicate West**

**Hutchings Court Reporters**

**JAMS - Hon. Robert May, Ret.**

**Judicate West**

**Knox**

**Lombard Consulting Services**

**Lorber, Greenfield & Polito LLP**

**Peterson Reporting**

**RGL Forensics**

**Rimkus Consulting Group, Inc.**

**Ringler Associates**

**Sarnoff Court Reporters**

**Steve Plourd Investigations**

**Teris**

**Thorsnes Litigation Services**

**West Coast Resolution Group**

**Thank you all and we look forward to seeing everyone again next year.**

## In Memoriam: Bonnie Beauman 1965-2011



Bonnie Beauman

Many in the San Diego legal community are deeply saddened by the untimely passing of Bonnie Beauman (formerly Bonnie Simonek).

Ms. Beauman was a native of Buffalo, New York and was raised in Bettendorf, Iowa. She enlisted in the United States Navy in 1984 at the age of 19 and spent 12 years serving as a Hull Maintenance Technician. She served onboard the USS LY Spear AS-36 and the USS McKee AS-41 and was a member of the Helicopter Crash and Salvage Boat Unit at North Island, Naval Air Station. During her final tour as a Navy Instructor at the Naval Training Center's Fire Fighting and Chemical, Nuclear and Biological Warfare Defense School, Ms. Beauman became the first Naval Reservist on Active Duty to gain full qualification as an Instructor.

Ms. Beauman was honorably discharged from the Navy in 1996. In addition to being honorably discharged, during her tenure Ms. Beauman received numerous medals and awards, including the Navy Achievement Medal, Navy Achievement Medal, Gold Star, Unit Commendation Medal, Battle Efficiency Award, Sailor of the Year (Fleet Training Center), Sailor of the Quarter (Fleet Training Center) and two Meritorious Service Medals.

Ms. Beauman graduated Cum Laude from the University of California, San Diego in 1996 and entered California Western School of Law in the same year. During her studies at California Western School of Law she received the American Jurisprudence Awards in Contracts and Alternative Dispute Resolution. She won First Place in the the Oral Advocacy Competition and, in addition, served as Editor of the California Western School of Law Law Review. She graduated Cum Laude from California Western School of Law in 1999.

After graduation from California Western School of Law, Ms. Beauman joined Klinedinst PC in August 1999 and became a Shareholder of the firm in January, 2005. She continued to practice at the Klinedinst firm until 2007 where her practice was focused in the areas of medical negligence, elder abuse and healthcare, construction litigation, business litigation and general liability defense.

From June, 2007 until December, 2007 Ms. Beauman was a Partner in the San Diego Office of Wilson, Elser, Moskowitz, Edelman, & Dicker, LLC, the country's largest insurance defense firm, where her practice also included family law. She then went out on her own and opened the Beauman Law Firm & Mediation Centers in January, 2008.

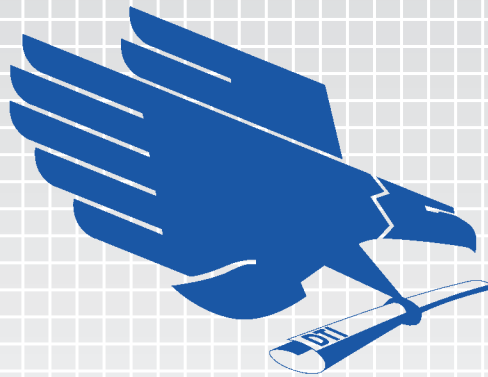
In addition to her law practice, Ms. Beauman was extremely generous with her time and energy to the community. She was involved in several charitable organizations including the Tariq Khamisa Foundation, an organization dedicated to ending violence among our youth and eradicating gang violence where she sat as a Member of the Board of Directors. In addition, she served on the Board of Directors for the San Diego Building Association's Baja Challenge wherein local construction companies, real estate businesses and other associated industries travel to Mexico each Fall to build homes for homeless families with children. Ms. Beauman was also involved with the American Lung Foundation, the San Diego Volunteer Lawyers and the efforts of the Lawyer's Club at the annual Women's Resource Fair wherein homeless women and children receive counseling, health care, dental care and job and housing assistance.

Ms. Beauman is survived by her five children.

