SAN DIEGO DEFENSE LAWYERS

THE UPDATE

SPRING 2013

Binding Mediation: Blasphemous Paradox or Creative Solution to Court Funding Woes?

By N. Denise Asher
NATIONAL CONFLICT RESOLUTION CENTER

Many will argue "Binding Mediation" is an oxymoron; that such a process necessarily violates mediation's primary goal of party self-determination. But in these times of budget cuts and courtroom closures, binding mediation may offer a creative solution which provides litigants the best of both worlds: the ability to first try to work it out voluntarily, with a mechanism for finality if that route fails. And according to a recent holding by the Fourth District Court of Appeal,[1] parties can be assured "Binding Mediation" will pass legal muster so long as the agreement to enter into such a process is sufficiently certain to enforce.

In Defense of the Sanctity of Mediation

The hallmarks of mediation are voluntary participation and self-determination by the parties. Cal. Rules of Court, Rule 3.853. Mediators must respect the right of each participant to decide the extent of his or her participation, and refrain from coercing any party to make a decision or to continue to participate in the mediation. *Id.* The policy arguments against binding mediation are thus legendary and legitimate.

Some of those reasons were discussed in *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, in which the appellate court overturned a judgment based on an award following binding mediation. The *Lindsay* court reached its decision on pure contract principles, holding the agreement to proceed to binding mediation was unenforceable due to the uncertainty of its terms and an inability to determine the parties' intent.[2] Declining to formally address the policy arguments, the Court stated: "where we are simply unable to find any meeting of the minds, [it] would be an inappropriate excursion into issues unnecessary to resolution of the case before us." However, the remainder of the opinion did little to hide the panel's "strong feelings about the efficacy vel non of binding mediation." *Id.* at 1625.

In the concurring opinion, Justice Sills wrote separately to "more clearly register the oxymoronic character of the concept," labeling a "fuzz phrase" like binding mediation unworthy of the tradition of good lawyering. *Id.* at 1626. He mocked the propriety of a process that envisioned when "settlement is not reached, then, puff, the mediation becomes an arbitration," and enumerated some of the practical pitfalls:

> Besides the self-contradictory nature of the phrase, the 'hybrid' concept of a 'mediation' which fails to reach a mutually acceptable settlement and then turns into an arbitration where the mediator is also the arbitrator can have unexpected consequences. One of these consequences is that the use of 'binding mediation' may actually retard settlement. Judges and lawyers with extensive experience in

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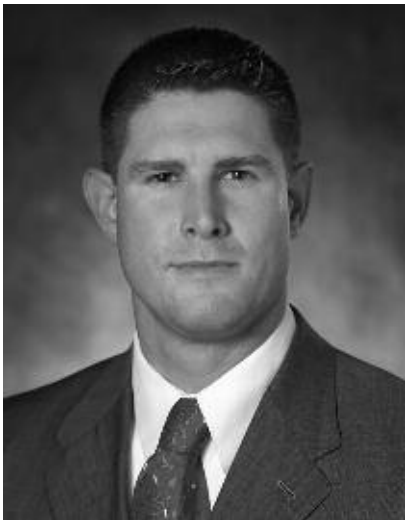
President's Message



By the time you are read this, SDDL has sponsored or co-sponsored three evening seminars and seven lunchtime MCLE presentations this year, totaling an unprecedented thirteen hours of MCLE credit in just five months. While this has been an explosive start to the year, we have much more planned to benefit our members, the defense bar, and our community.

Please mark your calendars for the Thirteenth Annual Juvenile Diabetes Research Foundation Golf Tournament on July 26th, 2013, when we return to the Country Club of Rancho Bernardo. Following this event, SDDL will host its 3rd Annual Padres Tailgate and game, against the Chicago Cubs, on August 23, 2013. Last, please make yourself available to judge for an evening with SDDL's Annual Mock Trial Competition, October 17-19 2013.

Two of our evening events this year have been co-sponsored by our colleagues with the Consumer Attorneys of San Diego, tying into SDDL's first pillar, civility. For those who have not seen it yet, I encourage you to review the American Board of Trial Advocacy's newest publication, "Why Civility and Why Now?" The program, endorsed by the American Inns of Court, is available for free on ABOTA's website. In addition, a video of the presentation from this year's Association of Southern California Defense Counsel's annual conference is available on the ABOTA website to view as well. You might recognize (in a good way!) some of the participants.

See you at the next SDDL event!

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 1 to December 31. Applications can be downloaded at: www.sddl.org

THE UPDATE

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Bottom Line

RESULT DATE: April 16, 2013

Juvenal Hernandez v. Juan Pacheco

(37-2011-00102264-CU-PA-CTL)

Hon. Ronald L. Styn, San Diego Superior

TOPIC: Personal Injury

SUB TOPIC: Auto v. Auto

FURTHER DESCRIPTION: Rear-End Collision

VERDICT: Defense

ATTORNEY: Plaintiff - Michael E. Moore (Law Offices of Michael E. Moore, San Diego); Frank De Santis, Thomas De Santis (Law Office of Frank De Santis, Chula Vista).

Defendant - Scott D. Schabacker (Law Offices of Scott D. Schabacker, San Diego).

MEDICAL: Plaintiff - John Finkenberg, M.D., orthopedic surgery, San Diego.

Defendant - Howard Tung, M.D., neurosurgery, San Diego.

FACTS: Defendant Juan Pacheco's car rear-ended plaintiff Juvenal Hernandez's car on Interstate 8 in San Diego on April 29, 2011.

The defense admitted liability.

DAMAGES: Plaintiff asserted spinal injuries involving the cervical and lumbar regions with a fusion operation at C4-5 and a lumbar laminectomy at L4-5. Defense asserted that the plaintiff's symptoms were previously claimed following an industrial injury in 2000 and that the plaintiff suffers from hypochondriasis, claimed unverified symptoms and required only non-surgical care. Plaintiff testified to significant residual neck and back pain one year status-post the neck surgery and six months status-post the lumbar surgery.

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"LUNCH AND LEARN" PROGRAMS

Avoiding Malpractice Claims: Five Key Elements

By Alexandra "Sasha" Selfridge

On February 12, 2013, SDDL hosted a Lunch and Learn MCLE program on the subject of legal malpractice. The speaker was Kathy Fitch.

According to Ms. Fitch, the "Five Key Elements" to avoiding malpractice are: (1) client selection; (2) your fee agreement; (3) communication; (4) a termination letter; and (5) do not sue for fees.

Client Selection

When attorneys consider whether to accept a new client, there are some "red flags" to look out for. One should always use a search engine (such as Google) to check for prior suits against lawyers by a potential client. If so, the new client may be someone who is always looking for someone to blame – and you may be next. In addition, it is a good practice find out whether previous counsel has been retained on the case, and if so, how many. If there have been three or more, there may be a reason to be skeptical about taking that case or client. Another "red flag" is a potential client who is unwilling to sign a fee agreement. If someone refuses to sign a fee agreement, there is probably a reason.

Your Fee Agreement

According to Business and Professions Code section 6148, hourly fee agreements must generally be in writing. Fee agreements should be very clear about exactly who is to be represented, especially when the represented party is an institutional client. In that circumstance, fee agreements should clearly state that the attorney does not represent the officers or other employees. In addition, for institutional clients, it is a good practice to specify to whom the attorney will report. Fee agreements should provide that clients will receive detailed billing statements, and that clients have the opportunity to question those statements. Ms. Fitch advises her clients to raise questions about fee statements quickly, as this makes it difficult question a statement after paying the bill. Fee agreements should specify the scope of services to be provided. With institutional clients, this may be difficult to accomplish with a general retainer; however, some limitations as to the scope of services (such as, no tax advice, or no advice regarding insurance coverage) can be included. Currently, if an attorney lacks malpractice insurance, this information must be disclosed to clients. While lack of insurance need not be disclosed in a fee agreement, Ms. Fitch advises that this is as good a place as any. Finally, an arbitration provision may be included in a fee agreement as well.

Communication

According to the Rules of Professional Conduct, rule 3-500, attorneys must keep their clients reasonably informed. Although the requirement is "reasonably," a better practice is to go further than that. Attorneys should keep their clients updated regarding significant dates, such as Case Management Conferences and hearings. In addition, important oral conversations or decisions should be confirmed in writing. Lawyers should answer all of their clients' questions. All telephone calls and e-mails correspondence from clients should be returned within a day or two. If clients feel informed and involved, attorneys will be congratulated, even if they lose.

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Cover Story Continued – Binding Mediation: Blasphemous Paradox or Creative Solution to Court Funding Woes?

> conducting settlement conferences know that the person conducting the conference frequently hears things from the lawyers that he would never hear were he the trial judge or arbitrator. For example, a lawyer might tell a mediator that his client doesn't recognize his exposure and cannot get him to understand the downside of his case. The lawyer will ask, 'You can help, I think he will listen to you.' Another lawyer might tell a mediator that he can possibly get another $50,000 if the other party will only come down another $100,000 on their demand. Or both lawyers might tell a mediator what they candidly think their case is worth but ask the mediator to explain to each party the exposures they face so as to get movement toward settlement. But no lawyer in his right mind would ever tell such things to a mediator if he thought it was possible the mediator might become the arbitrator." *Id.* at 1627-28.

