



# THE UPDATE

FALL 2012

## Local News of Civil Litigation-All the Litigation News That's Fit to Print or Broadcast

By Herbert M. Kritzer and Robert E. Drechsel

**Local media coverage of civil litigation differs significantly from coverage in major national media, with an emphasis on certain types of cases and a focus on large dollar amounts. What does this mean for the future of civil justice reform?**

In an article published some ten years ago in *Judicature*, the publication of The American Judicature Society, it was reported that the public's perception of typical court awards in civil cases far exceeded the actual awards. While median awards typically were on the order of \$30,000, the median estimate by survey respondents of the "typical" award was \$100,000 and about a quarter of those providing an estimate said the typical award was \$1 million or more.<sup>1</sup> Where does this perception come from? The simple answer suggested by prior research is that it comes from news reporting,<sup>2</sup> which typically focuses on big cases, what Haltom and McCann labeled "holler of the dollar."<sup>3</sup>

The public's perception of civil justice issues such as the typical damage awards is of central importance in the recurring debate about civil justice "reform."<sup>4</sup> Players in this

debate seek to shape the public's perception of how civil justice works in the United States in order to achieve their ends. Proponents of reform contend that Americans are too prone to turn to litigation, and often do so in situations where such action is unwarranted, or even downright silly; one need only think about the "tort tales" that have been, and continue to be, propagated even after they have been debunked.<sup>5</sup> An important question is the degree to which news reporting tends to support the image "reformers" seek to create.

The research on media reporting of civil litigation has drawn heavily on printed national news sources such as the *New York Times* and national newsweeklies.<sup>6</sup> While some of these national sources also serve a local market, they do not constitute the primary news source for most Americans. The two most heavily used sources are local television news and local newspapers;<sup>7</sup> in this article we present an analysis based on these two sources.

### Prior Research On News Coverage of Civil Litigation

Studies of reporting of litigation have

focused on print sources,<sup>8</sup> primarily print sources with national circulation. Much of that work focused on reporting of tort litigation,<sup>9</sup> although there are studies that focus more generally on civil litigation<sup>10</sup> or other areas such as discrimination.<sup>11</sup> A major focus has been on how case outcomes are covered,<sup>12</sup> and the findings are consistent in showing that plaintiffs' verdicts are more commonly reported than defense verdicts, and that the size of the awards is much greater than is the case for all plaintiffs' awards. A second focus is on the type of case that gets reported, and within torts the research shows that certain types of claims, particularly products liability claims<sup>13</sup> and perhaps medical malpractice claims,<sup>14</sup> are over-reported, although from what we know of typical verdicts,<sup>15</sup> it may be that this "bias" in the types of cases reported reflects where the larger awards are likely to occur. Only one study has examined coverage over time, and it shows that coverage has increased over the approximately 20 year period (1980-1998) they examined.<sup>16</sup>

Haltom and McCann looked at the frequency of stories about cases not involving personal injury and found that

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# President's Message



I don't know about you but I feel like I blinked my eyes while 2012 has rushed by. Since my last message SDDL has been busy. I hope you accepted my invitation to get out of your offices and catch up with your friends and colleagues at SDDL's first harbor boat cruise, our annual golf tournament, padres tailgate or one of our many CLE events. This spring we partnered with ESI Investigations for a tropical themed boat cruise around the San Diego Harbor. Ask anyone who attended, a great time was had by all.

Let me extend a huge THANK YOU to our Golf Tournament Chair, Tamara Glaser, and her team for putting on one of the best tournaments we have seen so far. The venue was great and competition was fierce. Through the golf committee's hard work, SDDL will be making a sizable donation to The Juvenile Diabetes Research Foundation. Also, we could not have had such a great tournament, raffle and auction without our generous sponsors. Thank you all.

We still have many events to look forward to this year. Join us on October 18, 19 and 20, to judge in SDDL's annual Mock Trial competition. With twenty teams of students from all over the country, this competition should be intense. Anyone who has ever volunteered for this competition can tell you what a rewarding experience it is to watch these young and ambitious students compete. On Friday night, October 19, we will be hosting a cocktail hour with the law school students and the mock trial judges at the Westin Downtown to announce the finalists. Make sure to contact David Roper for more details.

For the first time in SDDL's history, in November we are holding a Trivia Night Competition on November 13, 2012. Get your team of four together and be ready to compete for the Ein-"Stein" Award! Last, mark your calendars now for the Installation Dinner which is set for January 26, 2012 at The Prado. >

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## 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, 2012. 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 in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.

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# Bottom Line

**Case Title:** Durant v. SDG&E, et al.

**Case No.:** GIE030830

**Judge:** Hon. Luis R. Vargas

**Plaintiff's Counsel:** Daniel Gilleon and Rory Pendergast (Mitchell & Gilleon); Sean Simpson and Charles Moore (Simpson & Moore)

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

**Type of Incident:** Plaintiff was riding his motorcycle to work at NAS North Island on Coronado when he came up behind a line of traffic stopped by a construction flagger to allow a contractor to offload a Bobcat from a flatbed and drive it across the street into the public utility power substation. Plaintiff began passing stopped traffic on the right as the unloading operation was completed and the flagger released traffic. Plaintiff collided with the side of a pickup truck which began to turn into a parking space. Plaintiff initially sued only the pickup driver, and settled that case for the driver's minimum limits policy. He then sued the public utility and the contractor, alleging that the equipment offload was done in a negligent fashion and caused the accident. Plaintiff later contended he must have been struck by the Bobcat. During trial, plaintiff dismissed the public utility for a waiver of costs while a non-suit motion was pending. Plaintiff sought \$350,000 in medicals (reduced to \$241,000 per Howell) for undisputed injuries including a scapular fracture, a mild concussion and soft tissue injuries, and for disputed injuries

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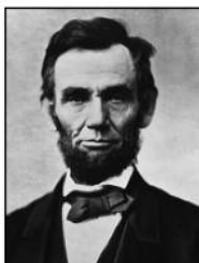
## SDDL Presents MCLE Program on "Three Perspectives On How Insurance Considerations Affect Legal Malpractice Claims"

On August 7th the SDDL presented an informative and well-attended MCLE program offering varying perspectives on the topic of how legal malpractice insurance considerations affect professional liability claims against lawyers.

The attorney speakers for the program were Kevin DeSantis, a shareholder of Butz Dunn & DeSantis, APC, and Dan Stanford, principal of Stanford & Associates. Mr. DeSantis and Mr. Stanford are both prominent and certified specialists practicing in the area of legal malpractice. They were joined by Dorothy Amundson, a Certified Insurance Counselor and account executive with the San Diego insurance brokerage Cavignac & Associates. Ms. Amundson specializes in professional liability insurance. With more than a

half century of legal malpractice related experience between, the hour long program presented to a crowded room of attorneys from a diversity of practice areas involved discussion and healthy questions-and-answers on tips to avoid claims, insights into how malpractice claims are crafted, and how the realities of professional liability insurance affect the resolution of legal malpractice claims.

The SDDL thanks the speakers for sharing their time with the membership, and Peterson's Court Reporting for sharing its venue for the Brown Bag series. >



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TO SCHEDULE, contact Anna Gateley-Stanton: phone (619) 685-3137, e-mail: stanton@scmv.com

# Cover Story Continued – Local News of Civil Litigation- All the Litigation News That’s Fit to Print or Broadcast

**TABLE 1. Types Of Civil Cases in Local News Sources**

	Television	Newspaper	Both
Torts	47.4%	21.0%	28.2%
Business	4.6%	11.7%	9.8%
Consumer	11.4%	4.4%	6.3%
Contract (including debt)	6.3%	13.6%	11.6%
Discrimination	14.1%	14.8%	14.6%
Other Employment	5.0%	6.4%	6.0%
Intellectual Property	4.4%	2.8%	3.2%
Family	5.4%	2.9%	3.6%
Government	12.3%	28.0%	23.7%
Other	5.6%	10.8%	9.4%
Number of cases	956	2,566	3,522

Note: Percentages are based on the number of cases

none of the other areas constitute more than one percent of the issues covered in news reports.<sup>17</sup> Haltom briefly examined at what stages of the litigation process cases get reported in the print media, and found that the most commonly reported stage is a “decision” (38.2 percent of articles) followed by filing (29.5 percent);<sup>18</sup> he also reports length of articles, which he found averages 537 words.<sup>19</sup> Nielsen and Beim looked specifically at discrimination cases as reported in national print media and several regional newspapers; they compared what the media reports to data covering discrimination cases litigated in the federal courts. As in the studies of torts, they found that the media over-reports plaintiff wins and the size of awards. They also found that class actions are over reported but interestingly trials (as opposed to settlements) are not.<sup>20</sup>

### Data sources

Our research design reflects an opportunity that was presented to us. For a study of local television news coverage of the 2004 and 2006 elections, Professor Kenneth Goldstein captured local news broadcasts in a national sample of markets in 2004<sup>21</sup> and in

weeks of 2007. From these news broadcasts, we obtained clips of court and litigation related stories. Preliminary analyses of the broadcast news data led us to seek and obtain funding to create a parallel set of data based on reporting in local newspapers in the same markets for the same exact time periods.

Over 9,500 television news broadcasts were reviewed by staff working for Professor Goldstein at the University of Wisconsin NewsLab; from these broadcasts 1019 clips that in some way referred to civil litigation were extracted, totaling 917 minutes. At least one newspaper from every one of the markets covered by the television data was available in either Westlaw or LexisNexis.<sup>23</sup> To

a sample of Midwest markets in 2006 (the capital city and the largest media market in the state);<sup>22</sup> he also captured a sample of broadcasts from the 10 Midwest markets for early 2007. The data collection covered approximately four weeks prior to the 2004 election, approximately eight weeks prior to the 2006 election, and most of the first twelve

locate stories, we constructed complex search strings, one for LexisNexis and one for Westlaw.<sup>24</sup> We identified 2,627 newspaper news items that in some way referenced civil litigation.<sup>25</sup> In order to assess coding reliability, we double-coded 104 newspaper stories; the intercoder reliability was 88.2% which gives us confidence in our data and coding process.

Because of the data collection design, both in terms of timing and locations covered, formal generalization to the U.S. as a whole is not possible. Nonetheless, we believe that the data we collected do provide a useful portrait of what local coverage looks like. One obvious question is whether the fact that a large portion of our data was collected in periods immediately before elections led to significant bias in the types of cases we found. To check this, we looked at whether the types of parties involved in cases differed across the three time periods. More specifically, are cases more likely to involve government defendants (other than police agencies) during election periods? The hypothesis here was that government defendants might be overrepresented in such periods because of suits filed over election-related processes. No meaningful pattern was evident.<sup>26</sup>

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**Herbert M. Kritzer** holds the Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. His most recent book is *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (2004).

**Robert E. Drechsel** is a professor in the School of Journalism and Mass Communication and an affiliated professor of law at the University of Wisconsin-Madison. He is the author of numerous articles on the interaction of journalists and sources in trial courts and trial judges’ use of the news media.

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### Analysis – Story Characteristics

The television stories ranged in length from 7 seconds to 935 seconds; the median story was just under half a minute (29 seconds). Just over thirty-nine percent of the stories were between 20 and 30 seconds in length; 13.6% were less than 20 seconds, and 23.4% were 60 seconds or more. One way to put this into perspective is to note that the typical news reader will speak about 150 words in a

one minute report. Thus, the typical report that at least mentions litigation contains only about 75 words.<sup>27</sup> (This paragraph consists of 84 words).

The newspaper stories in our sample vary in length from 10 words to 4,179 words,<sup>28</sup> with a mean of 435 words and a median of 364 words.<sup>29</sup> Thus, in terms of content (measured in words but neglecting the role of visuals), the newspaper stories have about five times more content than the television stories. Another way to see the difference is that 91.6% of newspaper stories are longer than the median television story. Despite the old saw that “a picture is worth a thousand words,” we doubt that the additional visual element in the television stories comes close to making up the difference in terms of information conveyed. To fill out the distribution for newspaper stories, 12.7% contain 100 or fewer words, 22.0% 101-250 words, 31.8% 251-500 words, 27.6% 500-1,000 words, and 5.9% over 1,000 words.

One crucial difference between newspapers and television as a source of news is the degree to which each requires active engagement by the consumer. One can think of television as a “push” source because the entire newscast is pushed at the viewer (of course, the viewer can “tune out” and not hear or see a particular story), while a newspaper is more of a “pull” source, in that the consumer must decide to look at a page and read a story.

**Types of Cases** We used a fairly detailed coding scheme (18 categories) for type of case, particularly for distinguishing among types of tort cases. In Table 1 we have collapsed our various categories of torts, and combined several other categories. Perhaps most surprising, given prior research based on the print media, is that local news reporting on civil litigation is *not* dominated by torts. While torts are the

largest category reported by local television news, civil cases involving government action make up the single largest type of case reported by newspapers, with torts coming in second. Given our sampling periods, one might ask whether the significant reporting of cases involving government action reflects the fact that the 2004 and 2006 data were collected in the weeks prior to elections (and cases raising issues about election processes would be classified as government action cases).<sup>30</sup>

Newspapers are more likely to report business-related cases, almost certainly reflecting in part the separate business sections in most newspapers. Television has a higher proportion of consumer cases than do newspapers, perhaps reflecting what television editors see as the audience appeal of consumer-related stories. Finally, it is worth noting the measurable proportion of cases involving intellectual property; these mostly are cases involving well-known trademarks, copyright cases such as music sharing, or information technology-related patents (e.g., Apple patents related to the iPhone).