# SDDL Member List

Abed, Gil	Clancy, Erin Kennedy	Grebing, Charles R.	Lopez, Michelle	Patajo, Lee T.	Spieß, Frederick
Allen, Sean D.	Clark, Kevin J.	Greenberg, Alan E.	Lorber, Bruce W.	Pate, William C.	Stairs, Victoria G.
Allison, Christopher R.	Clifford, John R.	Greenfield, Joyia C.	Lotz, Thomas	Patel, Samir R.	Stenson, Mark E.
Amundson, Steven Grant	Coady, Patrice M.	Greenfield, Kenneth N.	Mahlowitz, Robert M.	Pendleton, Mary B.	Stephan, Gregory D.
Anderson, Kendra	Cohen, Philip H.	Greer, Jeffrey Y.	Mangin, Margaret	Penton, Robyn	Stohl, Matthew
Areves, Sylvia S.	Correll, Thomas M.	Gregory, Gillian	Manzi, Jeffrey F.	Peterson, Jared	Sulzner, Bruce E.
Artiano, Ray J.	Creighton, Jennifer S.	Grimm, W. Patrick	Martin, Michael B.	Peterson, Mark T.	Taylor, Carolyn
Bae, Judy S.	Crenshaw, Lyndsay	Guido, Richard A.	McCabe, Hugh A.	Phillips, Charles A.	Terrill, Elizabeth M.
Balestreri, Thomas A.	Cumba, Deborah A.	Hack, Philip L.	McCarthy, Garry	Picciurro, Andre M.	Todd, Christopher W.
Barber, D. Scott	Cumba, Mark T.	Hagen, Gregory D.	McClain, Robyn S.	Polito, Steven M.	Townsend, Giles S.T.
Beck, Teresa	Daniels, Gregory P.	Hall, David P.	McCormick, Carloyn Balfour	Popcke, Michael R.	Traficante, Paul
Bello, Erin	DeSantis, Kevin	Hallett, David E.	McDonald, Sarah A.	Potocki, Joseph	Trexler, Sheila S.
Belsky, Daniel S.	Dea, Michael	Harris, Cherrie D.	McFall, James A.	Price, Virginia	Tukloff, Tammara N.
Bennett, Mark B.	Deitz, Eric R.	Harris, Dana	McFaul, James A.	Purviance, E. Kenneth	Turner, J.D.
Benrubi, Gabriel M.	Dickerson, Jill S.	Harrison, Robert W.	McKean, Dinah	Ramirez, A. Paloma	Tyson, Robert F.
Berger, Harvey C.	Dixon, Deborah	Haughey Jr., Charles S.	McKenzie, Megan	Randall, Jill E.	Umoff, Alliea
Bingham, Roger P.	Doggett, Jeffrey	Healy, Kevin J.	McMillan, Shawn A.	Rasmussen, Konrad	Van Nort, Kelly A.
Bitterlin, Dane J.	Donnelly, John M.	Heft, Robert R.	Meek, Michelle	Ratay, M. Todd	VanSteenhouse, Tracey Moss
Blackwell, Kristi	Doody, Peter S.	Hilberg, Scott	Mendes, Patrick J.,	Rawers, Brian A.	Velastegui, Marvin P.
Blumenfeld, Jeanne	Dorsey, Martha J.	Holmes, Karen A.	Mercaldo, Beth M.	Rawers, Kimberlee S.	Verbick, Todd E.
Boetter, Bruce W.	Doshi, Jason	Holnagel, David B.	Mercaldo, Marco B.	Reeve, Tom	Verma, Joy
Bogart, Jeffrey H.	Dube, Douglas	Horton, Sommer C.	Merkel, Joshua	Reinbold, Douglas C.	Verne, Andrew G.
Bonelli, Eva	Dugard, Prescilla	Howard, Benjamin J.	Mertens, Michael	Rij, James J.	Vranjes, Mark E.
Boruszewski, Kelly T.	Dunn, Elizabeth	Hudson, Clark R.	Miersma, Eric J.	Rodriguez, Robert C.	Wade, Jeffrey P.
Botham, Renee M.	Dyer, Roger C.	Huerta, Sharon A.	Miller, Nelse	Rogaski, Michael	Wallace II, James J.
Brast, Dan	Ehtessabian, Jonathan R.	Hughes, William D.	Mixer, Melissa K.	Romero, Richard E.	Wallington, Hilary
Brennan, Moira S.	Eilert, Anita M.	Hulburt, Conor J.	Morache, Matthew	Roper, David B.	Walsh, John H.