Justice Sills then reiterated that mediations are meant to involve a truly voluntary process that by definition reflects the consent of the parties and is "distinctive from arbitration in [the] inherent lack of consequences." Arbitration, on the other hand, entails a binding adjudication by a neutral decision-maker "ultimately backed up by the government." Justice Sills concluded that binding mediation is nothing more than "half-baked arbitration," a process which runs the risk of leaving the parties with the "worst of both worlds." *Id.*

Other writers have discussed the legitimate ethical concerns to consider when a neutral takes off one hat and puts on another, noting a "party or their counsel may consciously or subconsciously defer to the mediator's perceived preference if that neutral may later wield the power of an arbitrator."[3] The author went on to describe practical concerns:

> [B]inding mediation, if agreed to at the outset, or before a settlement is reached, creates a subtle appearance of impropriety because it gives the mediator a financial incentive if the case does not settle. In addition, neutrals with a penchant for decision-making may not push hard enough for a settlement, choosing instead to resolve the dispute through arbitration....
>
> [T]here is the larger concern that when a mediator steps out of his or her designated role, he or she may be unable to prevent what was learned in private caucus from influencing the arbitration award...Similarly, the neutral might be more inclined to render a decision that reflects the compromise he or she was unable to broker during the mediation, rather than ruling as the merits would otherwise dictate. [This] could have a chilling effect on the mediation process by discouraging lawyers from revealing, even confidentially, their cases' weaknesses and vulnerabilities.

Against the backdrop of such serious concerns, it begs the question: why anyone in their right mind would even explore the idea of binding mediation? The answer, of course, is that there is always another side to the argument.

Binding Mediation -- The Rules Say We Can

With the policy arguments against binding mediation in mind, the California Rules of Court expressly allow for the option of combining mediation with other forms of alternative dispute resolution. However, if such a hybrid forum is to be used, the mediator must exercise caution to ensure the parties' informed consent is obtained, and the process is handled in a manner consistent with applicable law. Rule of Court 3.857(g) provides:

> A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

The Fourth District Court of Appeal was recently called upon to again address a judgment flowing from a "binding mediation." As before, the Court relied heavily on contract principles to decide the case, but on the facts before it this time, upheld the judgment. The Court held that so long as the terms of the parties' agreement are sufficiently certain to enforce, "binding mediation is not a constitutionally or statutorily prohibited means of waiving jury trial rights where, as here, the parties have agreed to settle their dispute in a nonjudicial forum." *Id.* at 728.

In *Bowers,* the parties sued one another for defamation and related business torts which were subject to an arbitration agreement. After several days of arbitration, the parties agreed to try to settle their disputes before the arbitrator reached a decision, and came up with a plan for "Med/Arb" or "binding mediation." Pursuant to the plan, the parties would attempt to settle the case at mediation, and if that failed, the mediator would have the ability to decide the case by choosing either the high or low number of a predetermined

range. *Id.* at 728-729. The parties entered into a Settlement Agreement and Release which provided, in pertinent part:

> The Parties shall then proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral.... the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against [Defendants] at some amount between $100,000 and $5,000,000, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party.

Id. at 729-730.

The parties subsequently amended the Settlement Agreement at the request of their chosen mediator to reflect that if the parties didn't reach a voluntary settlement, the parties would submit a final demand and offer, and the mediator was empowered to set the amount of the judgment by choosing either the plaintiffs' demand or the defendant's offer, which could then be entered as a legally enforceable judgment in San Diego Superior Court.

Not surprisingly, the parties went through the process, couldn't agree to settle the case, and the mediator had to choose between the parties' final positions. The mediator ultimately selected the plaintiffs' demand, and plaintiffs petitioned to confirm the mediator's award. Defendants objected, asserting the court could not confirm the award because it was a mediation award, rather than an arbitration award. The trial court agreed and declined to confirm the award as an arbitration award, but instead enforced the settlement agreement and subsequent mediator's award under C.C.P. Section 664.6. *Id.* at 731.

In doing so, the trial court explained that despite the use of "undefined legal terms such as 'mediation with a binding arbitration component' and 'mediation/binding baseball arbitration', the parties clearly agreed in writing that the mediator would decide the amount of the judgment with the 'binding mediator judgment' to then be entered as a legally enforceable judgment...." The court further noted the case involved sophisticated parties and knowledgeable counsel who entered into the agreement voluntarily, and could have explicitly provided other terms if that was what they intended. *Id.*

On appeal, the defendant argued the term "binding mediation" was an inherently uncertain term, and relying upon *Lindsay, supra*, urged the Court to set aside the judgment. The Court declined to do so, distinguishing Lindsay on its facts, and held that the agreement before it was sufficiently certain to be specifically enforceable. *Bowers, supra*, at p. 736.

The defendant next attacked the judgment contending "binding mediation" was not among the constitutionally and statutorily permissible means of waiving jury trial rights, including those codified in Code of Civil Procedure Section 631. The Court rejected this argument as well, holding Section 631 inapplicable on these facts. As noted by the Court, Section 631 relates only to the manner in which a party can waive the right to

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Bottom Line

Case Title: Sohaey v. Carstens, M.D.
Case Number: 37-2012-00095300-CU-MM-CTL
Judge: Hon. Ronald L. Styn
Plaintiff's Counsel: Doug Walters, Esq.
Defendant's Counsel: Clark Hudson, Esq. and Sezen Oygar, Esq.
Type of Incident/Causes of Action: Medical Negligence
Settlement Demand: N/A
Settlement Offer: C.C.P. section 998 for waiver of costs/dismissal
Trial Type: Jury
Trial Length: 4 days
Verdict: Unanimous defense verdict for the doctor

On April 3, 2013, Sezen Oygar and Clark Hudson successfully teamed up in the defense of a local Rheumatologist/Internist. The plaintiff, a female patient with a lengthy history of osteoarthritis in both knees, alleged the defendant physician was negligent when performing a Synvisc injection to her left knee because she subsequently developed an infection. Specifically, plaintiff claimed the defendant doctor failed to use sterile technique when performing the injection by contaminating the needle or failing to properly remove bacteria from the skin during his sterile prep. Plaintiff argued the infection, a streptococcus viridans bacteria which is generally mouth borne but ended up in her knee, was almost impossible to occur if the doctor used sterile technique. Plaintiff maintained throughout trial because this type of incident did not ordinarily occur unless someone was negligent, then it follows the doctor had to be negligent. Finally, plaintiff alleged she should have been started on antibiotics three days earlier when her first culture results showed the rare strep bacteria.

The defense maintained throughout trial infections are a well-recognized risk of any interventional medical procedure.

While steps are taken to minimize the risk of infection, one can never completely eliminate the risk; infections can and do occur despite a physician's best efforts. Defendant doctor documented his use of sterile prep and appropriately ordered the necessary follow up tests to determine whether or not the strep bacteria was a contaminate or pathogen. The defense maintained because of defendant's thorough follow up care the plaintiff received the appropriate treatment she needed once a diagnosis was made. Further, even if a diagnosis had been made three days earlier, plaintiff's treatment and outcome would have remained the same.

The jury deliberated for approximately fifteen minutes before rendering a unanimous defense verdict on behalf of the doctor. >

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Avoiding Malpractice Claims: Five Key Elements

A Termination Letter

A termination letter notifies the client that the attorney is closing his or her file, and that no further work will be done on the matter. Termination letters are not technically required, but they are a very good practice. The statute of limitations set forth in Code of Civil Procedure section 340.6 is tolled by continuous representation, and without a termination letter, attorneys represent their clients forever. In addition, once requested, attorneys must return their clients' files. It is a good practice to keep a copy of a client file if it is requested, as it may have been requested for a reason.

Do Not Sue for Fees

Suing a client for fees is the most certain way to invite a suit for legal malpractice. The best way to avoid having to sue for fees is for attorneys to keep clients current with fees and costs. Attorneys should send bills out monthly, and on time. If clients get behind, attorneys are not required to work for free, but cannot abandon their clients either. Clients will need to be aware that getting behind on fees and costs can affect attorneys' ability to represent them. Certain time-consuming motions may no longer be possible to prepare. If attorneys really need to collect from a client, it is a better practice to make a claim for fee arbitration, and leave it at that. If attorneys truly must sue, they should wait one year after the termination of the attorney-client relationship to file suit. At that point in time, the one-year statute of limitation will have expired. At the same time, clients can assert attorney negligence to offset fees which are owed. It is a good practice for attorneys to check their insurance policies before suing for fees, as many will not cover legal malpractice where the attorney sued first.

Hot Topics

In Ms. Fitch's experience, one of the biggest problems giving rise to legal malpractice litigation is lack of communication. Sometimes clients do not understand certain risks, or why certain actions were not taken. The other main problem is missing deadlines, especially statutes of limitation and motions for summary judgment. If a deadline is missed, attorneys should deal with it directly rather than hide it.