Given that we have detailed coding for types of torts, we also examined the claim that cases such as medical malpractice and products liability are over reported and routine tort matters such as auto accident injuries are underreported. Table 2 shows the distribution for tort cases, showing both the percentage of torts and the percentage of all cases for our various categories. Clearly some types of tort cases attract more attention than do others. The two most prominent types of cases are products liability and police misconduct. Auto accidents are clearly

*continued from page 3*

**Bottom Line**

including mild traumatic brain injury, stroke, and a neck injury requiring future fusion surgery, and a low back injury that led to a failed disc replacement/fusion surgery requiring 5-level fusion surgery in the future. Plaintiff had not worked since the accident in 2004 and contended he would never work again. He sought past and future loss of earnings of approximately \$1,000,000. Plaintiff’s wife asserted a loss of consortium claim. Plaintiff asked the jury for between \$17M and \$24M. The defense asked for a defense verdict.

**Settlement Demand:** \$2.2M at mediation. \$1.7M at commencement of trial, reduced to \$1.3M during trial.

**Settlement Offer:** \$250,000 at mediation, increased to \$475,000 (CCP 998), increased to \$500,000 during trial.

**Trial Type:** Jury

**Trial Length:** 6 weeks

**Verdict:** Defense (11-1 on causation) >

*continued on page 12*

**TABLE 2. Type of Tort Cases Reported**

	As Percent of Tort Cases			As Percent of All Cases		
	Television	Newspaper	Both	Television	Newspaper	Both
Auto	3.8%	3.3%	3.5%	1.8%	0.7%	1.0%
Products Liability	29.4%	28.4%	28.8%	13.9%	6.0%	8.1%
Medical Malpractice	5.7%	6.9%	6.4%	2.7%	1.4%	1.8%
Other Personal Injury	38.6%	20.0%	28.5%	18.3%	4.2%	8.0%
Property Damage	3.5%	8.7%	6.4%	1.7%	1.8%	1.8%
Libel/Slander	6.8%	8.9%	8.0%	3.2%	1.9%	2.2%
Privacy	1.1%	1.5%	1.3%	0.5%	0.3%	0.4%
Police misconduct	15.0%	14.5%	14.7%	7.1%	3.0%	4.1%
Number of cases	453	539	992	956	2,566	3,522

# Changing Times - The California Code of Civil Procedure Is Amended to Limit Depositions to Seven Hours

By Cara L. Patton, Esq., Butz Dunn & DeSantis

California has recently added Section 2025.291 to the Code of Civil Procedure, which limits depositions in most cases to seven hours. This law, which is analogous to the federal seven hour limit, takes effect January 1, 2013.

The law establishes the simple rule that "examination of the witness ... shall be limited to seven hours of total testimony." CCP § 2025.291. The deposition is not restricted to one day, and does not include examination by the deponent's counsel. The rule also provides that the court shall allow additional time if needed to fairly examine the deponent, or if a person or circumstances impede the examination. The limit will apply to all California civil actions as well as workers compensation cases.

But the rule also has several

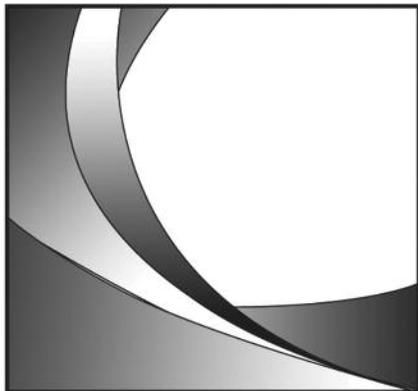
exceptions, the first of which recognizes agreements by the parties to waive the seven-hour limit for one person's deposition or for all depositions in the case. CCP § 2025.290(a). Other exceptions include expert witnesses, Persons Most Knowledgeable, all depositions in employment law cases, and suits which are designated as complex. Interestingly, the law does not define "employee," which will likely lead to discovery battles in cases where the defendant maintains that the plaintiff was properly classified as an independent contractor, not an employee. Also worth noting, the limit does not apply to parties who join the case after the deposition is taken.

This law will have interesting ripple effects, most of which will increase the burden on deposing parties. Preliminarily, the limit will require more

judicial intervention and as California court resources become more and more scarce, obtaining timely relief through discovery motions is increasingly difficult. For proceedings involving multiple parties, counsel will have to coordinate the examination so that each party has sufficient time to examine the witness. Most depositions involving interpreters will likely require a stipulation or court order to extend the time limit. It is also possible that litigants will try to frame their claims in a manner that will avoid a designation as complex or employment-related.

Essentially, the new law shifts the burden onto the party taking the deposition to move the court for more time; previous, the burden was on the deponent to seek a protective order for an excessively lengthy deposition. As a

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# Former SDSC Court Reporters Form Coalition

**SAN DIEGO** – On September 25, 2012, San Diego Superior Court officials issued a press release indicating that, effective November 5, 2012, official court reporters will no longer be available to report civil and probate proceedings. Additionally, as of December 28, 2012, official reporters will only be available for family law matters for domestic violence restraining order hearings, contempt hearings, and request for order hearings of 40 minutes or less. This decision arises from the court’s decision to eliminate a total of 38 court reporter positions attributed to ongoing state budget and funding issues.

However, those court reporters aren’t disappearing. A group of reporters set to be laid off by the court system have formed a coalition, the San Diego Courtroom Reporters Coalition. The coalition envisions a referral agency will evolve to provide a contact point for civil attorneys who seek courtroom-experienced reporters to report trials and

other proceedings.

The coalitions members, at this point, will be reporters approved by San Diego Superior Court, which will potentially ease or avoid problems involving stipulations between counsel to use a given reporter. The coalition indicates that the Superior Court will provide a list of approved reporters on its Web site once the layoffs begin.

“Courtroom reporting and freelance deposition reporting are entirely different animals,” says Russell Walker, an official reporter at the Chula Vista courthouse. Walker is one of the many layoff candidates. “To be a courtroom reporter, you have to understand the environment, working with the judges, and be aware of appellate procedures for preparation and filing of transcripts. Attorneys can save themselves a lot of time and stress by using one of our laid-off officials who understand all of these factors.”

Following the lead of Los Angeles area reporters who have also suffered

cutbacks, formation of the coalition began late in the summer of 2012, when it became apparent that the courts were going to follow through with layoffs. Interested reporters have been meeting regularly to make decisions on setting up the group, preparing to start reporting proceedings on Monday, November 5.

“We are the best reporters for the courtroom. The courts know us, and we know where to go and what to do, in the proceeding and after, with transcripts. We’ll be ready to serve the civil law community come November,” says Walker.

The coalition has established a Web site, [www.sd-crc.com](http://www.sd-crc.com). Attorneys and parties looking for courtroom reporting can also contact the coalition at (619) 810-7622. >



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# 22ND ANNUAL SDDL MOCK TRIAL COMPETITION

The San Diego Defense Lawyers annual Mock Trial Competition began simply enough 22 years ago as a contest between the University of San Diego School of Law and California Western School of Law. Since then it has gained a national reputation as one of the favorite student competitions in the country.

This year the preliminary rounds of the Competition will be held on the evenings of Thursday, Oct 18 and Friday, October 19 at the downtown San Diego Hall of Justice. The semi-final and final rounds will be held on Saturday, October 20 in the Grace Courtroom on the campus of USD.

For 2012 we have teams from more, and different law schools than ever before including teams from all over the country, including:

American University School of Law	Brooklyn Law School
California Western School of Law	Georgetown Univ. School of Law
Laverne School of Law	Southern Methodist Univ. School of Law
St. Thomas School of Law	Texas Tech University School of Law
Texas Wesleyan Univ. School of Law	Thomas Jefferson School of Law
U.C. Davis School of Law	U.C. Hastings College of Law
University of San Diego School of Law	Whittier School of Law

The preliminary rounds of the Competition are judged by local attorneys who volunteer their time to help make the Competition a success. Panels of three judges hear each trial, scoring the contestants and providing valuable feed-back.

The panels for the semi-final rounds this year will include San Diego Superior Court judges, the Honorable Francis M. Devaney and the Honorable Michael Orfield (Ret.). The final, championship round will be presided over by San Diego legal icon Cary Miller. Mr. Miller was a founding member of the SDDL and was actually the person who helped create the first SDDL Mock Trial Competition 22 years ago.

The SDDL relies on the volunteer spirit of the San Diego legal community to provide the judges that make these trials possible. And if you would like to volunteer on the evenings of October 18 or 19th, or the morning of October 20, 2012, contact David B. Roper at [droper@lorberlaw.com](mailto:droper@lorberlaw.com).

## Recent SDDL Social Events

### Padres Game

Good times were had by all at the 2012 San Diego Defense Lawyers Padres Tailgate on August 17th. The Padres representatives



provided private security and ensured we had everything we needed for the event.

And with I ♥ Tacos cooking up fresh fish tacos, chicken and steak, Mexican

beers, soda and water for all, the only thing we needed was 10 more runs from a lackluster



Padres offense. They ended up losing 10-1 to the San Francisco Giants.

Scoring issues aside, the tailgate was a terrific opportunity for people to meet some of the newer members and catch up with others they haven't seen in a while. The event was sponsored by Merrill Corporation, whose representatives poured the beers and chatted with the 50 or so members and guests who came to the event on an unusually warm Thursday evening. >

### Sunset Cruise

San Diego Defense Lawyers sunset cruise around San Diego Harbor turned out to be an incredibly successful event! Our event sponsor ESI went out of their way to show SDDL members a festive evening of great food, wine, and the sites of San Diego Harbor. Their reps were congenial and entertaining. The private two-level Emerald Hornblower ship provided plenty of space for members and guests to enjoy a full bar and seemingly endless appetizers on deck in the open air, and full buffet dining downstairs.



Some of the highlights from the cruise included crisscrossing along the supports and underneath the Coronado Bridge,



Cruising through Glorietta Bay and past the Del, and numerous military exercising being conducted by the Navy Seals. The two-hour event at sunset, long enough to take in the sites and sea air, but without anyone suffering any ill effects from the cruise, was a good time had by all and is sure to be an annual event. >

## September Brownbag

San Diego Defense Lawyers' September lunchtime MCLE presentation entitled, "Litigating with your Smartphone, iPad or other Tablet Device," was a standing-room only event. The speaker, Erin Pedersen, Esq., of Peterson Reporting, provided members with an introduction and insights into the top litigation "apps" available today for use in your general practice, at depositions, mediation, arbitration and trial. The program illustrated the practical applications for apps that could be used for legal research, editing motions/letters, photographing and organizing deposition exhibits on your iPad, and how to present evidence wirelessly from your iPad.

The September Brownbag also was an opportunity for the membership to vote on changes to the SDDL By-Laws, which now limit the number of SDDL board members from any one firm. The members also voted to all allow electronic voting. >

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### Changing Times - The California Code of Civil Procedure Is Amended to Limit Depositions to Seven Hours

silver lining, however, the limit creates an incentive for plaintiffs to identify all parties in the case before depositions begin, in order to avoid repeated depositions of the plaintiff by late-added parties. Savvy counsel will address the issue of deposition time restrictions early in the case, ideally through a joint case management order presented at the first Case Management Conference. >

## SDDL'S FIRST ANNUAL EIN- "STEIN" TRIVIA NIGHT

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# Denial of Coverage Under E&O Policies Based Upon Untimely Notice of Claim

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In its unpublished opinion in the recent case, *In Re/Max Mega Group v. Maxum Indemnity Co.*, Case No. 11-55142 (9th Cir. March 12, 2012), the Ninth Circuit Court of Appeals upheld a denial of coverage under an E&O Policy as the insured had notice of the claim well before the Policy’s 30-day notice provision highlighting the importance of prompt notice of any claims to professional liability carriers.

The Declarations Page of the Professional Liability Claims Made Policy issued to Re/Max Mega Group (“Re/Max”) by Maxum Indemnity Company (“Maxum”) for the period of December 22, 2006 through December 22, 2007 provided the Retroactive Date was the inception date of the policy, December 22, 2006, and that coverage would not apply to any “negligent act, error or omission” that occurred prior to that date. Further, the Maxum policy provided claims must be reported “as soon as practicable, but in no event later than thirty (30) days after notice to any insured.”

The underlying case involved Re/Max and one its agents, Lynn Kim (“Kim”) who represented Suk Young Yoo (“Yoo”) in the purchase of a residence in Rancho Palos Verdes on October 19, 2006. Yoo claimed the seller failed to disclose material facts regarding the subject project and that Kim and/or Re/Max knew or should have disclosed such material facts related to the subject property. Prior to filing litigation, Yoo’s attorney sent a letter on January 26, 2007 to Re/Max advising of Yoo’s claims. Yoo’s attorney sent additional letters on February 8 and 22, 2007 threatening litigation unless Re/Max agreed to participate in mediation. Mediation took place on April 6, 2007 but was

unsuccessful. Yoo then filed litigation against Re/Max on May 7, 2007. On June 6, 2007, Maxum received a copy of Yoo’s complaint. This was its first notice of the Yoo claim.

Thereafter, on June 11, 2007, Maxum declined coverage to Re/Max on the basis the alleged “negligent acts, errors or omissions” occurred prior to the Retroactive Date of the policy, December 20, 2006, and therefore the claim and any defense in litigation were not covered. The denial letter stated Maxum was not waiving any other rights or privileges under the terms and conditions of the policy. Later, Maxum also raised a late notice defense to coverage.

Re/Max then filed coverage and bad faith litigation against Maxum in the Los Angeles Superior Court, which was later removed to Federal Court. Once in Federal Court, Maxum filed a motion for summary judgment. The Court granted Maxum’s motion and the Court found that Re/Max had notice of Yoo’s letters in January 2007 (or March 2007 at the

latest) but did not report the claim or forward the letters to Maxum until later May/June 2007, almost two months after the 30-day notice deadline in the policy had passed. Re/Max argued the letters did not constitute “claims” within the meaning of the policy. This position was refuted by the Court and Yoo’s letters were determined to be claims because they asserted Re/Max was liable for negligence and fraud, threatened litigation, requested mediation and included a copy of a civil complaint for damages. They, therefore, constituted written demands for money or services.