Brewster, George	Enge, Cherie Armstrong	Ingold, Scott	Morales, Norma A.	Rosing, Heather L.	Walshok, Janice Y.
Bridgman, Lisa S.	Everett, John H.	Inman, Heidi	Moriarty, Marilyn R.	Roth, James M.	Ward, Danielle
Burfening, Jr., Peter J.	Ezeolu, Ndubisi	Isaacs, Jackson W.	Moriyama, Jamie	Rowland, Zachariah H.	Washington, Merris A.
Burke, David P.	Fallon, Daniel P.	Iuliano, Vince J.	Mortyn, Russell	Ryan, Greg J.	Weadock, Katherine T.
Butz, Douglas M.	Farmer, John T.	Jacobs, Michael W.	Mougin, Cassandra	Ryan, Norman A.	Weeber, Craig
Buzunis, Constantine D.	Feldner, J. Lynn	Jaworsky, Todd E.	Mullins, Angela	Sahba, Anahita M.	Weinstein, Michael R.
Calvert, Stanley A.	Fick, Ryan	Jeffries, Sara A.	Murphy, Jason Michael	Schabacker, Scott D.	White, Daniel M.
Cameron, Christina Marie	Ford, Jennifer Morgan	Jones, Allison	Nahama, Susan S.	Schneider, Allison	White, Timothy M.
Campbell, John B.	Fraher, John	Joseph, Dane F.	Neil, Michael I.	Selfridge, Alexandra	Wilson, Jessica G.
Campbell, Kurt U.	Frank, Robert W.	Kaler, Randall W.	Ni Mhairtin, Jackie M.	Semerdijan, Dick A.	Wilson, Lesa
Campbell, Rachael A.	Freistedt, Christopher M.	Katz, Bruno W.	Nicholas, Dana	Serino, Denise M.	Winet, Randall L.
Cannon, Paul B.	Freund, Lisa L.	Kearns, Patrick J.	Noland, Leslee A.	Serrano, Gilbert	Woodhall, Blake J.
Cardone, David D.	Furcolo, Regan	Kelleher, Thomas R.	Noon, Timothy S.	Shedlosky, Joy	Woodfall, Brian D.
Carney, Antonia	Gabriel, Todd R.	Kenny, Eugene P.	Norman, Robert S.	Shields, Robert A.	Worthington, Brian P.
Carvalho, Jeffrey P.	Gaeta, Anthony P.	Kish, Fernando	Noya, Scott	Shu, Shirely	Yaeckel, A. Carl
Case, Anthony T.	Gallagher, Robert E.	Knutson, Lucy M.	Nunn, Randall M.	Sigler, Stephen T.	Yoon, Monica J.
Catalino, David	Garbacz, Greg A.	Kope, Jennifer	O'Neill, Dennis S.	Silber, Scott	Zackary, Fort A.
Cauzza, Jarod	Gibson, Michael	Landrith, Kevin S.	Oberrecht, Kim	Singer, Sarah Elaine	Zickert, Robert W.
Cercos, Ted R.	Glaser, Tamara	Lauter, Ronald James	Obra-White, Bethsaida	Skyer, David C.	
Chiruvolu, Rekha	Gold, Carleigh L.	Lea, Chris M.	Oliver, Susan L.	Sleeth, Jack M.	
Chivinski, Andrew R.	Gorman, James	Letofsky, Larry D.	Olsen, Thomas F.	Smith, Kevin D.	
Cho, Sally J.	Graham, Kevin R.	Liker, Keith A.	Oygar, Sezen	Smith-Chavez, Elizabeth A.	
Christison, Randall B.	Grant, Danny R.	Lillig, Rebecca M.	Paskowitz, Michael A.	Soden, Julie Morris	
Ciceron, Keith S.	Graves, Alan B.	Lin, Arthur Ying-Chang	Passons, Omar	Souther, Matthew R.	

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



**DOCUMENT TECHNOLOGIES, INC.**  
[www.dtiglobal.com](http://www.dtiglobal.com)

---

**DOCUMENT TECHNOLOGIES, INC.**  
Proudly Announces its Acquisition of  
Esquire Litigation Solutions

---

Document Technologies, Inc. (DTI) is the nation's largest independent provider of facilities management and discovery solutions, servicing clients through offices in more than 20 markets across the U.S.