Cathy Fitch is a partner at Coughlan, Semmer, Fitch & Pott, LLP, where she specializes in the defense of professionals, mainly attorneys. She is a Certified Specialist in Malpractice Law, and was recently recognized (for the second year) as a Super Lawyer in that field. >

San Diego Defense Lawyers Twenty-Ninth Annual Installation Dinner

By Alexandra "Sasha" Selfridge

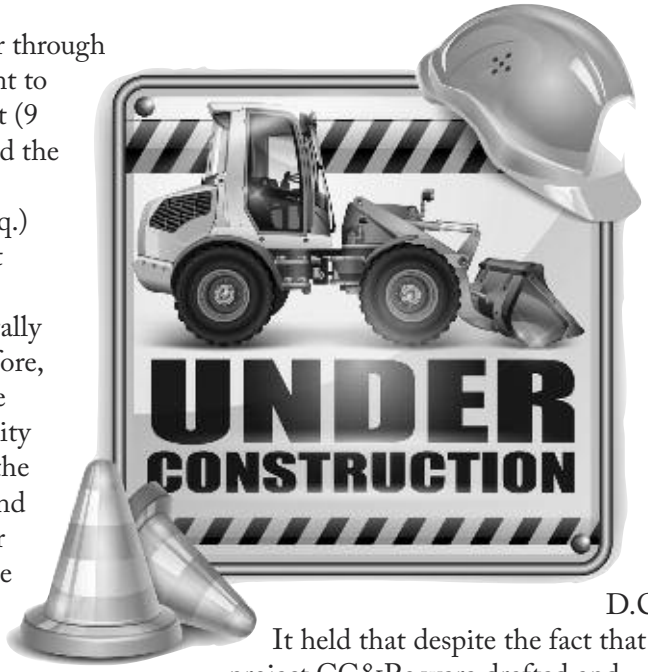
Thank you to the more than 200 members who attended the San Diego Defense Lawyers' 29th Annual Installation Dinner on January 26, 2013 in Balboa Park. The Prado's Grand Ballroom was stunning, and a good time was had by all! This year we were proud to honor the San Diego Defense Lawyer of the Year, Clark R. Hudson, Esq. In addition, 2012 SDDL President, Victoria Stairs, was pleased to present the Juvenile Diabetes Research Foundation with a check for $7,500 on behalf of our organization. With the proceeds from the raffle tickets sold at the Installation Dinner, SDDL will be making a donation to the PACE program as well. If you were unable to attend, you missed some great speeches including those by 2013 SDDL President, Ben Howard, and Ken Greenfield, who was our Master of Ceremonies for the evening. Judge Hoffman, Judge Sammartino, Judge Medel, and his lovely wife Debbie Medel were in attendance. Rebecca Mowbray of the Consumer Attorneys of San Diego, Brian Rawers of the American Board of Trial Advocates, Marcella McLaughlin of the San Diego County Bar Association, and Barbara Donnell of the Juvenile Diabetes Research Foundation also attended. Past SDDL Presidents Charlie Grebing, Jim Wallace, Chris Todd, and Dan White joined as well. It was a wonderful evening, and we are already looking forward to next year! >

Comment: The Future of Construction Defect Litigation Following *Pinnacle Museum Tower Assoc. v. Pinnacle Market Development*

By James Chodzko, Esq., Mediator for West Coast Resolution Group

In *Pinnacle Museum Tower Association v. Pinnacle Market Development (US) LLC, et al.* (2012) 55 Cal. 4th 223, the California Supreme Court held that where the developer of a mixed use residential and commercial interest community properly drafted and recorded covenants, conditions and restrictions (CC&Rs) for the Association, it may require each condominium owner to waive his/her right to a jury trial and have any construction dispute resolved exclusively through binding arbitration pursuant to the Davis-Sterling Common Interest Development Act (Civil Code Sections 1350 et seq.; hereinafter referred to as the Act). This decision promises to transform and reduce the time, cost and uncertainty that has marked the rite these cases have been navigated by lawyers for more than 30 years in California.

At first blush, consumers will likely balk at losing their right to a jury trial and, now, being compelled to submit their construction defect claims to binding arbitration. But consider the reasoning set forth in *Pinnacle*. There, the Owners Association filed a construction defect lawsuit against the project developer in the San Diego County Superior Court, seeking recovery for damages to its property and damage to the separate interests of the condominium owners who comprise its membership. In reply, the developer filed a motion to compel arbitration based on Article XVIII contained as part of the (CC&Rs), that provided that the Association and its individual owners agree to resolve any construction defect disputes with the developer through binding arbitration pursuant to the Federal Arbitration Act (9 U.S.C. section 1 et seq.) and the California Arbitration Act (C.C.P. sections 1280 et seq.)



The trial court held that Article XVIII was both substantively and procedurally unconscionable and, therefore, unenforceable. It found the substantive unconscionability pertains to the fairness of the agreement's actual terms and the assessments of whether they are overly harsh or one sided; the terms must be so one-sided as to "shock the conscience." *Pinnacle, supra*, 55 Cal. 4th at 246. The procedural unconscionability identified by the trial court was that the subject provision took the form of a contract of adhesion. The court noted that this element addresses the circumstances of contract oppression or surprise due to unequal bargaining power between/among the parties. *Id.*

The Fourth District Court of Appeal affirmed the trial court ruling. It concluded, by a split vote, that the arbitration clause set forth in the project C.C. & R's. did not constitute an agreement sufficient to waive Plaintiffs' right to a jury trial for construction defect claims. *Pinnacle, supra*, 55 Cal 4th at 234-235. The majority additionally held that, even assuming the Association and its members were bound by the jury waivers in the purchase agreements signed by the individual condominium owners, the waivers were unconscionable and unenforceable. *Id.*

The California Supreme Court reversed the holding of the Fourth D.C.A. It held that despite the fact that the project CC&Rs were drafted and recorded before the sale of any unit and without input from the Association or any of its members, it was a circumstance dictated by the legislative choices embodied in the Act. [see also B & P Code sections 11018.1, 11018.2 and 11018.5 subd. (c)]. The *Pinnacle* court found that the intent of the Act is to permit such landowners to develop and market their properties to purchasers as condominium developments operating under certain covenants and restrictions. By providing for Pinnacle Market's capacity to record a declaration that, when accepted by the first purchaser, binds all others who accept deeds to condominium properties, the Act ensures that the terms reflected in the declaration - *i.e.*, the (CC&Rs) governing the development's character and operation - will be respected in accordance with the expectations of all property owners unless proven unreasonable. The Court added that while a condominium

declaration may perhaps be viewed as adhesive, a developer's procedural compliance with the Act provides a sufficient basis for rejecting an Association's claim of procedural unconscionability. The Court also held that the arbitration provisions of Article XVIII are not substantively unconscionable. It found that, in fact, the California Department of Real Estate reviewed and approved the Pinnacle Museum project, coupled with the fact that the Association neglected to identify any aspect of Article XVIII that was overly harsh, or, so one-sided that it shocks the conscience, led the Court to conclude that Article XVIII of the subject CC&Rs, is consistent with the provisions of the Act and is neither procedurally nor substantively unconscionable. Its terms requiring binding arbitration of construction disputes were found, by the Supreme Court, to be enforceable.

This decision has markedly changed the landscape of construction litigation in California. Rather than litigating construction defect disputes pursuant to a most time consuming and excessively expensive litigation process, the California Supreme Court has, in appropriate cases, ordered the litigants in such matters to proceed to binding arbitration. Implied in this holding is the instruction from our Supreme Court to those involved in construction defect disputes to seek resolution of these disputes outside the judicial process.

Since May, 1980 I have actively represented property owners, homeowner associations, real estate developers, architects, engineers, design professionals and subcontractors in lawsuits predicated on defects alleged to exist in mass produced residential dwellings. Throughout those years, construction defect lawsuits were litigated and tried in federal and state courts throughout California. It has been my experience that those cases were typically settled or tried only after years of litigation. I believe the road to resolution of such claims can be travelled more quickly, with considerable cost savings to the litigants, with the issuance of an arbitration award. These cases have a tendency to take on lives of their own, but the arbitration process can expedite their resolution.

As an instructive example, I served as the arbitrator in a fiercely contested construction dispute two years ago. I was able to schedule discovery, hear the evidence presented by all the parties at the arbitration hearing and issue my final award in 11 months. And as we all know, the state trial court's ability to quickly process civil disputes has certainly not increased in the last two years. Thus, for those of us who have worked in this arena for so many years, *Pinnacle*, though insisting on a new way of resolving construction disputes, may be a blessing for all litigants who have been numbed by the cost, delays and uncertainties of the present system.

Given the crises being experienced in the operation of courts throughout the State of California, I believe these strains will be much alleviated by the *Pinnacle* decision. Moreover, litigants will have the opportunity to select a "private judge" – one who has relevant practical experience – as their arbitrator. As examples, arbitration of such disputes will permit parties to conduct pre-hearing discovery in a much more cost and time efficient manner. Judgment will be entered more quickly than through conventional litigation. On balance, I believe the *Pinnacle* case will greatly streamline and reduce the costs of engaging in the historically cumbersome and astronomically expensive construction defect lawsuit of the past. >

On The Move

Farmer Case Hack & Fedor is proud to announce that Jason Murphy, formerly a partner at Campbell Murphy of San Diego, joined the firm on February 1, 2013. A 2001 University of San Diego School of Law graduate, Jason provides quality and cost-effective consulting, representation and litigation services to clients ranging from individuals and small businesses to large corporations and institutions in the areas of personal injury, construction defect, business, employment, and corporate law in cases throughout California. >

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Bottom Line

SPECIALS IN EVIDENCE:

MEDS: Plaintiff initially asserted $170,000 in medical expenses that were reduced to $61,000 at trial under the Howell decision.

JURY TRIAL: Poll, 11-1 (no causation); Deliberation, one hour.

SETTLEMENT DISCUSSIONS: Plaintiff demanded $175,000. Defendant offered $50,000.

RESULT: Defense verdict. >

The Applicability of SB-800's Statutes of Limitation to Homeowners Association's Claims for Construction Defects

By Samir R. Patel, Esq.
LORBER, GREENFIELD, & POLITO, LLP

In 2002, the California Legislature enacted the Right to Repair Act (hereinafter "SB-800"), as codified in Title VII of the Civil Code, section 895, et seq. SB-800 established performance standards for residential construction, and provides a statutory protocol to address alleged violations of those standards. SB-800 defines a "structure" as a "residential dwelling, other building, or improvement located upon a lot or within a common area." (Civ. Code § 895, subd. (a).) A "homeowner" is defined as "individual unit owners … and in the case of a common interest development ... any association ... ." (Civ. Code § 895, subd. (f).) While SB-800 uniformly refers to "purchasers," its express provisions state that a homeowners' association (hereinafter "HOA") will be treated as a "purchaser" under the Title and have the same rights, responsibilities, and obligations. Civil Code section 945 states: "[f]or the purposes of this title, associations ... having the rights set forth in § 383 of the Code of Civil Procedure shall be considered to be original purchasers and shall have standing to enforce the provisions, standards, rights, and obligations set forth in this title."