This case, along with others such as *Pacific Employers Ins. Co. v. Superior Court*, 270 Cal.Rptr. 779 (1990), from the insured’s perspective illustrate the importance of evaluating the specific wording and provisions of professional liability policies with regard to providing notice of claims during policy periods. What to take from this unpublished decision: Late notice can result in a loss of coverage. >

# Significant Changes to California Mechanic’s Lien

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California’s mechanic’s lien law provides various rights and remedies to persons who provide labor, service, equipment or material to real property, including the right to record a mechanics lien on the improved work for both site work and construction, the right to recover construction funds from

a construction lender pursuant to a stop notice, and the right to recover against a bond guaranteeing payment in the event of default.

On July 1, 2012, pursuant to Senate Bill No. 189 (“SB 189”), all of California’s laws regarding mechanics’ liens, stop notices and payment bonds

were revised, renumbered, supplemented and/or replaced. Although some provisions of SB 189 went into effect prior to July 1st, the majority of the changes and the most significant changes went into effect on July 1st. The bulk of the changes, however, are not substantive and many of the provisions of the Mechanic Lien Laws are essentially unchanged.

As of July 1st, all of the mechanics' lien laws and related laws were moved from Civil Code Sections 3081.1 through 3267 and replaced with new laws set forth at Civil Code Sections 8000 through 8848 and 9000 to 9566. Among these are two provisions that were modified as part of 2009's A.B. 457 which went into effect in January 2011: a change in the required form of mechanics lien claim and method of service (Civ. Code § 3084) and the new requirement that claimants record a lis pendens within 20 days after filing an action to foreclose on mechanics liens (Civ. Code § 3146).

The following is a summary of significant and substantive changes to the Mechanics Lien Laws which took effect on July 1, 2012:

**Definition of Completion.** The deadline for recording a mechanics lien is generally triggered by the "completion" of a work of improvement. Under the laws prior to July 1, 2012, acceptance by the owner was one of the things deemed to constitute "completion." Under new Civil Code §8180, that is no longer the case. Civil Code §8180 deleted acceptance by the owner as one of the requirements for completion but maintained the other circumstances that constitute "completion" such as actual completion of all work on the project, occupation or use coupled with cessation of labor, a cessation of labor for 60 continuous days, or recordation of a notice of cessation after cessation of labor for a continuous period of 30 days, and acceptance by a public entity.

**Time for Recording Notice of Completion.** Under the laws prior to July 1st, owners must record notices of

completion within a window of 10 days after actual completion of the project. Under the new law, Civil Code §8182, that time period is extended to 15 days.

**Preliminary Notice.** Under the laws prior to July 1st, a "Preliminary 20-Day Notice" must be served by most types of lien claimants at the outset of their work, to preserve their lien claim, payment bond, and stop notice rights. Under the new law found at Civil Code §8200, this notice is referred to simply as a "Preliminary Notice." The required language for the Preliminary Notice has been changed. Section 8200 eliminates ambiguity in the current law and makes clear that contractors in direct contract with the project owner need only provide a Preliminary Notice to construction lenders and reputed construction lenders, if any.

**Waiver and Release of Lien Rights.** In order to ensure that a "downstream" subcontractor has validly released its right to assert lien, stop notice, or payment bond rights, the law requires that specific waiver and release language be used. Under the new law, found at Civil Code §8132, et seq., the required language has changed slightly. Accordingly, one should be careful to utilize the correct statutory Conditional Waiver and Release form as of the day the release is executed. The form utilized for progress payments (as opposed to final payment) does not cover certain disputed or extra work items, or claims based on breach of contract, so "upstream" parties may want to supplement the statutory form with additional releases.

**Release Bond.** Under the new law, found at Civil Code §8424, the amount of the bond required to release property from a lien has been reduced from 150 percent to 125 percent of the lien amount.

**Attorney's Fees on Petition to Expunge Lien.** The new law creates a stronger incentive to parties to remove liens on which they did not timely foreclose to make sure their liens are

formally released. The law prior to July 1st, capped the maximum recovery of attorney fees to a prevailing party on petitions to expunge stale liens at \$2,000. Under the new laws, effective July 1st, all "reasonable" fees are recoverable to the prevailing party. The new law also adds a requirement that an owner must first make a demand that the lien claimant withdraw the lien at least 10 days before initiating a petition to expunge.

**Conversion of Design Professional Liens into Mechanic Liens.** Under existing law, design professional liens were extinguished upon commencement of work. As of July 1, 2012, design professionals have the added protection of being allowed to convert their design professional liens into a mechanic's liens.

Despite the changes to the mechanic's lien laws, it should be noted, from a practical standpoint, that there is no need to re-file notices that were filed under the old laws since the effectiveness of a notice given or other actions taken on a work of improvement prior to July 1, 2012, is governed by the applicable law in effect prior to July 1, 2012, and not the new laws under SB 189 which went into effect on July 1, 2012.

In addition to the above practical effects on practitioners and parties, the effect of the new Mechanic Lien Laws will impact the inside of the courtroom as well as the Courts are now subjected to new requirements with respect to releasing liens. Under the law prior to July 1st, the Court could indefinitely continue the hearing on a petition for release of a lien upon showing of good cause. Under the new law, effective July 1st, Courts must rule and make any necessary orders on a petition for release of a lien no later than 60 days after the filing of the petition. Additionally, under the new laws, an owner may now request an expedited proceeding to determine its liability for payment under a stop work notice. These changes could significantly expedite the lien release process. >

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**Local News of Civil Litigation-All the Litigation News That's Fit to Print or Broadcast**

underrepresented.

While medical malpractice cases are over represented to some degree, they do not stand out as particularly prominent. In fact, perhaps most surprising in Table 2 is the presence of libel and slander cases, which appear as or more frequently than do medical malpractice cases; this might reflect the media's self-interest in defamation cases. One final point regarding the reporting of tort cases: there do not appear to be any noteworthy differences between television and newspapers in the kinds of tort cases reported.

While some silly or odd cases are reported, they are relatively rare, at least on local television news—we do not have similar information for local newspaper reports. That is, in contrast to Haltom's expectation that outrageous inputs [would] surface in [the] news media,<sup>31</sup> we categorized only 21 out of 716 television stories examined separately by the senior author as reporting such cases. Furthermore, some of these cases, while unusual, are clearly serious. For example, we found coverage of two cases related to sperm, one in which a woman had been inseminated by sperm that was not her husband's and one in which someone other than a man's wife had been given his sperm. Yet another case involved a teacher who was fired by a Catholic school after undergoing in vitro fertilization (a violation of Catholic teaching). By contrast, in the "silly" category we would include cases in which a man sued a tattoo parlor that had misspelled a tattoo (although certainly serious to the plaintiff), a man who sued to stop paying alimony to his ex-wife on the grounds that the ex was now a man having had sex reassignment surgery, a runaway bride's suit against her spurned groom over royalties from a book about what had happened, a man who claimed he had been given the wrong hairpiece, and lastly, a threat by Mattel to file a suit against an artist who created a painting showing Barbie

being intimate with another female doll.

**What Gets Reported**

Much of the prior research has focused on the reporting of case outcomes, particularly verdicts. However, what, in terms of what is *happening* in a case, is reported by local news sources? Table 3 shows the distribution of what is being reported in terms of case stage. In contrast to the impression left by the extant research based solely on print media, only a small fraction of the local news clips report verdicts: 2.7% of local television reports and 4.5% of local newspaper reports.<sup>32</sup> Moreover, while the extant research reports that plaintiffs' verdicts are over reported, this does not appear to be the case for local television reports (47.8%) although it might be for local newspapers (71.0% plaintiffs' verdicts).<sup>33</sup> Many more stories report settlements:

9.2% of television stories and 14.2% of newspaper stories.<sup>34</sup> For both local television and local newspapers, reports most often involve cases that are pending. Activity at the appellate level is more often reported than are trials or verdicts. The pattern for local newspapers shown in Table 3 differs significantly from what Haltom<sup>35</sup> found in his study of a sample of articles from 28 newspapers on four randomly selected dates in 1993. He found 29.5% pretrial (including filing), 12.4% trial, 38.3% "decisions" (defined as "verdicts and damages"),

0.2% post-trial (presumably including appeals), and 19.6% "unfocused." We do not have an explanation of why our figures for newspapers differ so much from Haltom's.

Why are stories about outcomes so rare in our data, particularly given the impression left by studies of print media that there is a lot of

reporting of verdicts, particularly plaintiffs' verdicts? The most likely explanation is that we have taken care to pick up *any* reference to lawsuits while the print media based studies, other than Haltom's study of 28 newspapers and Haltom and McCann's study of 5 national newspapers, have searched the print sources in a way that mentions of case filings, pretrial processes, or negotiations were not picked up.

The clipping process we relied upon for the television stories required someone to actually watch *every* story on the broadcasts; print media studies, including ours, do not entail reading every story in the sample of newspapers considered. For our newspaper data, it is likely that our detailed and complex search strings turned up many more stories than did the search strings used in prior studies.

Haltom and McCann note that large demands, awards, and settlements tend to produce news coverage ("holler of the dollar"), which by implication leads the public to a distorted image of how the tort system (and the civil justice system more generally) works.<sup>36</sup> In fact, only a small fraction of our news clips make reference to amounts of damages claimed, awarded, or received in settlement, and even for tort cases only about a quarter of cases refer to dollar amounts.<sup>37</sup> Furthermore, for newspapers, stories appearing on a first page are slightly *less* likely than stories "inside" to mention a specific dollar figure.<sup>38</sup> This suggests factors other than "holler of the dollar" account for the deemed newsworthiness of most cases.

However, while most stories do not report dollar figures, when such figures are reported they tend to be big. We have figures on verdict amounts won by plaintiffs for only 55 clips across both television and newspapers. Two-thirds of those verdicts exceed \$1 million; the median amount in the 55 clips is \$9 million. To put these figures in perspective, consider the findings of the most recent (2005) Civil Justice Survey of State Courts (CJSSC), which covers verdicts from a sample of urban, suburban, and rural jurisdictions. The CJSSC found that the median award was \$28,000 (after adjusting for factors such as comparative negligence), and only 4.4% of the awards exceeded \$1 million.<sup>39</sup>

Table 4 extends our analysis to include dollar figures reported for amounts sought and for settlements as well as verdicts. The picture changes a bit, but not enough to produce a different message. Looking at awards, settlements, and demands combined,

**TABLE 3. Stage of Case Reported by Local News**

Stage	Television	Newspaper	Both
Presuit	6.4%	4.6%	5.1%
Filing of suit	12.2%	19.6%	17.5%
Suit pending	49.2%	39.3%	42.0%
Trial	2.6%	6.7%	5.6%
Verdict	2.7%	4.5%	4.0%
Appeal	4.6%	11.1%	9.4%
Unfocused or other	22.3%	14.2%	16.4%
Number of cases	1,019	2,627	3,646

**TABLE 4. Amounts Sought, Awarded, and Obtained**

	All Case Types		Torts		Nontorts	
	Television	Newspaper	Television	Newspaper	Television	Newspaper
Median	\$4 million	\$6 million	\$4 million	\$2.35 million	\$8 million	\$8.6 million
Percent > \$1 million	66.3%	63.7%	68.2%	60.3%	64.3%	65.0%
Number of reports	205	507	107	141	98	366
Percent of reports tort	52.2%	27.8%				

the medians for television and newspapers are \$4 million (66.3% more than \$1 million) and \$6 million (63.7% more than \$1 million) respectively. One difference between television and newspapers is the higher likelihood that a report with a dollar figure would be associated with a tort case for television reports compared to newspaper reports, but this difference reflects the higher proportion of tort cases in television stories (see Table 1 above).<sup>40</sup> Looking separately at torts and other kinds of cases, the likelihood that the amount involved exceeds \$1 million is similar for torts as compared to other cases. At first glance, it does appear as though the

plaintiff or victim, and are more likely to provide some information on the defendant’s response.

**Summary and Conclusions**

We have sought to provide a basic mapping of the nature of reporting on civil litigation by local television and local newspapers. While we cannot formally generalize from our data due to the nature of the sample design, the findings suggest some potential correctives to the extant research which is based largely on studies of national print media sources.

First, while most of the public debate

about civil justice focuses on torts, a minority of the reports about lawsuits in both media concern torts (although the single largest category of case type reported on local

television news concerned torts). The most often discussed areas of torts, product liability and medical malpractice, actually constitute a minority of the reports within the category of torts. A substantial number of reports concern intentional torts (assault and abuse) or injuries and deaths arising from fires and explosions.

Second, relatively few reports on local television news deal with case resolution. Reports of case initiation are much more common. Among case resolutions reported, many more deal with settlements than with adjudicated outcomes. Among the small number of stories reporting actual verdicts, the stories do not strongly favor one side

or the other.

Third, dollar figures do not feature prominently in most reports. Nonetheless, when amounts of money are mentioned they tend to be fairly large figures. At least in terms of amounts

mentioned, our data are generally consistent with studies of case outcomes reported in the print media: it is the larger dollar figures that are reported.

Finally, the apparent difference in coverage between national/regional media (as reflected in other studies) and our study of local media is itself a striking finding, though not particularly surprising. The threshold for what becomes news is inherently different for local media with their narrower geographic focus and smaller audiences. To state the obvious, the vast majority of stories well worth coverage by local media generally won’t rise to the level of national or even regional media attention. It is only the truly unusual civil case that can achieve national prominence, and such cases almost certainly are not going to be reflective of the norm for civil justice.

What does this mean for proponents and opponents of civil justice reform? The fact that lots of suits get filed but few seem to reach resolution might reinforce the idea that large number of suits are without merit (even though most of those that we hear about being filed but not about being resolved actually do lead to settlements or adjudicated resolutions). While dollar figures are usually not mentioned, those that are mentioned—in either local or national media—would lead news consumers to believe that the typical case is considerably larger than it actually is, which in turn would lead them to think that lawsuits frequently, or even usually, involve large sums of money.

Alternatively, the fact that it is large verdicts that tend to get reported would serve to create and reinforce the view that juries are out of control. This in turn would reinforce the message of tort reform advocates that damage awards should be capped. To the degree that viewers and readers form their impressions of the need for tort reform primarily from watching or reading national media, where personal injury tort cases dominate reporting of civil justice, the impact would be magnified.

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**TABLE 5. What is Reported in the Story**

What is reported	Television	Newspaper	Both
Lawsuit has been filed	66.2%	74.7%	72.3%
Lawsuit being considered or to be filed	6.6%	5.6%	5.9%
Description of what’s at issue	71.5%	68.4%	69.3%
Description of impact on victim	29.5%	39.4%	36.7%
Response of defendant	20.8%	29.3%	26.9%
Link to other similar cases	4.4%	6.5%	5.9%
Other information reported	10.2%	2.9%	4.9%
Number of cases	1,019	2,627	3,346

medians differ substantially by case type; however, it turns out that while \$8.6 million is the median (50th percentile) for newspaper reports for nontorts, \$2.35 million is the 42nd percentile; for torts, while \$2.35 million is the 50th percentile for newspapers, \$8 million is the 58th percentile. Hence there is not really a great deal of difference here, either across case types or across media with regards to the magnitude of the amounts at issue.

Table 5 provides a bit more detail on the broad kinds of information reported. Newspapers are more likely to report that a suit has been filed, are more likely to provide some information on the impact on the

## Court of Appeal Revisits When Loss of Consortium Claims Accrue

By Brittany H. Bartold, Esq.  
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In June, Division Three of the Second Appellate District Court of Appeal issued an opinion in a writ proceeding in *Vanhooser v. Superior Court* (June 1, 2012, B239667) \_\_\_ Cal.App.4th \_\_\_, holding that a couple’s marital status at the time of diagnosis or discovery of actual injury or symptoms of an asbestos-caused illness, rather than marital status at the time of exposure, determines whether the first element of a loss of consortium right of action is satisfied.

In *Vanhooser*, the petitioner’s husband was exposed to asbestos in the 1960’s and 1970’s during his service in the United States Navy, and until 1990 as an automobile mechanic during which time he used products provided by defendant Hennessy. The couple was married on or about December 31, 1991. However, the husband first exhibited symptoms of mesothelioma in late 2010. He was diagnosed in 2011. Petitioner included a loss of consortium cause of action in her husband’s suit for negligence and strict products liability. The trial court granted Hennessy’s summary judgment motion finding that petitioner had no claim for loss of consortium because she was not married to her husband when he was exposed to the asbestos. Writ proceedings followed the trial court’s ruling.

The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order

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## Supreme Court Revisits the Common Law “Release Rule” and Addresses the Effect of Section 877 of the Code of Civil Procedure Bottom Line

By Brittany H. Bartold, Esq.  
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Recently, the California Supreme Court published its opinion in *Leung v. Verdugo Hills Hospital* (August 23, 2012, S192768) \_\_\_ Cal.4th \_\_\_, repudiating the common law “release rule.” The Leung court held that “when a settlement with a tortfeasor has judicially been determined not to have been made in good faith, nonsettling joint tortfeasors remain jointly and severally liable, the amount paid in settlement is credited against any damages awarded against the nonsettling tortfeasors, and the nonsettling tortfeasors are entitled to contribution from the settling tortfeasor for amounts paid in excess of their equitable shares of liability.”

The plaintiff sued a pediatrician and the hospital in which her son was born after he developed jaundice and kernicterus, which caused irreversible brain damage. Before trial, plaintiff settled with the pediatrician for \$1 million. However, the trial court denied the pediatrician’s motion for a determination of good faith settlement finding that the settlement was not in good faith. (*Ibid.*) The jury then awarded plaintiff almost \$15 million and found that the pediatrician was 55 percent at fault, the hospital was 40 percent at fault and the parents were 5 percent at fault. The hospital appealed, contending that under the common law “release rule,” the plaintiff’s settlement with the pediatrician also released the nonsettling hospital from liability for plaintiff’s economic damages. The Court of Appeal agreed stating that it was bound by the common law release rule. (*Id.* at p. 6.) Under this rule, “a

plaintiff’s settlement with, and release from liability of, one joint tortfeasor also releases from liability all other joint tortfeasors.” The rationale was that there could only be one compensation for a single injury and because each joint tortfeasor is liable for all of the damage, any joint tortfeasor’s payment of compensation in any amount satisfies the plaintiff’s entire claim.

The Supreme Court explained that Code of Civil Procedure section 877, governing good faith settlement determinations, was enacted to remedy the harsh results caused by the common law release rule. However, in this case, section 877 was found to not apply because the trial court determined that the settlement was not made in good faith. The Leung court further held that when a plaintiff’s settlement with one of several defendants has been determined by a trial court not to have been made in good faith, liability should be apportioned under the set-off-with-contribution approach. Under this approach, “the money paid by the settling tortfeasor is credited against any damages assessed against the nonsettling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess of their equitable shares of liability.” The court explained that this approach did not change the respective positions of the parties and it was consistent with comparative fault principles and the rule of joint and several liability. Therefore, the Supreme Court concluded that the common law release rule was no longer to be followed in California. >

# New Supreme Court Opinion Addresses Witness Interviews and the Work Product Privilege

By Brittany H. Bartold, Esq.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

Recently, the California Supreme Court held, in *Coito v. Superior Court* (June 25, 2012, S181712) \_\_\_\_ Cal.4th \_\_\_\_, that recordings of witness interviews conducted by investigators employed by defendant's counsel are entitled as a matter of law to at least qualified work product protection. The court also held that information responsive to form interrogatory number 12.3, concerning the identity of witnesses from whom defendant's counsel has obtained statements, can also be subject to protection, if certain tests are met.

In *Coito*, the plaintiff filed a wrongful death complaint after her son drowned in the Tuolumne River in Modesto, California. Counsel for the state dispatched investigators to interview four juveniles who witnessed the drowning. (Ibid.) The content of one of the witness's recorded interview was later used during a deposition. The plaintiff then served the state with supplemental interrogatories and document demands seeking the names, addresses, and telephone numbers of individuals from whom written or recorded statements had been obtained and seeking production of the audio recordings of the four witness interviews. The state objected to the requested discovery based on the work product privilege. The trial court sustained the objection, but the Court of Appeal reversed, concluding that the work product protection did not apply.

The Supreme Court granted review and reversed. The court first looked to the policy and legislative history of the work product privilege and held that witness statements obtained as a result of an interview conducted by an attorney or by an attorney's agent at the attorney's request "are entitled as a

matter of law to at least qualified work product protection." According to the court, witness statements may be entitled to absolute protection if the attorney can show that disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories," quoting Code Civ. Proc., § 2018.030. "Upon an adequate showing, the trial court should then determine, by making an in camera inspection if necessary, whether absolute work product protection applies to some or all of the material." If the absolute privilege does not apply, "then the items may be subject to discovery if plaintiff can show that "denial of discovery will unfairly prejudice [her] in preparing [her] claim . . . or will result in an injustice," again quoting Code Civ. Proc., § 2018.030.

With its decision in *Coito*, the court disapproved of earlier Court of Appeal decisions in *Fellows v. Superior Court*, (1980) 108 Cal.App.3d 55, *Rodriguez v. McDonnell Douglas Corp.*, (1978) 87 Cal.App.3d 626, *People v. Williams* (1979) 93 Cal.App.3d 40, and *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, to the extent those decisions suggest that a witness statement taken by an attorney does not, as a matter of law, constitute work product. The court also stated that *Greyhound Corp. v. Superior Court*, (1961) 56 Cal.2d 355, and *Nacht & Lewis Architects, Inc. v. Superior Court*, (1996) 47 Cal.App.4th 214, should not be read to support such a conclusion.

As to form interrogatory number 12.3, which requests the identity of

witnesses from whom defendant's counsel has obtained statements, the *Coito* court held that responsive information was not automatically entitled as a matter of law to absolute or qualified work product protection. Instead, according to the court, the interrogatory usually must be answered. However, such protection can be obtained if the objecting party persuades the trial court that disclosure "would reveal the attorney's tactics, impressions, or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts." The court explained: "[T]he trial court should then determine, by making an in camera inspection if necessary, whether absolute or qualified work product protection applies to the material in dispute."

The *Coito* decision provides protection from plaintiff discovery requests focused on uncovering witness investigations and statements that interfere with the work product privilege. >



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# Prevailing Party Clauses—An Insurance Professional's Perspective on Their Usefulness and Effect in Contracts for Design Professionals

By Dorothy Amundson \*

CAVIGNAC & ASSOCIATES

A "prevailing party" contract clause (also called an attorney's fees clause) is a contractual provision that requires the loser-or "non-prevailing party"-of a lawsuit or claim to pay the prevailing party's legal fees. In California as in almost all jurisdictions in the United States, in the absence of such a contractual provision or a statutory mechanism, each party typically bears their own legal expenses. Often the legal costs-attorneys' fees, court costs, expert-witness fees and other related expenses-may equal or exceed the amount in dispute.

The term prevailing party suggests that there will be a winner and a loser in every lawsuit. But results of litigation are seldom that clear. Courts and juries often find merit in aspects of both the plaintiff's and the defendant's claims. In such cases, the judge or jury often awards partial judgments to both parties. Absent definitional language within the contract, a court may consider any award to a client as prevailing. For example, if the owner sues a design professional, and one of their sub-consultants is brought into the suit, although the owner may have 40 percent liability, with the sub-consultant being attributed 50 percent and the design professional only 10 percent, the owner may be deemed to have prevailed against the design professional. In this situation, had there been a prevailing party clause in the contract, the design professional would likely face a claim to pay the owner's legal expenses.

Most courts in the United States do not award legal costs to the prevailing ("winning") party unless a specific statute or contractual provision allows for recovery of these expenses. While there are jurisdictions that have enacted attorney-fee-shifting statutes, these tend to favor the plaintiff in actions brought against "bad guys," such as violators of

EPA regulations or landlords who refuse to release security deposits. But what of the design professional who is named in a lawsuit of little or no merit? Very often, merely the threat of the huge expense of a legal squabble is enough to make a design professional throw in the towel and offer to settle-even if he or she is not at fault. Consequently, there has been much recent discussion about whether or not a prevailing party clause is, in fact, in a design professional's best interest. If the agreement is silent on the issue, both parties are generally responsible for their own legal expenses in a lawsuit, no matter who "wins" the dispute. Some clients demand a prevailing party clause that is one-way, giving only the client the right to recoup legal costs. Alternatively, some agreements contain a bilateral clause stating that the prevailing party-whichever that may be-is entitled to recover his or her legal expenses from the loser. Design professionals sometimes consider this two-way provision as a way to curb frivolous lawsuits and their related legal expenses. But there is an honest difference of opinion as to whether it helps more than it hurts to have prevailing party language in such agreements. In short, the clauses are double-edged swords. Notably, today neither the AIA nor EJCDC standard documents contain a prevailing party clauses in their owner/consultant agreements. Why is this?

First, there is the obvious risk of creating additional liability - if a court or other trier of fact finds the design professional negligent as alleged, then the design professional must pay the other party's legal expenses in addition to the actual damages caused. But, making matters worse, such a voluntary contractual assumption of liability for the other party's legal defense costs may not be covered by a professional liability policy. This is because professional

liability insurance covers the design professional's legal liability arising out of their negligent acts errors or omissions. It does not generally cover contractual assumptions of liability, unless the design professional would be legally liable in the absence of the contract clause. If there is such a provision and a court finds the design professional even partially responsible for negligence as charged, the design professional may well have to pay the other party's legal expenses-in addition to the damages they caused. And, of course, those fees alone may well exceed what the design professional would have had to pay absent the clause. What's more, because such liability may not be covered, the design professional may have to pay the legal costs out of their own pocket. But the existence of such clauses also have a deterrent effect, creating risk to a would-be plaintiff that, at times, may be the linchpin to a decision not to sue. Because of this, insurance companies remain divided on the usefulness of prevailing party clauses. Some companies continue to believe that these clause effectively discourage claims. Other insurance companies do not support their usage, taking the position that that the assumption of another's legal fees does little to discourage claims and leads to damages not covered under a professional liability policy.

As an insurance broker to many design professionals, I normally suggest the design firm delete any unilateral prevailing party language. Not only are such clauses unreasonable, my experience is that they broaden the design firm's liability and may prove uninsurable. If a design firm's potential client refuses to remove the clause, then - at a minimum - it is suggested that the language be made mutual in effect. It is also recommended to include language that defines recoverable legal costs, or limits the

recovery to "reasonable" costs - otherwise a client could pull out all the stops in mounting an extravagant claim with the design firm footing the entire bill.

Are there potential problems with a mutual prevailing party clause? Absolutely! Even if the insurance company agreed to cover prevailing party costs at the time the contract is entered into, there is no guarantee these costs will be covered at the time a claim is made and reported. Remember: Professional liability policies are claims-made and reported policies; the original insurance company may have changed its policy towards prevailing party clauses or the design firm may have a different insurer by the time a claim arises and is tendered.