One of the most relevant features of the SB-800 statutes is that they include shortened statutes of limitation as to violations of certain enumerated performance standards. The shortened statutes of limitation are triggered from the date of "close of escrow." Hence, a determination of the earliest possible date for the "close of escrow" may be beneficial in the defense of an SB-800 claim. The importance of the codified statutes of limitation is that they are much more definitive than the statutes of limitation regarding tort and contract claims. For example, under Civil Code section 896, et seq., there is a four year limitation on claims arising from violation of the performance standards applicable to electrical systems (Civ. Code § 896, subd. (f)); a four year limitation as to plumbing systems (Civ. Code § 896, subd. (e)); a two year limitation as to landscaping (Civ. Code § 896, subd. (g)(12)); and a one year limitation as to irrigation systems and drainage (Civ. Code § 896, subd. (g)(7)).

With regard to a single family home, SB-800 applies to sales occurring after January 1, 2003, and the trigger date for the statutes of limitation is the date of "close of escrow" between the builder and the original purchaser. (Civ. Code § 895 subd. (e).) In this context, the close of escrow signifies the legal transfer of title from the builder to the homeowner. Usually, the grant deed and deed of trust are recorded within a day after the escrow holder's receipt of loan funds, which completes the transaction and establishes the "close of escrow."

Under SB-800, determining the trigger date of the statutes of limitation for an HOA suit is somewhat more complex. With respect to claims by an HOA, Civil Code section 895 subdivision (e) defines the "close of escrow" as the "date of substantial completion, as defined in Section 337.15 of the Code of Civil Procedure, or the date the builder relinquishes control over the association's ability to decide whether to initiate a claim under this title, whichever occurs first." [Emphasis added.] The date that the builder relinquishes control over the HOA is when the homeowners obtain majority control over the HOA Board of Directors in order to have "quorum," thereby enabling the Board of Directors to initiate a claim on behalf of the HOA against the builder. Hence, the "close of escrow" is when the balance of power on the HOA Board of Directors tips from the control of the builder's representatives to the actual homeowners. The bylaws of the HOA may allow for the builder to immediately relinquish any control relating to a suit for construction defects, at which point the HOA obtains immediate control over whether to initiate a lawsuit, and the statutes of limitation begin to run from that date.

As stated above, Civil Code section 895 subdivision (e) also provides that the date of "substantial completion" can operate as a trigger date for SB-800's defect-specific statutes of limitation as applied to HOA claims. Civil Code section 895 subdivision (e) specifically refers to Code of Civil Procedure section 337.15, which defines the date of "substantial completion" as the earliest of four dates: (1) the date of final inspection by the applicable public agency; (2) the date of recordation of a valid notice of completion; (3) the date of use or occupation of the improvement; or, (4) one year after termination or cessation of work on the improvement. The date of final inspection by a public agency is essentially when a municipality inspects the property for the last time. The date of recordation of a valid notice of completion relates to the date that a notice of completion is filed with the County Recorder's office. The date of use or occupation may be hard to pinpoint, but a final "Certificate of Occupancy" issued by a municipality may help define this date. The last criterion, "one year ... after the cessation of work," may be hard

to pinpoint as well, as some trades may continue to perform work on the common areas right up to, or even beyond, the earliest move-in dates.

As displayed above, the days when the only analysis regarding the applicable statute of limitation for construction defect actions was whether the defect was latent or patent are now long gone. An astute analysis of which of the various potentially applicable trigger dates, to ascertain the earliest, may provide a substantial advantage in the defense of an HOA's SB-800 claims. The defect specific statutes of limitation, as well as the different trigger dates applicable to an HOA's claims, can provide ammunition for the defense to obtain dispositive rulings at trial, or even by pre-trial motions. >

Bottom Line

Case Number: 37-2009-00099705-CU-PN-CTL

Judge: Hon. K. Enright

Plaintiff's Counsel:

Defendant's Counsel: Charles Grebing and Deborah Dixon

Type of Incident/Causes of Action: Legal Malpractice (underlying matter involved a deed dispute)

Trial Type: Jury/Judge: Jury

Trial Length: 4 days

Verdict: 3/12/13. Unanimous defense verdict within three hours >

On The Move

Veteran Litigation Team of Bacalski, Dubé and Serino Joins Forces with The Eclipse Group LLP

As of March 2013, the longstanding San Diego litigation team of A. Daniel Bacalski, Douglas Dubé and Denise M. Serino recently entered into partnership with the Eclipse Group LLP. The Eclipse Group is a Martindale-Hubbell AV-rated intellectual property, litigation and business law-focused firm with offices strategically located in five key industry and innovation hubs within the United States. "We have spent many years successfully representing our clients and building a solid reputation as some of the finest litigators in the San Diego area. We look forward to providing an even more expansive offering of legal services to our clients, and to have the opportunity to complement Eclipse Group's talented and well-experienced team of attorneys," said Dan Bacalski, founding partner of Bacalski, Ottoson & Dubé. Eclipse Group's co-founding partner and litigation chair, Edward F. O'Connor, said of the new relationship, "We feel very fortunate to have such a well-respected group of attorneys joining our team and, with their assistance, look forward to expanding our areas of practice and client outreach within the San Diego region and beyond." >

Stengel v. Medtronic En Banc Decision Narrows Preemption Doctrine to the Detriment of Medical Device Manufacturers

By Noushan Noureddini, Esq.
MORRIS POLICH & PURDY LLP

A recent Ninth Circuit Court of Appeals *en banc* decision marks a less than desirable shift in preemption law for medical device manufacturers. In *Stengel v. Medtronic Inc.*, 704 F.3d 1224 (2013), the Ninth Circuit granted rehearing *en banc* and unanimously reversed the decision of the district court in a product liability case by holding that the Medical Device Amendments ("MDA") of the Federal Food, Drug and Cosmetic Act ("FDCA") did not preempt the plaintiffs' state-law failure-to-warn claim, which was contained in the plaintiffs' proposed amended complaint.

In 2000, plaintiff Richard Stengel had a Medtronic pump and catheter surgically implanted into his abdomen. The Food and Drug Administration ("FDA") had previously approved the pump and catheter via the FDA's pre-market approval ("PMA") procedure, which required clinical trials to be conducted and evaluated before the device could be approved. The device delivered medication directly into the plaintiff's spine. However, within five years of implantation, the plaintiff began experiencing paralysis in his lower extremities. Although the plaintiff's physicians were able to remove the catheter, the plaintiff was rendered a permanent paraplegic. Medtronic eventually recalled the device in March 2008, following numerous post-approval complaints of adverse events that the plaintiff alleged were similar to his experience.

In holding that the plaintiffs' state-law failure-to-warn claim was not preempted, the *en banc* panel of the Ninth Circuit reasoned that the MDA does not expressly or impliedly preempt a state-law claim for violating a state-law duty that parallels a federal-law duty under the MDA. The plaintiffs' proposed amended complaint alleged that Medtronic failed to perform its duty under federal law to warn the FDA about any complaints regarding the product's performance, as well as any adverse health consequences that could be attributable to the product. Consequently, the plaintiffs claimed that because Medtronic did not comply with its "parallel" duty under federal law, it breached its duty to use reasonable care under Arizona tort law. The court concluded that the plaintiffs' allegations withstood preemption. In so ruling, the *en banc* panel of the Ninth Circuit emphasized that Arizona law protects consumers by imposing a general duty of reasonable care on products manufacturers. The court stated that because Arizona tort law allows a cause of action for failure to warn and because it contemplates a manufacturer providing warnings to a third party such as the FDA, the plaintiffs' state-law claim paralleled federal law.

The *Stengel* decision is significant to medical device manufacturers in several respects. The original three-judge Ninth Circuit panel that issued the earlier opinion in Stengel had concluded that a plaintiff's state-law claim had to fit through a "narrow gap" if it were to escape express or implied preemption. However, the *en banc* panel's decision signifies a substantial widening of that gap. Although the previous panel of the Ninth Circuit had joined the Eighth Circuit by holding that federal law impliedly preempted a state-law failure-to-warn claim to the extent that the claim was based on the defendant's failure to provide the FDA with sufficient information and the failure to file timely adverse event reports, the Ninth Circuit's *en banc* panel joined the Fifth and Seventh Circuits by concluding that a state-law failure-to warn claim is not expressly or impliedly preempted. As a result, plaintiffs may be more likely to elude preemption. However, because the *Stengel* decision highlights a circuit split with regard to preemption of state-law failure-to-warn claims, the U.S. Supreme Court could conceivably grant a writ of certiorari to resolve the circuit split, which could lead to a more positive outcome for medical device manufacturers.

Furthermore, *Stengel* marks a significant narrowing of *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), where the Supreme Court held that the plaintiffs' state-law fraud-on-the-FDA claims were impliedly preempted because the federal statutory scheme empowered the FDA to punish and deter fraud against the FDA. Consequently, the Supreme Court reasoned that the FDA's authority to punish and deter fraud against the FDA could be "skewed" by allowing fraud-on-the-FDA claims under state tort law, and that this in turn could interfere with the federal statutory scheme or the FDCA. Despite this holding, in *Stengel*, the panel held that the plaintiffs' state-law failure-to-warn claim was not expressly or impliedly preempted, even where the plaintiffs claimed that because Medtronic failed to comply with its duty to warn the FDA under federal law, it breached its duty to use reasonable care under Arizona tort law. In other words, *Stengel* implies that allowing a state-law failure-to-warn-FDA claim does not "skew" the FDA's authority nor does it interfere with the federal statutory scheme. This decision suggests a very narrow interpretation of *Buckman* and implied preemption, such that it will be increasingly challenging for medical device manufacturers to demonstrate that a state-law failure-to-warn-claim interferes with the federal statutory scheme or the FDCA. >

Summary of Recent Civil Cases of Interest

By Monty A. McIntyre, Esq.
SELTZER CAPLAN MCMAHON VITEK

U.S. SUPREME COURT

Class Actions

Comcast Corp. v. Behrend _ U.S. _ (2013): The U.S. Supreme Court reversed the Court of Appeals because the class action was improperly certified under Rule 23(b)(3). The district court accepted one theory, the overbuilder theory of antitrust impact as capable of classwide proof (Comcast's clustering activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates). But the district court and Court of Appeals erred in finding the damages model of plaintiffs, based upon all four theories of liability and not just the overbuilder theory, established that damages were capable of measurement on a classwide basis. Without presenting another damage methodology, respondents could not show Rule 23(b)(3) predominance and questions of individual damage calculations would inevitably overwhelm questions common to the class. (March 27, 2013.)

Standard Fire Insurance Company v. Knowles _ U.S. _ (2013): The U.S. Supreme Court vacated the district court judgment (the Eighth Circuit had declined to hear an appeal) and remanded the case for further proceedings. A stipulation in a class action complaint that the class will not seek damages above $5 million, the amount in controversy required under Class Action Fairness Act of 2005 (U.S.C. sections 1332 (d)(2),(5)), does not control the amount in controversy determination because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. (March 19, 2013.)

Copyright

Kirtsaeng v. John Wiley & Sons, Inc. _ U.S. _ (2013): The U.S. Supreme Court reversed the Second Circuit Court of Appeals and remanded for further proceedings. The "first sale" doctrine (17 U.S.C. section 109) applies to copies of a copyrighted work lawfully made abroad and allows a buyer to bring a copy into the United States and sell it or give it away without obtaining permission to do so from the copyright owner. (March 19, 2013.)

Torts

Levin v. United States _ U.S. _ (2013): The U.S. Supreme Court reversed the judgment of the Ninth Circuit Court of Appeals and remanded the case for further proceedings consistent with the opinion. The Court held that the Gonzalez Act direction in 10 U.S.C. section 1089(e) abrogates the Federal Tort Claim Act's intentional tort exception and permitted plaintiff's suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment who allegedly perfomed surgery without the patient's consent. (March 4, 2013.)

Millbrook v. United States _ U.S. _ (2013): The U.S. Supreme Court reversed the Court of Appeals and remanded the case for further proceedings consistent with the decision. The Federal Tort Claims Act does not waive the United States' sovereign immunity for intentional torts by law enforcement officers only when the tortious conduct occurs in the course of executing a search, seizing evidence, or making an arrest. The waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity or are executing a search, seizing evidence, or making an arrest. (March 27, 2013.)

9TH CIRCUIT COURT OF APPEALS

Civil Rights

Ellins v. City of Sierra Madre _ F.3d _ (9th Cir. 2013): The Court of Appeals reversed, in part, the district court's granting of summary judgment for defendants. Plaintiff was a police officer for the City of Sierra Madre who led a no-confidence vote of the police officers' union against the Chief of Police, Marilyn Diaz. Diaz subsequently delayed signing an application for a certification that, when issued, would have entitled plaintiff to a five percent salary increase. Plaintiff brought suit under 42 U.S.C. section 1983 against Diaz and the City of Sierra Madre alleging that Diaz's delay was unconstitutional retaliation for the exercise of his First Amendment rights. The Court found that plaintiff had established a prima facie case of First Amendment retaliation against Diaz and the summary judgment in favor of Diaz was reversed and remanded for further proceedings. But the summary judgment in favor of the City of Sierra Madre was affirmed because plaintiff did not adduce sufficient evidence to defeat summary judgment on his claim under *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978). (March 22, 2013.)

Rubin v. City of Lancaster _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the district court's judgment for defendant following a bench trial. Unless legislative prayer proselytizes, advances, or disparages a particular faith, it does not violate the First Amendment simply because it contains sectarian references. The mere mention of "Jesus" in one invocation did not cross the constitutional line. The prayer practice

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Summary of Recent Civil Cases of Interest

did not violate the First Amendment because volunteers of numerous faiths were invited to and had given invocations before City Council meetings, and the selection process did not discriminate against any faith. To avoid Establishment Clause problems, the City had declined to regulate the content of the prayers, requesting only that volunteers not use the opportunity to proselytize or disparage any one faith. The state constitutional claim failed for the same reasons. (March 26, 2013.)

Copyright

Columbia Pictures Industries, Inc. v. Fung _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the district court's summary judgment for plaintiffs on liability and on defendant's safe harbor defense, but modified, in part, the court's permanent injunction. Defendant, who used BitTorrent file transfer technology, was properly found liable for infringement. Inducement liability is not limited, either logically or as articulated in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), to those who distribute a "device." One can infringe a copyright through culpable actions resulting in the impermissible reproduction of copyrighted expression, whether those actions involve making available a device or product or providing some service used in accomplishing the infringement. The Court of Appeals agreed that defendant was ineligible for protection under the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. section 512 (but for some reasons different from those expressed by the district court). The Court modified the permanent injunction finding it to be vague and unduly burdensome. (March 21, 2013.)

Lundvarts LLC v. AT&T Mobility, LLC _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the dismissal by the district court. Plaintiffs failed to allege adequately that the mobile wireless carriers had the necessary right and ability to supervise the infringing conduct, so they could not prevail on the claim of vicarious copyright infringement. Plaintiffs also failed to allege adequately that the mobile wireless carriers had the necessary specific knowledge of infringement and therefore could not prevail on the claim of contributory copyright infringement. (March 25, 2013.)

ERISA

Tibble v. Edison International _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the district court's summary judgment and trial rulings. The act of designating an investment for inclusion started the six-year period for claims asserting imprudence in the design of the Plan menu, but mere notification that retail funds were in the Plan menu fell short of providing "actual knowledge of the breach or violation" to start the three-year statute of limitations (29 U.S.C section 1113). The offering of retail mutual funds was not categorically imprudent, but defendant was imprudent in failing to investigate the possibility of institutional-class alternatives. (March 21, 2013.)

Torts

Perez v. Nidek Co., Inc. _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the district court's dismissal of the complaint. Plaintiffs/patients who suffered no injuries but who were subject to the off-label use of a medical device for eye surgeries could not bring suit solely because the Food and Drug Administration ("FDA") status of the device was not disclosed to them. The Third Amended Complaint failed to state a claim under the California Protection of Human Subjects in Medical Experimentation Act because the surgeries were not "medical experiments" subject to the protection of the Act. Plaintiff Perez did not have standing to sue for injunctive relief under the California Consumers Legal Remedies Act because he did not demonstrate that he faced "a real or immediate threat of an irreparable injury." Plaintiff's common-law fraud claim was expressly preempted by the Medical Device Amendments of 1976 (21 U.S.C. section 360c) of the Federal Food, Drug and Cosmetic Act (FDCA) and was impliedly preempted because it amounted to an attempt to privately enforce the FDCA. (March 25, 2013.)

CALIFORNIA SUPREME COURT

Corporations

Bourhis v. Lort (2013) _ Cal.4th _ : A corporation that timely files a notice of appeal while its corporate powers are suspended may proceed with the appeal once its corporate powers have been revived, even if the revival occurs after the time to appeal has expired. The California Supreme Court applied principles of stare decisis in following two opinions from the 1970's holding that revival of corporate powers validates an earlier notice of appeal. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351; *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369.) (March 4, 2013.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Compton v. Superior Court (American Management Services, LLC) (2013) _ Cal.App.4th _ : The Court of Appeals reversed the trial court's order granting a petition to compel arbitration. When plaintiff applied for a job she was required to sign an agreement to arbitrate disputes regarding her employment and barring arbitration of class actions. The Court of Appeals found the arbitration agreement to be substantively unconscionable. It compelled employees to arbitrate claims they would likely bring while preserving the company's right to litigate claims it would likely bring, and had a short one-year statute of limitations for an employee to demand arbitration. The Court found that *AT&T Mobility, LLC v. Concepcion* _ U.S. _, 131 S.Ct. 1740 (2011) did not abrogate the one-sidedness rule of *Armendariz v.*

Foundation Health Psychcare Servs. (2000) 24 Cal.4th 83. The agreement was also procedurally unconscionable. (C.A. 2d, March 19, 2013.)

Civil Code

Appel v. Superior Court (Webcor Construction, Inc.) (2013) _ Cal.App.4th _ : The Court of Appeals granted a petition for writ of mandate ordering the trial court to change an in limine ruling. In a mechanic's lien action by a contractor against condominum owners, the trial court erred in denying the owner's motion in limine to introduce the construction contract because the owners were not parties to that agreement. Under Civil Code section 3123(a), the amount of a mechanic's lien is the lesser of: (1) the price agreed upon in the contract; or (2) the reasonable value of the work. The construction contract was therefore relevant and admissible regarding the mechanic's lien claim. (C.A. 2d, March 11, 2013.)