What to do? For insurability reasons, the trend seems to be that brokers recommend deleting any prevailing party clauses from professional services contracts. While there is no guarantee design firm can stop frivolous lawsuits, this strategy may minimize their frequency. Another tactic in negotiation the contract is to suggest the inclusion of a contractual certificate of merit clause that, as a condition precedent to the filing of an action, requires the client by contract to obtain written certification from a member of the specific profession that a case that has legal merit to a degree above and beyond the requirements of Section 411.35 of the Code of Civil Procedure. Another strategy is to include an alternate dispute resolution (ADR) clause. An ADR clause requires that before a party can file a formal lawsuit against the other, it must first submit to an alternate dispute resolution process technique such as mediation. Such a clause can have the effect of lowering legal costs incurred by both parties, help reach an amicable decision, and preserve the design firm's relationship with the client.

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## COURT OF APPEAL ISSUE

# New Legal Malpractice Opinion Regarding the Statute of Limitations and Actual Injury

By Brittany H. Bartold, Esq.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

On June 18, 2012, Division Three of the Fourth Appellate District Court of Appeal (Santa Ana) published a helpful and well-written legal malpractice opinion in *Croucier v. Chavos* (2012) 207 Cal.App.4th 1138. In *Croucier*, the court discussed the standards for equitable tolling and actual injury in a legal malpractice case, holding that "'actual injury' for purposes of [Code of Civil Procedure] section 340.6 cannot depend on absolute proof as a matter of law that damages were suffered."

In the underlying business litigation action, the attorney defendant successfully obtained a default judgment in favor of the plaintiffs, but failed to successfully enforce the judgment. In June 2008, the plaintiffs hired a new attorney to file a fraudulent conveyance action against the individual defendants from the business litigation. Then, in August 2009, plaintiffs filed the present action against the attorney defendant and his law firm for professional negligence based upon the attorney's failure to successfully enforce the judgment. The trial court sustained a demurrer to the first amended complaint without leave to amend based upon the statute of limitations.

The Court of Appeal affirmed, holding that the plaintiffs discovered the wrongful acts by June 2008 when their new attorney took over representation in the underlying business litigation and filed the fraudulent conveyance action. The court rejected plaintiffs' argument that they had not suffered actual injury in June 2008 since they did not have evidence that the judgment was collectible at that time. The court explained that "[t]he factual question of whether the judgment was actually collectible goes to the merits of the

malpractice action, not the question of whether the statute of limitations tolled." According to the court, "[s]ection 340.6 pertains to the discovery of an alleged wrongful act or omission, and 'actual injury' that logically follows assuming the allegations of wrongful acts or omissions are correct." Therefore, the plaintiffs suffered "actual injury" by June 2008 when the attorney defendant failed to enforce the judgment in the underlying business litigation.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, the Court of Appeal previously held that the test for actual injury under section 340.6 was whether the plaintiff sustained any damages compensable in an action against an attorney for a wrongful act or omission arising in the performance of professional services. The client ordinarily suffers damage when it discovers the attorney's error. The *Croucier* court applied these principles and determined that, under *Jordache*, the diminution of the plaintiffs' ability to enforce the judgment represented an actual injury sufficient to support a legal malpractice cause of action.

Further, the *Croucier* court explained that the efforts of plaintiff's new attorney to remedy the attorney defendant's mistakes did not toll the statute of limitations. This was because the existence and effect of the attorney error did not depend upon a judicial resolution of a separate action. According to the court, although further proceedings might reduce or remedy the plaintiffs' damage, only the malpractice action could result in findings as to whether the attorney defendant actually committed malpractice and whether the judgment could have been enforced. >

# Insurance Law Update

By James M. Roth, Esq.  
THE ROTH LAW FIRM

Three recent appellate decisions — two from the Fourth District and one from the Ninth Circuit — highlight the continued efforts to judicially refine the law relative to the insurance arena. The Fourth District recently found that (1) an insured’s purported assignment of liability insurance policies written on an “occurrence” basis to the insured’s spinoff company required the insurers’ consent, notwithstanding Insurance Code § 520, which provides that an “agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss,” and *even if the events giving rise to liability occurred before the assignment, where the policies prohibited assignment without the insurers’ consent*; and (2) an insurer waived the right to seek arbitration under an agent’s contract when the *insurer actively litigated the agent’s statutory claims for more than a year before seeking arbitration*. The Ninth Circuit recently interpreted California law to impose a duty on insurers to effectuate settlement where liability is reasonably clear *even in the absence of a settlement demand*.

## Anti-Assignment Provisions in Liability Policies Remain Enforceable in California

In the case styled *Fluor Corporation v. Superior Court* (2012) 2012 WL 3741979, the Fourth District Court of Appeal (Division 3) held that an insured’s purported assignment of liability insurance policies written on an “occurrence” basis to the insured’s spinoff company required the insurers’ consent, notwithstanding Insurance Code § 520, which provides that an “agreement not to transfer the claim of the insured against the insurer after a loss has happened, is

void if made before the loss,” and even if the events giving rise to liability occurred before the assignment, where the policies prohibited assignment without the insurers’ consent.

Plaintiff, Fluor Corporation, is the second of two corporations named Fluor Corporation. Plaintiff, described here as Fluor-2, was created in 2000 as the result of a corporate restructuring transaction called a “reverse spinoff” in which Fluor-1 transferred various assets to Fluor-2. Following the transaction, both Fluor-1 and Fluor-2 continued to operate as independent companies with neither having ownership interest in the other.

Between 1971 and 1986, Hartford Accident & Indemnity Company (Hartford) issued 11 comprehensive general liability policies to the original Fluor Corporation. The policies all were “occurrence” policies that obligated the insurer to defend and indemnify against liability for bodily injury or property damage, provided the injury or damage occurs during the policy’s coverage period. Between 2001 and 2008, Hartford had paid defense and indemnity costs on behalf of both Fluor-2 and Fluor-1 in lawsuits alleging injuries suffered as a result of exposure to asbestos at the original Fluor Corporation’s work sites before Fluor’s corporate restructuring in 2000. However, in 2009, Hartford questioned whether Fluor-2 was covered under the policies issued to Fluor-2’s predecessor. Fluor-2 argued that the Hartford policies were assigned to it as part of the restructuring transaction, while Hartford maintained that any such assignments were invalid because the policies all contain consent-to-assignment

provisions prohibiting any assignment of any interest in the policies without Hartford’s consent.

Hartford sought a declaratory judgment that it was neither obliged to defend nor indemnify Fluor-2 for the subject asbestos claims, and it asked to be reimbursed for defense costs and indemnity payments already made on Fluor-2’s behalf. Fluor-2 filed a motion for summary adjudication based on the purported invalidity of the consent-to-assignment provisions. As the court of appeal later observed, Hartford’s case for the enforceability of the consent-to-assignment provisions should have been “open-and-shut,” given the California Supreme Court’s decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934, 129 Cal.Rptr.2d 828, upholding such provisions under similar factual circumstances. Fluor-2, however, challenged the validity of *Henkel* based on the supreme court’s failure to consider a “statutory directive” that none of the scores of briefs filed with the Supreme Court had cited and that only one court has cited in the 130 years since its enactment. Originally enacted in 1872 as part of the original codification of California law and later moved to the Insurance Code in 1935, the provision on which Fluor-2 relied, Insurance Code § 520, provides: “An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss...”

The trial court passed on the opportunity to disregard *Henkel*, and denied Fluor-2’s motion, “[The Supreme Court] can be dead wrong,” observed the trial judge, “but they are still the



Supreme Court.” After the Fourth Appellate District denied Fluor-2’s motion for a writ of mandate, Fluor-2 petitioned the California Supreme Court for review. The supreme court granted the petition for review and directed the appellate court to vacate its order denying mandate and to issue an order to show cause why summary adjudication should not be granted Fluor-2.

The Fourth Appellate District has now explained that Insurance Code § 520 has no bearing on the validity of *Henkel* “for the simple reason that liability insurance did not exist in 1872.” When the language of § 520 was adopted by the California Legislature, insurance covered only first party property damage losses, which are easily identifiable. The court determined that the legislature “cared not a wit” about the more difficult question of when a loss occurs under an occurrence-based liability policy: when a judgment is entered against the insured giving rise to the insurer’s contractual duty to indemnify, or injury or damage occurs triggering coverage under the policy. Accordingly, the court concluded that it was bound by the supreme court’s ruling in *Henkel* that the date of the loss for purposes of determining the enforceability of a consent-to-assignment clause in a liability policy is the date on which the insured sustains a loss for purposes of bringing an action for breach of contract: The date on which a judgment is entered against the insured. “If the rule of law in *Henkel* is to be vitiated,” the court observed, “the Legislature in the 21st century, not the Legislature in the 19th century, must do it.”

### **Insurer Waived Right to Arbitrate Agent’s Statutory Claims by Participating in Litigation**

In the case styled *Hoover v. American Income Life Insurance Co.* (2012) 206 Cal.App.4th 1193, 142 Cal.Rptr.3d 312, the Fourth District Court of Appeal

(Division 2) held that an insurer waived the right to seek arbitration under an agent’s contract when the insurer actively litigated the agent’s statutory claims for more than a year before seeking arbitration.

Plaintiff worked as a sales agent for four months for defendant American Income Life Insurance Co. (AIL). Plaintiff’s relationship with AIL was partly governed by a collective bargaining agreement between AIL and an employees union. The agreement provided that agent compensation would be in conformity with an agent contract that was incorporated into the agreement. The agent contract that plaintiff signed contained an arbitration clause requiring the parties to arbitrate unresolved disputes relating to the contract.

After plaintiff left AIL she claimed that she had been hired as an employee and was entitled to minimum wage, reimbursement of work-related expenses, and prompt payment of earned wages upon termination, as provided by California Labor Code §§ 203, 1194, and 2802. AIL contended that plaintiff was an independent contractor who was not entitled to minimum wage, reimbursement, or earned wages. Plaintiff brought a class-action complaint against AIL alleging that AIL had hired her and similarly situated persons to sell insurance as employees, then failed to pay and reimburse them, in violation of statutory rights under the Labor Code. Plaintiff also alleged unfair business practices. AIL litigated the claims, participated in discovery, and twice attempted to remove the matter to federal court. More than a year into the litigation, AIL made a demand for arbitration that plaintiff rejected. AIL then moved to compel arbitration and to stay litigation of plaintiff’s individual claims, based on the arbitration provision in the agent contract.

The trial court denied the motion to

compel arbitration, ruling that plaintiff’s statutory wage claims were not subject to arbitration because neither the arbitration agreement nor the collective bargaining agreement in which it was incorporated referred to the arbitration of statutory rights. The court also ruled that AIL waived its rights to arbitrate by participating in the litigation process.

The court of appeal affirmed, concluding that AIL waived the right to seek arbitration by actively litigating the action for more than a year and causing prejudice to plaintiff. AIL did not introduce the question of arbitration for almost a full year and conducted its litigation in a style inconsistent with the right to arbitrate, the court observed, noting that AIL twice attempted to remove the case to federal court and gave recalcitrant responses to plaintiff’s discovery requests. This suggested that AIL’s policy was one of delay rather than one of seeking a prompt and expeditious resolution as might occur through arbitration. At the same time, AIL availed itself of discovery mechanisms like depositions not available in arbitration and solicited class members in an effort to reduce the size of the class. This combination of ongoing litigation and discovery with delay in seeking arbitration could result in prejudice. The record accordingly supported the trial court’s determination that the right to arbitrate was waived by prejudicial delay.

Even if AIL had not waived its right to assert arbitration, the court of appeal stated that it would decide AIL could not compel arbitration of plaintiff’s claimed Labor Code violations. Labor Code §§ 2802 and 2804 provided that an employee could not waive the right to reimbursement from an employer for employment-related expenses, while §§ 203, 219, and 229 provided that the right to timely payment of earned wages upon

*continued from page 19*  
**Insurance Law Update**

termination could not be contravened by private agreement. The court rejected AIL's argument that federal law, the Federal Arbitration Act, and the strong national policy favoring arbitration preempted the California statutes. AIL failed to demonstrate that the agent contract involved interstate commerce, thus triggering preemption. Even though AIL was based in Texas, there was no evidence in the record that the relationship between plaintiff and AIL had a specific effect on interstate commerce. Plaintiff did not work in other states or engage in loan negotiations with banks headquartered in another state. Further, the agent contract did not waive a judicial forum for statutory claims. The contract did not mention the arbitration of statutory claims or identify any statutes, but applied only to "disputes." Plaintiff's lawsuit represented an effort to enforce non-waivable rights, not an attempt to enforce compliance with the agent contract or the collective bargaining agreement, the court concluded. Neither the contract nor the agreement required plaintiff to arbitrate her statutory claims.

**Insurers Have a Duty to Effectuate Settlement Where Liability Is Reasonably Clear Even in the Absence of a Settlement Demand**

In the case styled *Yan Fang Du v. Allstate Ins. Co.*, (9th Cir. 2012) 681 F.3d 1118, the U.S. Ninth Circuit Court of Appeals interpreted California law to impose a duty on insurers to effectuate settlement where liability is reasonably clear even in the absence of a settlement demand.