Centex, Inc. v. Superior Court (2013) _ Cal.App.4th _ : In a construction defect case, the Court of Appeals granted a peremptory writ of mandate directing the trial court to vacate its order denying plaintiff's motion for relief from the Government Code claim filing requirements and for leave to file a cross-complaint against the City of San Diego (City) for equitable indemnity. Because there was no allegation in the original 2009 complaint pertaining to plumbing or sewer standards, that complaint did not give rise to Centex's equitable indemnity claim against the City seeking to apportion potential liability for a violation of Civil Code section 896(e). Government Code section 901 did not trigger the accrual of the equitable indemnity action against the City until the service of an amended complaint giving rise to a claim for equitable indemnity. (C.A. 4th, March 25, 2013.)

Civil Procedure

McDaniel v. Asuncion (2013) _ Cal.App.4th _ : The Court of Appeals affirmed the trial court's award of expert fees to defendant under Code of Civil Procedure section 998 following the entry of a defense verdict. Although joint 998 offers may be invalid, in a wrongful death action, a single joint cause of action is given to all heirs, and the judgment must be for a single lump sum. A unitary verdict can easily be compared to a joint offer to determine whether the offering party has achieved a more favorable judgment. The Court of Appeals found it could clearly be determined that defendant received a more favorable judgment and affirmed the award of expert witness fees. (C.A. 5th, March 27, 2013.)

People ex rel. Harris v. Rizzo (2013) _ Cal.App.4th _ : The Court of Appeals reversed the trial court's sustaining of a demurrer without leave to amend. This case arose out of rampant corruption in the City of Bell. When it appears that a charter city is under the control of individuals who are looting the city's coffers for their own benefit, the Attorney General may bring an action on behalf of the city against the allegedly corrupt individuals to remove the city from their control and require them to pay restitution to the city to the extent their acts were unauthorized. (C.A. 2d, March 20, 2013.)

Zamora v. Lehman (2013) _ Cal.App.4th _ : The Court of Appeals affirmed a summary judgment in favor of defendants regarding claims of alleged breach of fiduciary duty. Defendant executives had signed an employment agreement that contained a provision stating that if either party - the executive or the corporation - had "[a]ny claim" against the other, the claiming party had to present the claim in writing to the other party within one year of the date the claiming party knew or should have known about the facts giving rise to the claim. This contractual modification of the statute of limitations was valid. The complaint alleged the corporation became aware of the facts underlying the breach of fiduciary duty claim on November 22, 2002, and the trial court properly found the action was barred because plaintiff (the bankruptcy trustee) failed to notify defendants in writing that the company had a breach of fiduciary duty claim against them on or before November 22, 2003. (C.A. 2d, March 7, 2013.)

Class Actions

Daley v. Sears Roebuck and Co. (2013) _ Cal.App.4th _ : The Court of Appeals affirmed the trial court's denial of a motion for class certification and granting of a motion to preclude class certification. Plaintiff's theory of liability - i.e., that Sears acted in a uniform manner toward the proposed class members (auto center managers and assistant managers) resulting in their widespread misclassification as exempt employees - was not amenable to proof on a classwide basis. (C.A. 4th, March 20, 2014.)

Employment/Labor/Workers' Compensation

Alberda v. Board of Retirement of Fresno County Employees' Retirement Association (2013) _ Cal.App.4th _ : The Court of Appeals reversed the trial court's denial of a petition for writ of mandate. The Board of Retirement of Fresno County Employees' Retirement Association (Board) denied Thomas Alberda's application for a service-connected disability retirement. Alberda filed a petition for a writ of mandate to set aside the Board's determination, which the trial court denied. Alberda appealed claiming the trial court applied an incorrect standard of review: Instead of undertaking an independent determination of whether Alberda's disability was service-connected, the trial court denied the petition after concluding substantial evidence supported the hearing officer's finding on that issue. The Court of Appeals held the trial court erred in applying the wrong standard of revew, reversed the order denying the petition, and remanded the

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A California Court of Appeal Split –

Can A California Court Compel An Out Of State Party To Appear In California For Deposition?

Glass v. Superior Court versus *Toyota Motor Corporation v. Superior Court*

By Zachariah H. Rowland
BALESTRERI POTOCKI & HOLMES

A recent case presented the following question: Can a California court compel an out of state party to attend a deposition in California? The answer may depend on where the case is venued. According to the California Court of Appeal for the Fourth District, the answer is yes. (*Glass v. Superior Court* (1988) 204 Cal.App.3d 1048.) In the Second District, the answer is no. (*Toyota Motor Corporation v. Superior Court* (2011) 197 Cal.App.4th 1107.)

The difference of opinion centers on the relationship between Code of Civil Procedure sections 1989 and 2025.260.[1] Section 1989 provides that a witness, "including a witness specified in subdivision (b) of Section 1987, is not obliged to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service."[2] Section 2025.260 provides that the trial court can issue an order compelling a deposition "at a more distant place than that permitted under 2025.250." Section 2025.250, subdivision b, in turn, provides that the deposition of an organization must be held either within "75 miles of the organization's principal executive or business office, in California, or within the county where the action is pending and within 150 miles of that office."[3] If Section 1989 controls, a court cannot compel an out of state witness, whether a party or not, to attend a deposition in California. If Section 2025.260 controls, it can. As explained above, two appellate courts have split on the issue.

The Fourth District decided a court could issue such an order in *Glass v. Superior Court.* In *Glass*, an Indiana mortgage company filed suit in California against the defendant Glasses (husband and wife) for allegedly diverting the company's business to their own mortgage company. (*Glass, supra* at 1050.) Defendants sought to depose three senior members of the Indiana company's management team in California and moved for an order compelling their appearance. (*Id.*) The trial court denied the motion on the basis that the Indiana residents could not be compelled to travel to California for deposition. (*Id.*) Defendants sought writ review and the California Court of Appeal for the Fourth District reversed.

The court based its reversal on the contention that section 2025 (now section 2025.260) "acts as an implied partial repeal of section 1989." (*Glass, supra* at 1051.) Therefore, according to the *Glass* court, "counsel may follow the procedures prescribed by section 2025 and obtain an order to depose an out of state resident in California." (*Id.* at 1052.)

Twenty-three years later, the Second District reached the opposite conclusion in *Toyota Motor Corporation v. Superior Court*. It held that because section 1989 expressly includes section 1987, subdivision b, which applies to party and party-affiliated witnesses, a court cannot order a non-resident witness to appear in California for deposition. (*Toyota* 197 Cal.App. at 1125.) *Toyota*'s facts, however, slightly differ from those in *Glass*.

Toyota was a products liability suit arising out of a vehicle crash. (*Id.* at 1110.) The plaintiffs alleged that a defective steering rod in the vehicle led to the crash and that after learning of the alleged defect, Toyota waited too long to recall the vehicles. (*Id.*) During the course of litigation, plaintiffs noticed the depositions of five Toyota employees who resided in Japan as individual witnesses. (*Id.*) Toyota refused to produce the witnesses in California, but did agree to produce them in Japan. (*Id.* at 1111.) Plaintiffs moved to compel their attendance at deposition in California pursuant to section 2025.260. (*Id.*) The trial court granted the motion to compel the Japanese witnesses to appear in California, but required the plaintiffs to pay for the witnesses' airfare and accommodations and limited the depositions to a single day. (*Id.* at 1112.) Defendant Toyota sought writ review of the trial court's order. (*Id.*)

The Second District reversed and held that section 2025.260 (which allows a party to compel a deposition beyond the normal geographic limits prescribed by 2025.250) does not provide the trial court with authority to compel a non-resident to attend a deposition in California. (*Id.* at 1125.) In essence, the Court held that because section 1989 provides that out of state witnesses are not "obliged to attend as a witness," a trial court cannot compel an out of state witness to attend a deposition in California pursuant to section 2025.260. (*Id.* at 1122.) Therefore, the Second District concluded that "[t]he plain language of the statutory scheme and the legislative history of that language fully support the conclusion that a trial court cannot order a non-resident to appear at a California deposition." (*Id.*) In reaching its conclusion, the Second District discarded the holding of *Glass* as "unpersuasive." (*Id.* at 1123-1124.)

The *Toyota* court went on to note that its holding "was not limited to individual witnesses, but also applies to a court order directing that a party produce for deposition a specifically named nonresident witness (e.g. an employee, officer or director of a corporation)." (*Id.* at n.20.) However, the court refrained from expressing an opinion as to whether its holding extended to "a court order made pursuant to section 2025.230 which provides for the circumstances where '. . . the deponent named is not a natural person.'" (*Id.*) In other words, if a party issues a deposition notice for a specific employee of a company who is not a California non-resident, under *Toyota*'s holding the employee cannot be compelled to appear in California for deposition. On the other hand, if that same employee is the "person most qualified" to testify on behalf of an organization on a specific subject pursuant to section 2025.230, it may be possible to compel his or her attendance in California.[4]

The most obvious difference between the two cases seems to be the most meaningful, although neither case mentions it: *Glass* addressed whether an out of state plaintiff could be compelled to appear in California for deposition while *Toyota* addressed compelling an out-of-state defendant.[5] Based on that fact, whether a trial court can (or will) compel an out of state party witness to appear in California for a deposition may depend on the party-affiliation of the witness. However, neither California statute nor case law explicitly makes this distinction. On the other hand, it could also depend on where the case is venued in California.

The uncertainty these conflicting holdings creates becomes even more problematic for defense counsel in personal injury lawsuits involving an out of state plaintiff. First, given the contradictory case law, it is impossible to predict how the trial court would rule on a motion to compel an out of state plaintiff to appear for deposition in California. (*Compare Toyota, supra with Glass, supra*.) Second, the defense bears the financial burden of bringing the motion to find out. (C.C.P. § 2025.260.) Third, an independent medical examination can only be properly noticed for a location "within 75 miles of the plaintiff's residence." (C.C.P. § 2032.220.)[6] While the defense can move for an order compelling the plaintiff to appear for examination beyond that geographical limit, the court can only issue such an order if the defense pays the "reasonable expenses and costs of the examinee for travel to the place of the examination." (C.C.P. § 2032.320(e)(2).)[7] Paying the plaintiff's travel expenses from Nevada or Arizona may be a relatively minor cost, but consider the possibility of an international plaintiff travelling from Turkey, India, or China and the cost becomes significant or possibility prohibitive.

From an overall policy perspective, *Toyota*'s holding seems a little obtuse. After all, the issue is not jurisdictional. Almost invariably, by the time depositions are being taken, both plaintiff and defendant have made appearances in state court and submitted to its jurisdiction. Further, as the concurring opinion in *Toyota* points out, California's "long arm" statute (Section 410.10) is meant to "'exercise the broadest possible jurisdiction, limited only by constitutional considerations.'" (*Toyota, supra* at 1127.) In light of that fact, the concurrence found it "difficult to understand section 1989's stringent residency requirement for attendance of witnesses in this state." (*Id.*) Nevertheless, until the California Supreme Court or the legislature resolves the conflict, *Toyota* and *Glass* remain good law with the outcome of the motion perhaps depending on where you are in California.

[1] All references to statutes hereinafter refer to the Code of Civil Procedure ("C.C.P.") unless otherwise indicated.

[2] Section 1987, subdivision b, includes party witnesses, such as a plaintiff.

[3] The law is slightly different with respect to natural persons. They can be deposed within 75 miles of their residence or "within the county where the action is pending and within 150 miles of the [their] residence."

[4] As a practical matter, this quirk in Toyota's holding might play out as follows: Instead of issuing the "Notice To Acme Corp. of Deposition of Vice-President John Doe," a party issues "The Notice of Deposition of Acme Corp." and some of the topics are "John Doe," "John Doe's involvement with the project," "The letter written by John Doe," "All emails authored by John Doe," and so on.

[5] Curiously, although this is a distinction without a difference with respect to the California Code of Civil Procedure, it matters a great deal in Federal court. In fact, the Federal Civil Rules Handbook provides that, in general, "plaintiffs will be required to travel to the district where suit is pending for their depositions, whereas defendants can have their depositions taken where they work and live." (Federal Civil Rules Handbook, 825 (Baicker-Mckee, Jannsen, Corr 2013).) The rule is based on the observation that the plaintiff chooses the forum for litigation, not the defendant. (Webb v. Green Tree Servicing LLC (D. Md. 2012) 2012 U.S. Dist. LEXIS 98188.) ("This rule 'is based on the rationale that the plaintiff has selected the forum and should not be heard to complain about having to appear there for a deposition'" citing to Shockey v. Huhtamaki, Inc. (E.D. Kan.2012) 280 F.R.D. 598, 600.) Of course, the plaintiff can move for a protective order and, on a successful showing of undue hardship or expense, the court may mandate a more convenient location for the deposition. (See Gipson v. Southwestern Bell Tel. Co., 2008 U.S. Dist. LEXIS 77481.)

[6] As to an IME, federal law takes the same general tack with respect to location with one drawback. Under federal law a motion demonstrating that plaintiff's medical condition is "in controversy" and "good cause" for the examination exists is necessary. However, with respect to location, federal law again holds that the general rule is that "plaintiff will be required to travel to the district where the action is pending to be examined." (Federal Civil Rules Handbook, 895 (Baicker-Mckee, Jannsen, Corr 2013).) Further, at least with respect to location, federal law also places the burden on the plaintiff to bring a motion for a protective order demonstrating why the examination should be held elsewhere. (Levick v. Steiner Transocean Limited (S. D. Fla. 2005) 228 F.R.D. 671.)

[7] Unfortunately, removal to federal court, where the general rule is that plaintiff must appear in the district where he filed suit for deposition and for a medical examination, is impossible. (See 28 U.S.C. § 1441(b)(2).) (See also Republic Western Insurance Co. v. International Insurance Company (N.D. Cal. 1991) 765 F. Supp. 628, 629.) >

Social Discovery: An Accessible Goldmine of Information

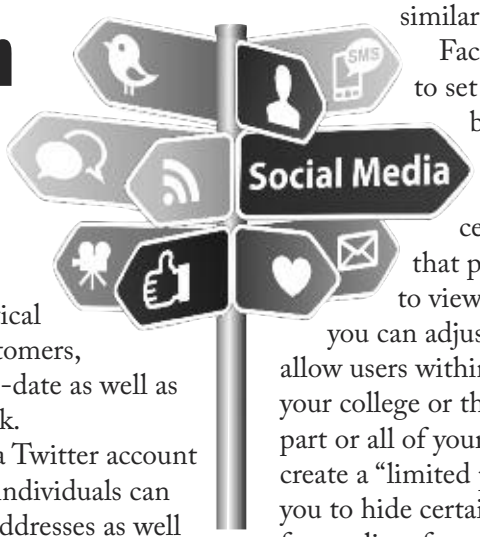
By Andrew Bayer, CEDS
TERIS – SAN DIEGO

Social media is often perceived as the modern-day Wild West as it relates to litigation, an unknown frontier vast with riches but rife with difficulties. However, this perception could not be further from the truth. An ever-changing eDiscovery industry and vendors have invested significantly into the development of solutions geared toward social media discovery. And lawyers now have the ability to include this gold-mine of information in their standard discovery processes.

An example of a current solution is licensing researchers to use software that provides the ability to search, collect, review and create production sets from material contained on the major social media outlets as well as any and all web-based content. This technology coupled with a select few service provider partnerships now provides access to a breadth of social media information, and is an efficient tool available to attorneys who find themselves in litigation in which such social media information is relevant.

Unsurprisingly, the bulk of the social media discovery is focused on three separate outlets: Twitter, Facebook and LinkedIn. But, in addition to these forums, it is essential to not overlook material found on other websites across the internet. The primary usefulness of the search tools presently available is in the relative ability to search all such sources. That said, the three major focuses continue to be on the following sources:

Twitter (as definied by pcmag.com) - A very popular instant messaging system that lets a person send brief text messages up to 140 characters in length to a list of followers. Launched in 2006, Twitter was designed as a social network to keep friends and colleagues informed throughout the day. However, it became widely used for commercial and political purposes to keep customers, voters and fans up-to-date as well as to encourage feedback.



After establishing a Twitter account at www.twitter.com, individuals can import their e-mail addresses as well as use the Twitter search to locate and invite people. Twitter messages ("tweets") can be made public and sent to anyone requesting the feed, or they can be sent only to approved followers.

Messages can be sent and received via cellphone text messaging (SMS), the Twitter Web site or a third-party Twitter application. To follow a Twitter feed, the Twitter site and feed name become the URL; for example, Microsoft's Twitter feed is www.twitter.com/microsoft.

Facebook (as defined by techterms.com) - is a social networking website that was originally designed for college students, but is now open to anyone 13 years of age or older. Facebook users can create and customize their own profiles with photos, videos, and information about themselves. Friends can browse the profiles of other friends and write messages on their pages.

Each Facebook profile has a "wall," where friends can post comments. Since the wall is viewable by all the user's friends, wall postings are basically a public conversation. Therefore, it is usually best not to write personal messages on your friends' walls. Instead, you can send a person a private message, which will show up in his or her private Inbox, similar to an e-mail message.

Facebook allows each user to set privacy settings, which by default are pretty strict. For example, if you have not added a certain person as a friend, that person will not be able to view your profile. However, you can adjust the privacy settings to allow users within your network (such as your college or the area you live) to view part or all of your profile. You can also create a "limited profile," which allows you to hide certain parts of your profile from a list of users that you select. If you don't want certain friends to be able to view your full profile, you can add them to your "limited profile" list.

Another feature of Facebook, which makes it different from MySpace, is the ability to add applications to your profile. Facebook applications are small programs developed specifically for Facebook profiles. Some examples include SuperPoke (which extends Facebook's "poke" function) and FunWall (which builds on the basic "wall" feature). Other applications are informational, such as news feeds and weather forecasts. There are also hundreds of video game applications that allow users to play small video games, such as Jetman or Tetris within their profiles. Since most game applications save high scores, friends can compete against each other or against

millions of other Facebook users.

Facebook provides an easy way for friends to keep in touch and for individuals to have a presence on the Web without needing to build a website. Since Facebook makes it easy to upload pictures and videos, nearly anyone can publish a multimedia profile. Of course, if you are a Facebook member or decide to sign up one day, remember to use discretion in what you publish or what you post on other users' pages. After all, your information is only as public as you choose to make it!

Linked In (as defined by techterms.com) - LinkedIn is a social networking website designed for business professionals. It permits the sharing of work-related information with other users and keep an online list of professional contacts.

Like Facebook, and the formerly ubiquitous social networking site MySpace, LinkedIn allows users to create a custom profile. However, profiles created within LinkedIn are business-oriented rather than personal. For example, a LinkedIn profile highlights education and past work experience, which makes it appear similar to a resume. Profiles also list users' connections to other LinkedIn users.

By using LinkedIn, a user can keep in touch with past and current colleagues, which can be useful in today's ever-changing work environment. The site also allows users to connect with new people and potential business partners. While people outside a user's personal network cannot view another's full profile, they can still view a snapshot of the user's education and work experience. Users can also contact one another using LinkedIn's anonymous "InMail" messaging service.

LinkedIn has several benefits for business professionals, which is why it is used by millions of people across the world. But remember: keeping information professionally oriented is key. Keeping personal information off this or any website is key to maintaining a professional reputation in the modern day. >

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Summary of Recent Civil Cases of Interest

case to the trial court. (C.A. 5th, filed February 20, 2013, published March 12, 2013.)