The subject motor vehicle accident occurred on June 17, 2005. The insured negligently collided with another vehicle injuring four occupants of that vehicle. The Allstate insurance policy had policy

limits of \$100,000 per person with a maximum accident aggregate of \$300,000. Following the motor vehicle accident, Deerbrook Insurance Company (an Allstate Company) attempted to obtain medical documentation for one of the injured victims and a statement from its own insured but was unsuccessful. Notwithstanding the absence of cooperation by the victim and the insured in providing the documentation requested, Deerbrook eventually evaluated the claim file on February 15, 2006 concluding that its insured was liable for the accident. Deerbrook was aware that one of the victims was seriously injured. Nevertheless, no settlement demands or offers were made by any of the claimants until June 9, 2006 when the claimants' attorney (representing all four plaintiffs) made a global demand of settlement for \$300,000. For the first time, the attorney documented the seriously injured victim's medical expenses in excess of \$100,000. The medical specials for the remaining three victims were not significant in comparison.

When the demand was made, the adjuster told the attorney that Deerbrook had insufficient information about the three lesser injured victims and suggested that the seriously injured victim's claim be settled separately with Deerbrook paying the \$100,000 per person limit. In August 2006 the attorney rejected Deerbrook's \$100,000 settlement offer as being "too little too late." Thereafter, the seriously injured victim filed a personal injury lawsuit against the insured and received a jury verdict in excess of \$4 million. Deerbrook paid its \$100,000 per person limit to partially satisfy the judgment. The insured then assigned his bad faith to the seriously injured victim in exchange for a covenant not to

execute.

The case was decided through trial with the jury concluding that Deerbrook did not unreasonably or without proper cause, fail to accept a reasonable settlement demand for an amount that was within policy limits. The verdict was appealed.

The issue before the Ninth Circuit Court of Appeals was whether an insurer had a duty, after liability of the insured had become reasonably clear, to attempt to effectuate a settlement in the absence of a demand from the claimant. The Ninth Circuit recognized that California courts had commonly applied the duty to settle to situations in which the insurer unreasonably rejected a settlement offer within policy limits. However, the issue before the court was whether the duty to settle in California more broadly required an insurer to effectuate settlement when liability was reasonably clear, even in the absence of a settlement demand. The Ninth Circuit concluded that the duty to settle was that broad.

The court began its analysis by recognizing that in those situations where there was a substantial risk of an insured's exposure in excess of the policy limits, the interests of the insurer and the insured diverge creating a conflict of interest. To ameliorate the conflict of interest, the covenant of good faith and fair dealing required insurance companies to consider the interests of the insured, in good faith, equally with its own interests and to evaluate settlement offers within policy limits as though the insurance company alone carried the entire risk of the loss. The court noted that the conflict of interest that animates the duty to settle exists irrespective of whether a settlement demand is made by the injured party.

# Summary of Recent California Civil Cases of Interest

By Monty A. McIntyre, Esq.

SELTZER CAPLAN MCMAHON VITEK

## ALTERNATIVE DISPUTE RESOLUTION

*Reyes v. Liberman Broadcasting, Inc.* (2012) \_ Cal.App.4th \_ : The employer did not waive its right to enforce an arbitration agreement by delaying its motion to compel arbitration (for almost 14 months) until after the U.S. Supreme Court issued its ruling in *AT&T Mobility v. Concepcion* (2011) 563 U.S. \_ [131 S.Ct. 1740, 179 L.Ed.2d 742]. (C.A. 2nd, September 4, 2012)

*Truly Nolen of America v. Superior Court* (Miranda) (2012) \_ Cal.App.4th \_ : Based upon recent U.S. Supreme Court decisions the Fourth District questioned the continuing validity of the California rule in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 to invalidate an express arbitration waiver contained in an employment arbitration agreement governed by the Federal Arbitration Act (FAA), but concluded it should follow *Gentry* until the California Supreme Court reviews *Gentry* in light of the recent United States Supreme Court decisions of *AT&T Mobility LLC v. Concepcion* \_ U.S. \_ [131 S.Ct. 1740] (2011) and *Stolt-Nielsen v. AnimalFeeds Internat. Corp.* \_ U.S. \_ [130 S.Ct. 1758] (2010). The trial court was directed to allow additional briefing/argument to determine whether the arbitration agreement contained an implied agreement to authorize class arbitration. If it does the court should deny the motion to preclude class arbitration and refer the matter to arbitration. If it doesn't the court should order the matter to arbitration on an individual basis. (4th C.A., August 9, 2012)



*Caron v. Mercedes-Benz Financial Services USA LLC* (2012) \_ Cal.App.4th \_ : The Federal Arbitration Act (FAA) preempts the Consumer Legal Remedies Act's anti-waiver

provision for class actions because the provision acts as an obstacle to the FAA's goal of enforcing arbitration agreements according to their terms. (C.A. 4th, filed June 29, 2012, published July 30, 2012)

*Goodridge v. KDF Automotive Group, Inc.* (2012) \_ Cal.App.4th \_ : The motion to compel arbitration was properly denied. The appearance and text of an arbitration provision in an automobile purchase contract was procedurally and substantively unconscionable and could not be severed from the contract. (C.A. 4th, September 13, 2012)

## CIVIL PROCEDURE

*Harwan v. Hixson* (2012) \_ Cal.App.4th \_ : Plaintiff failed to show that his causes of action fell within the commercial speech exemption to the anti-SLAPP law (California Code of Civil Procedure section 425.16), the absolute and qualified privileges of California Civil Code section 47 did not apply to the company press release regarding its internal investigation, and plaintiff demonstrated a probability of prevailing on his causes of action for

defamation, invasion of privacy, unfair business practices and breach of contract. (C.A. 4th, September 13, 2012)

## CIVIL RIGHTS

*Maxwell v. County of San Diego* \_ F.3d \_ (9th Cir., 2012): Although Sheriff's officers could not normally be liable under 42 U.S.C. section 1983 for a gun shot wound inflicted by a third party, by delaying the departure of the ambulance they could be liable under the "danger exception" for affirmatively placing the victim in a place of danger. Tribal paramedics who were individually sued, were not entitled to tribal immunity. (September 13, 2012)

## CLASS ACTION

*Dennis v. Kellogg Company* \_ F.3d \_ (9th Cir., 2012): A class action settlement was disapproved because distribution of food items as cy pres distributions to unidentified charities to feed the indigent were insufficiently related to the class or its false advertising claims against Kellogg Company, and the \$5.5 million valuation the parties attached to the product cy pres distribution was, at best, questionable. (September 4, 2012)

*Rodriguez v. Disner* \_ F.3d \_ (9th Cir., 2012): Attorney fees were denied to antitrust class counsel because they violated the California Rules of Professional Conduct by entering into incentive agreements with class representatives that conflicted with other class members, but failed to disclose the conflict to the court and the class and failed to obtain an express waiver of the conflict. (August 10, 2012)

*Tucker v. Pacific Bell Mobile Services* (2012) \_ Cal.App.4th \_ : The court affirmed the sustaining of a demurrer without leave to amend for claims of violation of the Consumer's Legal Remedies Act and fraud, because plaintiffs were unable to establish commonality in potential class members' reliance on alleged misrepresentations regarding rate plans by the cellular service provider. (C.A. 1st, August 8, 2012)

*continued on page 28*

# DESIGNING A FIRM

By kelly hinchman | LEED® AP, ASID Allied  
casa bella interiors + hinchman | johnson design studio



use of color and texture through materials such as stone, metals and wood are the growing trend.

“First impressions are a lasting impression”.

In decorating and designing space for law firms, it is essential to showcase the firm’s brand and name sake in a complimentary fashion with the reception area.

This is an efficient

Like most industries, the legal environment has changed over the years because of variations in the economy, technology, politics and environmental concerns. These factors are not only shifting the practice of how law firms work, interact with their clients, research, but also how firms utilize their space and design an office environment.

As a residential and commercial interior designer, I am finding more firms are redesigning their work space to not only include traditional aesthetics, but also integrating technology conferencing and creating more flexible spaces.

There is a shift from the once very formal and traditional environment of a law firm to the modern and green design. As ostentation has become obsolete during this shift so have wood wall paneling, heavy mahogany furniture, and dark formal fabrics.

Cutting edge is the look of “new,” the use of day lighting via glass doors and walls, light sophisticated neutrals and the

use of space and resources. In the reception area, the key is to use signage as art and for branding opportunities. The use of social interaction engineering through a lobby furniture design makes it possible for opposing council and clients alike to feel comfortable in close proximity.

Here is an example of a recent design I completed for Wingert Grebing Brubaker & Juskie, utilizing the space and brand as the central feature of the reception and conference room area.

Technology integration in the conference furniture and built-in units include “smart” tables with built-in AV technology,



Powerpoint capabilities, video conferencing, and telecommuting. Designing with these elements will reduce long dis-

tance travel and increase efficient conferencing.

Break rooms are another area that can be easily upgraded, without an expensive budget. An ordinary break room can be transformed into a cyber-cafe and lounge atmosphere, which function as a “touchdown” space for colleagues to work, talk, and relax. Upgraded break rooms will also promote socialization amongst peers, offer mini breaks and ultimately result in increased productivity.

Flexibility and adaptability in the legal environment is one of the keys for success. An efficient office design will incorporate ability to allow for change to occur in the design solution while minimizing the cost for that change. This

can be achieved by furniture solutions and not by rigid drywall partitions. This approach for planning flexible spaces and furniture integration in the early stages of construction or design development is critical and will save in costly change orders and post construction modifications.

As the practice of law continues to change, so does the look and feel of law firms. The trend today in San Diego remains minimalistic and professional. There are many ways to accomplish an upgrade to your local firm without reaching a national budget crisis.

*Kelly Hinchman designs law firms in San Diego County. This article has been reprinted at the request of the author due to typographical errors in its original publication. Kelly can be reached at kelly.hinchman@gmail.com or 858.793.9004. >*





*continued from page 15*  
**Local News of Civil Litigation—  
 All the Litigation News That’s  
 Fit to Print or Broadcast**

Working in the opposite direction is the local reporting of a fair number of lawsuits dealing with consumer issues or significant problems created by products and services purchased by consumers. Good examples among the stories we found are illnesses produced by contaminated lettuce and injuries to pet dogs due to contaminated pet food. From these cases citizens may come to think that although many cases seem unwarranted, many others are clearly justified, and may be the only way ordinary individuals can obtain redress from powerful corporations. Similarly, the large number of suits against government may be seen as an important mechanism of redress against government officials who abuse the power of their offices.

Overall, the message from local news reporting of civil litigation is mixed for those who would place limits on lawsuits, whether those would be limits on the amount that can be recovered, limits on legal fees, or direct limits on the cases that can be brought. Some news coverage works to support the proponents of limits, but our analysis shows that, at least at the local media level, much is reported that cuts against the limits proponents would impose. And it is on local market television and newspapers that people seem to rely most heavily for their news.

The authors would like to thank Kenneth Goldstein for giving us access to the data. We would also like to thank Emily Adams, Marc Ratkovic, Christopher Terry, Taylor Tarvestad, Jessica Jankiewicz, and Lior Sztainer for research assistance. William Haltom generously provided us with some tabulations from the data he and Michael McCann collected for their book, *Distorting the Law*. Support for the UW Newslab which compiled the television data was provided primarily by the Joyce Foundation with some additional support in 2004 from the Carnegie Foundation. Support to collect the newspaper data was provided by the ABA Litigation Research Fund. Additional support for this project was provided by the Journal Foundation, the University of Wisconsin Graduate School, the University of Wisconsin Department of Political Science, the

University of Wisconsin School of Journalism’s Thayer Center for Media Law and Management, William Mitchell College of Law, and the University of Minnesota Law School. We would also like to thank Daniel Chen for his helpful comments. Earlier versions of this paper were presented at the 2010 Conference on Empirical Legal Studies, Yale University, November 5-6, and the 2011 Annual Meeting of the Law and Society Association, San Francisco, California, June 2-5.

1. Herbert M. Kritzer, *Public Perceptions of Civil Trial Verdicts*, 85 *Judicature* 78-82, at 80 (2001).
2. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 *Hofstra L. Rev.* 763-90 (1995); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 *Judicature* 64-67 (1996); William Haltom & Michael McCann, *Distorting the Law: Reform Politics, Mass Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004).
3. Haltom & McCann, *supra* n. 2, at 62.
4. Haltom & McCann, *supra* n. 2; Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (New York: Random House, 1994); Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1988); Walter Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America’s Rule of Law* (New York: St. Martin’s Press, 2003).
5. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 *Ariz. L. Rev.* 717-52 (1998).
6. Haltom & McCann, *supra* n. 2, at 152, mention some television broadcasts about the lawyers and litigation issues, but they do not undertake a systematic study of those broadcasts. In an earlier book William Haltom did look at local newspapers, but his analysis was limited; see *Reporting on the Courts: How the Mass Media Covers Judicial Actions 201-12* (Chicago: Nelson-Hall Publishers, 1998).
7. Pew Research Center, *News Consumption and Believability Study* (2006) [available at <http://people-press.org/reports/pdf/282.pdf>]. Pew found that 54% of survey respondents reported regularly watching local TV news; the next most commonly used source was a newspaper at 40%.
8. In fact, we know of no systematic research on television coverage of civil litigation.
9. Bailis & MacCoun, *supra* n. 2, at 422-23, appear to have included some articles dealing with lawsuits not involving torts; however, their report of their study focuses specifically on torts.
10. Haltom, *supra* n. 6, at 201-43; Haltom and McCann, *supra* n. 2.
11. See Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 *Stan. L. & Pol’y Rev.* 237-65 (2004).

12. Bailis & MacCoun, *supra* n. 2, at 423, collected data that included stories on things other than outcomes; however, the article reporting their study gave no indication of what other phases of lawsuits were covered in their data. It does appear that about two thirds of the “resolved” lawsuits in their sample were resolved through a trial verdict (*id.*, 425).
13. Haltom & McCann, *supra* n. 2, at 162.
14. Bailis & MacCoun, *supra* n. 2, at 424.
15. Seth Seabury, et al., *Forty Years of Civil Jury Verdicts*, 1 *J. Empirical Legal Stud.* 1-25 (2004).
16. Haltom & McCann, *supra* n. 2, at 162-64.
17. Haltom & McCann, *supra* n. 2, at 162.
18. Haltom, *supra* n. 6, at 212. Haltom’s analysis is based on a sample of 434 newspaper articles drawn from 28 newspapers on four randomly chosen dates in 1993. All of the newspapers were available on Lexis-Nexis, and were identified by searching for the words *court*, *courts*, *trial*, *trials*, *lawsuit*, *lawsuits*, *jury juries*, or *jurors* (*id.*, 316n67).
19. Haltom & McCann, *supra* n. 2, at 172-73. Through correspondence with William Haltom we learned that this interpretation of their published figures is not exactly correct. More refined information provided to us by William Haltom indicates that only about 8% of the articles focused on case initiation while about 44% dealt with case conclusions. Haltom and McCann present a similar analysis based on 2,385 newspaper articles from wide circulation newspapers; from the numbers they report, it appears that 39.6% of the articles report the “conclusion” of the cases (presumably both decisions and settlements), and only 11.3% report filings.
20. Nielsen and Beim, *supra* n. 11.
21. These markets covered approximately 23 percent of the nation’s population. The specific markets were New York, Los Angeles, Philadelphia, Dallas, Seattle, Tampa, Miami, Denver, Orlando, Dayton, and Des Moines.
22. These markets were Chicago and Decatur/Springfield in Illinois, Detroit and Lansing in Michigan, Minneapolis/St. Paul in Minnesota, Cleveland and Columbus in Ohio, and Milwaukee and Madison in Wisconsin.
23. With the exception of three markets, all of the newspapers we coded were retrieved using LexisNexis; the remaining were retrieved using Westlaw. The three markets for which we used Westlaw were Seattle, Miami, and Decatur, Illinois.
24. The search strings differed reflecting differences in syntax and limits on length (1000 characters for LexisNexis, 650 characters for Westlaw). To verify that they produced roughly equivalent results, we did searches using both LexisNexis and Westlaw for one newspaper available on both, and found virtually the same number of hits. These search strings are available from the authors. Note that we did not limit our searches to civil litigation,

# INSURANCE COVERAGE FOR LONG-TAIL/CONTINUOUS INJURY CLAIMS: THE DECK IS NOW STACKED\*

Jack Fischer, Esq.

THE ROTH LAW FIRM PLLC

## Case Summary:

In *California Casualty v. Continental Insurance Company*, \_\_\_ Cal. 4th \_\_\_; 12 C.D.O.S. 9101, (August 9, 2012)\*, the California Supreme Court affirmed an Appellate Court decision which held that, in the context of continuous injury claims, an insurer is obligated to pay all sums for property damage, up to its policy limits, as long as some of the continuous property damage occurred while such policy was “on the loss.” The Court also approved the stacking of applicable policy limits where an occurrence is continuous across two or more policy periods and the policy does not contain an “anti-stacking” provision. Significantly, this is the first California case to consider the stacking of excess policies in a continuous loss scenario.

## Factual Background:

The State of California sought indemnification from several of its insurers in connection with a federal court-ordered cleanup of the State’s Stringfellow Acid Pits waste site. The site was an industrial waste disposal facility that the State designed and operated from 1956 to 1972. Each insurer from whom the State sought indemnification issued one or more excess commercial general liability insurance policies to the State between 1964 and 1976. The site was uninsured prior to 1963 and after 1978.

Although a state geologist determined that a Riverside County quarry was a suitable location for the disposal of industrial waste, there were several flaws that existed at the site which made it ill-suited to serve an industrial waste facility. In 1998, a federal court found the State liable for, among others, negligence in investigating, choosing, and designing

the site, overseeing its construction, failing to correct conditions at it, and delaying its remediation. The State claimed that the costs associated with the remediation could reach \$700 million. In September 1993, the State filed an action against several of its insurers seeking indemnification for its liability in the federal action.

The pertinent language of all of the policies at issue was essentially identical. Under the heading “Insuring Agreement,” the insurers agreed “[t]o pay on behalf of the Insured all sums which the insured shall become obligated to pay by reason of liability imposed by law . . . for damages . . . because of injury to or destruction of property, including loss of use thereof.” Limits on liability in the agreements were stated as a specified dollar amount of the “ultimate net loss [of] each occurrence.” “Occurrence” was defined as meaning “an accident or a continuous or repeated exposure to conditions which result in . . . damage to property during the policy period . . .”

### “All Sums” Allocation of Indemnity Obligations in “Long -Tail” Claims:

In a progressive property damage case (i.e. long-tail claim), it is virtually impossible for an insured to prove what specific damage occurred during each of the multiple consecutive policy periods. As such, the Court determined that “the fact that all policies were covering the risk at some point during the property loss is enough to trigger the insurers’ indemnity obligation.”

Each of the State’s insurers argued that the Court should adopt a “pro rata” rule for allocation of an insurer’s indemnity obligations. Under that approach, an equal share of the amount of damage is assigned to each year over

which a long-tail injury occurred such that the amount owed under any one policy is calculated by dividing the number of years an insurer is on the risk by the total number of years that the progressive damage took place. The resulting fraction is the portion of liability owed by that particular insurer.

The Court ultimately rejected a pro rata approach to allocating an insurers’ indemnity obligations in long-tail claims under an “all sums” policy. In so doing, the Court looked to the language of the insuring agreement and determined that the position advocated by the insurers would “unduly restrict their agreement to pay ‘all sums’ the insured is obligated to pay for damages due to injury to or destruction of property . . .” The Court expressly found that “[u]nder the CGL policies here, the plain ‘all sums’ language of the agreement compels the insurers to pay ‘all sums which the insured shall become obligated to pay . . . for damage . . . because of injury to or destruction of property. . . .” It went on to note that the “grant of coverage does not limit the policies’ promise to pay ‘all sums’ of the policyholder’s liability solely to sums or damage ‘during the policy period.’” It found that each insurer was severally liable to pay up to its policy limits and that the “policies at issue obligate the insurers to pay all sums for property damage . . . up to their policy limits . . . as long as some of the continuous property damage occurred while each policy was ‘on the loss.’”

## Stacking Considerations:

Under the “all sums” approach detailed above, the Court contemplated that when the “entire loss is within the policy limits of one policy, the insured can recover from that insurer, which may then seek



contribution from the other insurers on the risk during the same loss.” However, that analysis left unanswered the question of whether an insured can stack consecutive policies and recover up to the policy limits of the multiple plans where each of those policies potentially cover a continuous long-tail loss. In answering that question in the affirmative, the Court ultimately adopted an “all-sums-with stacking rule.”

Under the all sums with stacking approach, the Court held that the wording of the specific policies at issue did not preclude the stacking of multiple policy limits. It expressly held that an insurer is free to include “anti-stacking” language in its policy and that, absent language which would preclude an insured from stacking policy limits, the insured is allowed to recover up to the applicable limits of each triggered policy. In so holding, the Court rejected the anti-stacking holding of *FMC corp. v. Plaisted & Companies*, 61 Cal.App.4th 1132, 1142 (1998) which, for more than a decade, “prevented an insured from stacking multiple consecutive policies in a case in which the insured had caused toxic contamination ‘over a period of many years.’” Under the rule expressed in *FMC*, where the loss exceeded the primary limits of a single policy, the insured was required to choose a single policy period year for the entire loss and it could recover only up to the specific single policy limit (subject to the rule of contribution) in effect at the time the loss occurred. *Id.*

Notably, in footnote note 6 of its opinion, the Court expressly reference *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1853 (1996) in which the Court of Appeal adopted a “horizontal” approach to excess liability coverage, meaning that if the limits of liability of each primary insurance policy adequately cover the occurrences, there is no excess coverage expectation.”

### Effect of the Court’s Holding:

Arguably, the Court’s holding on the “all sums” analysis is expressly limited to the

policies then under consideration. As detailed above, the Court looked to the insuring language and determined that the “all sums” language does not restrict coverage to property damage only occurring during the policy period. As such, the Court found that an insurer’s indemnity obligations may include indemnification for damages occurring before or after the respective policy period(s). Note that, as relevant, the recent versions of the standard CGL policy do not obligate an insurer to pay “all sums” but, rather, obligate it to only pay “those sums” that an insured becomes legally obligated to pay because of property damage.

As far as the stacking ruling is concerned, the Court’s reference to the “horizontal” exhaustion rule from the *Stonewall* case would tend to support the argument that there is no expectation of coverage under an excess policy until such time as the applicable limits of all primary insurance on the loss during the progression of the property damage.

*\*Note that this opinion is not final, and may be withdrawn from publication or modified on rehearing. These events would render the opinion unavailable for use as legal authority in California state courts.*

*\*\*Nothing contained herein should be construed as legal advice and no attorney-client relationship. Furthermore, no attorney-client relationship is established by virtue of the analysis and/or opinions expressed herein. Any such relationship is expressly disavowed. >*

### cover story continued from page 25

#### Local News of Civil Litigation- All the Litigation News That’s Fit to Print or Broadcast

but looked for a range of stories about courts, lawyers, and judges; we limit our analysis here to stories dealing in some way with civil litigation.

25. In collecting the 2007 television data, Goldstein took a 1/3 sample of news broadcasts; in order to insure comparability, we coded a 30 percent sample of the newspaper clips we identified.

26. With one exception, we have not at this stage sought to test for differences by size of market,

- newspaper ownership, or television network.
27. See Fred Fedler, et al., *Reporting for the Media 508* (New York: Oxford University Press, 2004).
28. We did not count words, but relied on the word count shown by Westlaw or Lexis. In the case of items that were embedded in a news summary that reported multiple stories, our coders estimated the percentage of the summary that comprised the specific item. We applied that percentage to the overall word count for the summary to get a word count for the item.
29. Haltom, *supra* n.6, at 212, found that the articles in his sample averaged 537 words in length; he does not report a median.
30. We also looked separately at 2004/2006 and 2007 to assess whether the percentage of government action cases is higher during election periods; we found that at most, there might be a very slight increase.
31. Haltom, *supra* n. 6, at 212-15.
32. It may be that national newspapers have a somewhat different focus than do local papers. We do have data from the *New York Times* for one month in 2004. Using our categories for the 150 stories from the *New York Times*, we have 8% presuit, 9% filing, 46% suit pending, 5% trial, 2 percent verdict, 15% appeal, and 14% unfocused or other.
33. The difference between television and newspapers is statistically significant,  $\chi^2=4.68$ ,  $p=.031$ .
34. This difference is statistically significant,  $\chi^2=16.51$ ,  $p<.001$ . Some of the stories reported judges’ rulings on motions (7.2% of television stories and 12.3% of newspaper stories). Some proportion of these rulings are dispositive, and most of the dispositive rulings prior to trial would favor the defendant.
35. Haltom, *supra* n.6, at 211-12. Haltom also provided us with data from five national newspapers examined in Haltom & McCann (*supra* n.2): 3.3% pre-filing, 8.1% filing, 16.3% pre-trial, 12.6% during trial, 43.7% conclusion (settlement, verdict, judgment, etc.), 16.1% appeal.
36. Haltom & McCann, *supra* n. 2, at 62.
37. The difference between television and newspapers is not statistically significant for all types of cases, but difference between torts and nontorts is significant for both media ( $\chi^2=6.22$ ,  $p=.013$  for TV;  $\chi^2=20.44$ ,  $p<.001$  for newspapers). The difference between torts and nontorts is not surprising because many nontort cases deal with nonmonetary issues.
38. This difference, 15.7% vs. 20.4%, is statistically significant,  $\chi^2=6.68$ ,  $p=.010$ .
39. Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, No. NCJ 223851 (2008) [available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>, last visited June 14, 2012].
40. This difference is statistically significant ( $\chi^2=38.24$ ,  $p<.001$ ). >

continued from page 23

**Summary of Recent California Civil Cases of Interest**

**CONSTITUTION**

*Dablia v. Rodriguez* \_ Fd.3d \_ (9th Cir., 2012): The First Amendment did not protect a city police detective because he spoke in the course of his duties in disclosing a colleague's use of abusive interrogation tactics to a sheriff's department. (August 7, 2012)

**CONSUMER PROTECTION**

*Davis v. HSBC Bank of Nevada, N.A.* \_ F.3d \_ (9th Cir., 2012): The district court properly granted a motion to dismiss. The false advertising claim failed, the fraudulent concealment claim failed, and the California Unfair Competition Law claim failed because disclosures in the online application fell within a "safe harbor" because they were required by the Truth in Lending Act and Regulation Z. There was no abuse of discretion when the district court incorporated by reference the disclosure documents submitted with the motion to dismiss. The authenticity of the documents was not questioned because the complaint alleged the contents of the disclosure statements. (August 31, 2012).

*Drew v. Equifax Information Services, LLC* \_ F.3d \_ (9th Cir., 2012): Summary judgment was reversed because issues of material fact existed as to Chase Bank's alleged violations of the Fair Credit Reporting Act. The court also reversed a dismissal of similar claims against FIA Card Services on statute of limitations grounds.

**CONTRACTS**

*Maxim Crain Works, L.P. v. Tilbury Constructors* (2012) \_ Cal.App.4th \_ : The enforcement of a contract's unfavorable choice of law provision against the party who drafted the contract did not violate any California public policy. (C.A. 3rd, August 8, 2012)

**EMPLOYMENT/LABOR**

*Bell v. H.F. Cox, Inc.* (2012) \_ Cal.App.4th \_ : An employer's source for payment of vacation benefits owing to a terminated employee was a question of fact that precluded a summary adjudication ruling that the benefit claim was pre-empted by the Employee Retirement Income Security Act. (C.A. 2nd, September 6, 2012)

*Bullock v. Berrien* \_ F.3d \_ (9th Cir., 2012): A government employee did not fail to exhaust her administrative remedies by filing an administrative complaint for disability discrimination, later withdrawing her optional administrative appeal without waiting 180 days, and then filing an action in the district court. (July 30, 2012)

*Frankl v. HTH Corporation* \_ F.3d \_ (9th Cir., 2012): A preliminary injunction was granted against an employer because sufficient evidence supported an agency's unfair-labor-practice charges against an employer that terminated an employee active in union organizing. (September 6, 2012)

*Hernandez v. Chipolte Mexican Grill, Inc.* (2012) \_ Cal.App.4th \_ : Consistent with *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cl.4th 1004, although employers are required to make meal and rest breaks available to employees, they are not required to make certain that employees use them. (C.A. 2d, August 30, 2012)

*Lamps Plus Overtime Cases* (2012) \_ Cal.App.4th \_ : The trial court properly denied the motion for class certification, finding that the employees had failed to establish the commonality required for class certification. In addition, while employers must provide employees with breaks, they need not ensure that employees take breaks. (C.A. 2nd, filed August 20, 2012, published September 5, 2012)

*Muldrow v. Surrex Solutions Corporation* (2012) \_ Cal.App.4th \_ : An employee who was paid on commission for the candidates he recruited who were hired by the clients of his employer, was statutorily exempted from pay for overtime wages. (C.A. 4th, August 29, 2012)

*Sparks v. Vista Del Mar Child and Family Services* (2012) \_ Cal.App. \_ : A former employee who sued for wrongful termination was not bound by an arbitration clause because it was included in a lengthy employee handbook, was not called to his attention, and he did not specifically acknowledge or agree to arbitration. (C.A. 2nd, July 30, 2012)

**GOVERNMENT**

*Costa Mesa Employees' Association v. City of Costa Mesa* (2012) \_ Cal.App.4th \_ : The trial court properly granted a preliminary injunction barring a city from contracting with a private entity for services previously provided by city employees, or from laying off city employees as a result of the contract, because it appeared that the city may have violated its collective bargaining agreement and state law by attempting to outsource a wide variety of municipal services. (C.A. 4th, filed August 17, 2012, published September 13, 2012)

**INSURANCE**

*Axis Insurance Surplus Company v. Reinoso* (2012) \_ Cal.App.4th \_ : Substantial evidence supported a finding that a co-owner of an apartment complex who knew of sub-standard conditions at the complex was not an innocent insured eligible for liability coverage. (C.A. 2nd, August 6, 2012)

*Lee v. West Coast Life Insurance Company* \_ F.3d \_ (9th Cir., 2012): The federal interpleader statute does not protect a negligent stakeholder from tort liability for its creation of a conflict over



entitlement to the interpleaded funds. (July 31, 2012)

*Stephan v. UNUM Life Insurance Company of America* \_ F.3d \_ (9th Cir., 2012): UNUM's dual role as a plan administrator and insurer created a structural conflict of interest. When considering such a conflict of interest in an ERISA case, the traditional rules of summary judgment apply and the evidence must be viewed in the light most favorable to the non-moving party. Advice on the amount of benefits the insured was owed was plan administration advice to which the fiduciary exception to the attorney-client privilege applied, and documents regarding this advice should have been produced below to plaintiff. (September 12, 2012)

## REAL PROPERTY

*Weinstein v. Rocha* (2012) \_ Cal. App.4th \_ : The anti-deficiency rule in Code of Civil Procedure section 580b precluded a second deed of trust holder (the former owner of the property) from enforcing, under Code of Civil Procedure section 664.6, a Settlement Agreement that modified the second deed of trust. (C.A. 2nd, August 1, 2012)

## SECURITIES

*In Re Rigel Pharmaceuticals, Inc. Securities Litigation* \_ F.3d \_ (9th Cir., 2012): Merely alleging that the defendants should have used different statistical methodology in their drug trials is not sufficient to allege falsity in a securities fraud action. Plaintiff did not adequately allege that initial statements related to possible side effects were false or misleading. The complaint also failed to plead falsity regarding partnership plans because it did not allege that defendants falsely represented their actual partnership plans and expectations. (September 6, 2012)

## TORTS/PROFESSIONAL NEGLIGENCE

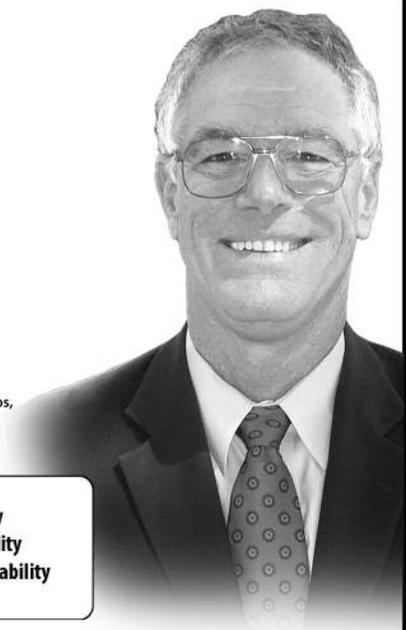
*Czajkowski v. Haskell & White, LLP* (2012) \_ Cal.App.4th \_ : Plaintiff's accounting malpractice action was barred by the two-year statute of limitations in California Code of Civil Procedure section 339(1) because he could not show that his failure to file within two years was justified by a reasonable failure to learn of the negligence earlier. (C.A. 4th, August 3, 2012)

*Doe v. Doe 1* (2012) \_ Cal.App.4th \_ : Because plaintiff (then a minor) attended one therapy session paid for by the parish and its insurance carrier but the carrier never gave written notice of the applicable statute of limitations, California Insurance Code section 11583 tolled the statute of limitations for childhood sexual abuse under Code of Civil Procedure section 340.1. (C.A. 2nd, August 27, 2012)

*Plotnik v. Meibaus* (2012) \_ Cal.App.4th \_ : California law allows a pet owner to recover for mental suffering caused by another's intentional act that injures or kills the pet. (C.A. 4th, September 4, 2012) >



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# On The Move...

**Victoria G. Stairs** has been practicing at Morris Polich & Purdy LLP since September, 2012. Her practice focuses on the representation of medical device companies ranging from individual cases to multi-district litigation at the state and federal levels.

**Sarah A. McDonald, Esq.** recently joined Morris, Polich & Purdy, LLP after five years with Grimm, Vranjes & Greer, LLP. Her practice area has expanded to include insurance coverage, coverage litigation, and general insurer-related litigation.

**Aleksandr Yarmolinets**, an associate at Wingert, Grebing, Brubaker & Juskie, LLP, has been awarded an LL.M., from the Georgetown University Law Center, in the area of securities and financial regulation. At Wingert Grebing, Aleksandr focuses on corporate matters, including public and private equity and debt offerings, as well as mergers and acquisitions. He is also a certified fraud examiner, and provides advice on disclosure and compliance requirements under California and Federal securities laws.

**Judy Bae, Esq.**, of the San Diego firm, Miller, Monson, Peshel, Polacek & Hoshaw, was recently named by The Daily Transcript as a "Top Attorney" in the area of Estate Planning/Probate & Trust. Ms. Bae's practice consists mainly of business and probate litigation,



Teresa Beck, partner at Lincoln Gustafson & Cercos, was recently elected to the Board of the National Conference of Women's Bar Associations (NCWBA). The NCWBA is an organization comprised of women's

bar associations from across the country and Canada. The NCWBA advocates for women in the legal profession and in society by mobilizing and uniting women's bar associations. Ms. Beck, who practices in California and Arizona, was also recently honored to introduce the incoming President of the American Bar Association, Laurel Bellows, during a national conference of the ABA's Woman Advocate Committee.

**George W. Brewster Jr.** was recently promoted to Chief Deputy (Tort Litigation), Office of County Counsel. In his new position, George will be part of County Counsel's management team, and will oversee the County's tort litigation and Claims & Investigations departments. He has been with the County for 24 years, and in practice for 29.

**Shalini Kedia** Launches KEDIA MEDIATION. Shalini Kedia recently launched a full-time mediation practice, KEDIA MEDIATION, focusing on personal injury, employment, and professional malpractice matters. Ms. Kedia is a member of the San Diego Superior Court Mediation Panel. KEDIA MEDIATION may be found online at [www.kediamediation.com](http://www.kediamediation.com).

## **BALESTRERI PENDLETON & POTOCKI CHANGES NAME TO BALESTRERI POTOCKI & HOLMES**

Balestreri Pendleton & Potocki has changed its name to Balestreri Potocki & Holmes, A Law Corporation, adding Karen Holmes as a named shareholder. Ms. Holmes has been a shareholder with the firm for 7 years. She has over 29 years experience as a successful litigator and trial attorney specializing in civil litigation and professional casualty defense matters.

Holmes has extensive trial experience and has served as Judge Pro Tem as well as arbitrator and mediator for the San Diego Superior Court. She is the

recipient of many professional awards and honors including being named a San Diego Super Lawyer since 2007.

"The addition of Karen Holmes' name to that of our law practice has been made in recognition of her extraordinary contributions to the firm and to the firm's clients," said Thomas Balestreri, founding member of Balestreri Potocki & Holmes. "We are excited to continue to expand the legal services we provide in the areas of construction, transportation, hospitality and products liability."

Balestreri Potocki & Holmes is a boutique law firm headquartered in San Diego, California. The firm provides high-quality representation to a diverse range of business clients with an emphasis in the legal advocacy and consultation of business owners and companies working in or related to the construction, transportation and hospitality industries.

## **BALESTRERI POTOCKI & HOLMES ADDS TWO NEW ASSOCIATES**

Balestreri Potocki & Holmes has hired Danielle G. Nelson and Douglas C. Reinbold as associates.

Ms. Nelson practices in the areas of insurance defense, construction defect, business litigation, real estate litigation, construction law, general liability litigation, and business and real estate transactional matters.

Ms. Nelson received her Bachelor of Arts degree from the College of Charleston in 1997. She earned her Juris Doctor from the Thomas Jefferson School of Law in 2001.

Mr. Reinbold's practice includes litigating and resolving a variety of complex construction and design professional cases, as well as handling a wide array of transactional matters. Mr. Reinbold received his Bachelor of Arts from Butler University in 2002 and his Juris Doctor, cum laude, from Thomas Jefferson School of Law in 2006.

Balestreri, Potocki & Holmes is a boutique law firm headquartered in San Diego, California. The firm provides high-quality representation to a diverse range of business clients with an



emphasis in the legal advocacy and consultation of business owners and companies working in or related to the construction, transportation and hospitality industries.

### **BUTZ DUNN & DESANTIS ANNOUNCES THE ADDITION OF TWO NEW ASSOCIATES**

Butz Dunn & DeSantis has hired Joy L. Shedlosky and Emily M. Straub as associates.

Ms. Shedlosky is a 2008 graduate of the University of San Diego School of Law where she was awarded The Order of Barristers and American Board of Trail Advocates Award. She received her B.A. in Communication with a Minor in Spanish Literature from the University of California San Diego. Ms. Shedlosky practices in the areas of professional liability, general business litigation, insurance coverage and employment law matters.

Ms. Straub received her Juris Doctor in 2008 from Duquesne University School of Law and her Bachelor of Arts in English, magna cum laude, from Clark University. Ms. Straub's practice includes professional liability, design professional liability, commercial litigation and employment litigation.

Butz Dunn & DeSantis specializes in civil litigation with an emphasis on complex business and commercial litigation, professional liability, unfair competition, employment advisement and litigation, public sector law and catastrophic personal injury. >

### *continued from page 20* **Insurance Law Update**

The Ninth Circuit concluded that an insurer can violate the duty of good faith and fair dealing by failing to attempt to effectuate a settlement within policy limits after liabilities become reasonably clear notwithstanding the fact that no settlement demand has been made. The question revolves around whether there was a reasonable opportunity to settle within the limits.

The Ninth Circuit rejected Deerbrook's argument that the "genuine dispute" rule insulated it from bad faith because the law was unsettled regarding Deerbrook's obligation to settle the case without first being presented with a settlement demand. The court responded to Deerbrook's argument by limiting the "genuine dispute" rule to first party insurance cases where courts are required to determine whether the insurer has refused to pay policy benefits unreasonably and without cause. Settlement in third-party insurance cases was different. >

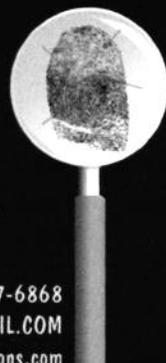
### *continued from page 14* **Court of Appeal Revisits When Loss of Consortium Claims Accrue Broadcast**

granting summary judgment on the loss of consortium cause of action. The court held that the first element of a loss of consortium cause of action — the existence of a marriage at the time of injury to the plaintiff's spouse — is satisfied if the plaintiff's marriage to the injured spouse predates discovery of symptoms, or diagnosis, of an asbestos-related disease. According to the Court of Appeal, "[t]his is so even if the marriage postdates the spouse's exposure to the asbestos that ultimately results in the injury." (Ibid.) The court reasoned that just like a legal malpractice case, there must be appreciable or actual injury before a right of action can arise with respect to a latent disease. Therefore, "for purposes of creation of a loss of consortium cause of action, injury to the spouse in the latent disease context occurs when the illness or its symptoms are discovered or diagnosed, not at the time of the tortious act causing the harm."

While Vanhooser may not prove to be a groundbreaking decision, it provides an update on this area of the law. >

## **BRUCE ALAN INVESTIGATIONS**

*All truths are easy to understand once they are discovered; the point is to discover them. --Galileo*



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