Richardson v. City and County of San Francisco (2013) _ Cal.App.4th _ : The Court of Appeals affirmed the trial court's denial of a writ of administrative mandamus that sought to overturn the decision of the San Francisco Police Commission to terminate Inspector Marveita Richardson, a sixteen year member of the San Francisco police force, as a result of three separate incidents (improper use of the police computer system, check forgery, and an incident involving the Antioch Police Department at her home in Antioch.) (C.A. 1st, filed February 13, 2013, published March 15, 2013.)

Privacy

Ignat v. Yum! Brands, Inc. (2013) _ Cal.App.4th _ : The Court of Appeals reversed the trial court's summary judgment for defendant. Limiting common-law privacy liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public. But alleging a violation of a person's common-law right to privacy is not the equivalent of alleging a violation of the constitutional right to privacy. Because plaintiff did not allege the latter violation, she was not entitled to have the summary judgment motion evaluated for constitutional privacy, and the trial court properly refused to consider her arguments on this theory of liability. (C.A. 4th, March 18, 2013.)

Torts

Garrett v. Howmedica Osteonics Corporation (2013) _ Cal.App.4th _ : The Court of Appeals reversed a summary judgment in favor of defendants. The doctrine of strict products liability based on a design defect is inapplicable to implanted medical devices available only through the services of a physician and cannot provide a basis for defendants' liability. However, on the issues of an alleged manufacturing defect and negligence, the trial court erred in excluding portions of the plaintiff's expert's declaration and that declaration created triable issues of fact precluding summary adjudication of those two counts. (C.A. 2d, March 6, 2013.)

Quigley v. McClellan (2013) _ Cal.App.4th _ : The Court of Appeals reversed the judgment for plaintiff because plaintiff's veterinary expert did not establish the applicable standard of care. Plaintiff's expert Dr. Heidmann never testified that Dr. McClellan's performance of the prepurchase examination of Poncho, or the subsequent disclosure of the horse's medical history, "was not consistent with what other doctors in the community would have arrived at under similar circumstances in the exercise of reasonable care." (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 87.) Dr. Heidmann simply disagreed with the conclusions that Dr. McClellan drew from the prepurchase examination, and he thought that "the best approach" in disclosing Poncho's medical history would have been to have a discussion with both Quigley and the trainers. However, this testimony, by itself, does not establish the standard of care. "[T]he fact that another physician or surgeon might have elected to treat the case differently or use methods other than those employed by [the] defendant does not of itself establish negligence." (Ibid.) Without explaining how an average veterinarian of ordinary skill would have treated the facts of this case differently than Dr. McClellan, Dr. Heidmann's testimony did not establish any relevant recognized standard of care. (C.A. 4th, filed March 12, 2013, published March 28, 2013.)

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Turbo Charge Your Slapp Fee Motions and Oppositions With The Use of Expert Declarations

By James J. Moneer
LAW OFFICES OF JAMES J. MONEER

This article is designed to inform practitioners regarding the larger body of case law interpreting the anti-SLAPP fee provision and its practical application in a civil litigation context. Given the growing body of case law in this area and the enormous discretion trial judges have in setting the amount of a SLAPP fee award, the use of expert declarations in making and opposing SLAPP fee motions provides maximum persuasive power in convincing the judge to move as close as possible to the number ultimately sought. Obviously, in the case of an unsuccessful SLAPP plaintiff, zero is ideal but unrealistic in most cases. In cases where the amount of fees sought by the defendant approaches or exceeds $50,000.00, expert declarations opposing the fee request almost invariably result in a significant reduction in the amount of fees awarded. If the court determines the bill is overinflated, the court may reduce or deny the fee motion altogether under *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137. In most cases, the amount of the reduction in the fee award pays for the cost of the expert declaration anywhere from two to ten times over. This is "damage control" after the SLAPP filer has lost the SLAPP motion and SLAPP appeal. The fee opposition in the trial court is the SLAPP plaintiff's last chance to mitigate the enormous damage that can easily befall him or her (and the plaintiff's attorney) if a large amount of fees are awarded. The same can be said of expert declarations in cases where defendants seek to boost the amount of fees awarded. Aside from assembling a detailed record of billing tasks and hours, an expert declaration supported by a solid foundation is like adding a turbo charger to your fee motion.

THE RAPID EXPANSION OF CALIFORNIA'S ANTI-SLAPP LAW

The California Anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, set forth in CCP § 425.16, is expanding and contracting at a feverish pace. Enacted in 1992 as a deterrent to the filing of meritless lawsuits which prevent citizens from exercising petition or free speech rights or punish them for doing so, section 425.16 has since been amended four times and interpreted by nearly 500 published opinions to date. Along with the anti-SLAPP statute's unique discovery stay and immediate appeal provisions, the unavailability of leave to amend, the one-sided mandatory attorney-fee provision set forth in subdivision (c) has made the section 425.16 special motion to strike the most powerful dispositive motion available to California civil litigation attorneys seeking to quickly dismiss an action or cross-action and recover fees and costs.

THE DEVELOPMENT OF SLAPP FEE JURISPRUDENCE

Under subdivision (c), a prevailing defendant is entitled to a mandatory award of reasonable attorney's fees and costs, broadly construed to the end of deterring "abuse of the judicial process" and "encouraging participation in matters of public significance." [CCP § 425.16, subd. (a)] *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1138; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360-362. A SLAPP defendant enjoys the same preference for attorneys fees as a civil rights plaintiff if they are successful. *Computer Xpress v. Jackson* (2001) 93 Cal.App.4th 993, 1018. A prevailing plaintiff, however, who defeats a special motion to strike may recover fees if the court determines the motion was frivolous or solely intended to cause unnecessary delay under the CCP § 128.5 standard pertaining to frivolous or delaying actions. CCP § 425.16, subd.(c); *Carpenter v. Jack In The Box* (2007) 151 Cal.App.4th 454. In the recent *Personal Court Reporter's, Inc. v. Rand* (filed 4/20/2012 No. B229358) 2012 DJDAR 5059 case, the trial court sanctioned defense counsel in the amount of approximately $22,000.00, which covered the amount of plaintiff's attorneys fees. The Court of Appeal not only affirmed, it also awarded plaintiff fees for the frivolous SLAPP appeal and reported attorney Rand to the State Bar for disciplinary proceedings. Noting the trend that losing SLAPP defendants have been abusing the immediate appeal provision, courts have shown more willingness to award fees to a prevailing plaintiff where it appears the SLAPP motion or appeal was frivolous or intended solely for delay. *Grewal v. Jammu* (2011) 191 Cal.App.4th 197. The SLAPP defendant who ultimately prevails on appeal is entitled to recover fees for all work performed at both the trial and appellate levels in connection with the motion. *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1425-1426. A defendant who prevails on less than all causes of action is entitled to recover fees for each cause of action stricken. *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.app.4th 140, 149-151. Where the time spent on claims successfully stricken on the SLAPP motion is inextricably intertwined with time spent on claims that were not stricken, the court must apply a reasonable method of apportioning compensable time from noncompensable time. *Mann II v.*

Quality Old Time Service (2006) 139 Cal.App.4th 328. In state court, compensable time includes all time necessarily spent in connection with succeeding on the SLAPP motion only. This includes time spent on the anti-SLAPP motion, SLAPP discovery motions, any specified SLAPP discovery ordered pursuant to subd. (g), SLAPP appeals and related writs, SLAPP fee motion time. *S.B. Beach Properties v. Berti* (2006) 39 Cal.App.4th 374, 381; *Lafayette Morehouse v. Chronicle Publishing* (1995) 39 Cal.App.4th 1379. More recently, the *Wanland* court held that all time spent in connection with enforcement of the judgment for SLAPP fees is compensable time - allowing for prevailing SLAPP defendants to hire collections counsel on a contingent or deferred hourly fee. *Wanland v. Mastagani, Holstedt & Chuirazzi* (2006) 141 Cal.App.4th 15, 20-21.

In *Dowling*, defendant's special counsel agreed to defend the case on a contingent fee basis with a nominal retainer up front. Plaintiff contended that Zimmerman was limited to recovering only the $1,300.00 in fees that she "actually incurred" as a nominal retainer. *Dowling, supra*, 1425-1426. Construing the statute broadly, the Court of Appeal also rejected this contention and concluded that Zimmerman was entitled to recover "reasonable" attorney's fees for work performed in both the trial court and on appeal under CCP § 425.16(c). *Id.*

In his discussion, Justice Nares concluded that attorney's fees and costs awarded under CCP § 425.16(c) are not "routine costs" under CCP § 917.1(d) but, instead, constitute a judgment directing the "payment of money" under CCP § 917.1(a)(1) for which a bond or undertaking is required to stay enforcement pending a SLAPP appeal. *Dowling, supra,* at 1426-1434. Again, the Court reasoned that the anti-SLAPP statute, including the fee provision, must be construed broadly to achieve its purpose and that requiring a SLAPP plaintiff to file a bond or undertaking to stay enforcement of a judgment for attorney's fees and costs awarded under section 425.16(c) pending appeal will deter the perpetuation of meritless SLAPP suits at the appellate level. *Id.*

PLAINTIFFS CANNOT EVADE FEES BY AMENDMENT OR DISMISSAL

Once a special motion to strike is filed, a plaintiff cannot evade fees by amending or withdrawing the complaint in lieu of opposition. Moreover, no meet and confer effort or other warning is required before fees may be awarded under the section 425.16(c). *Liu v. Moore* (1999) 69 Cal.App.4th 745, 749-751; *Simmons v. Allstate* (2001) 92 Cal.App.4th 1068, 1072-1073. Our High Court recently held that the SLAPP filer can evade fees only if the complaint or cross-complaint is voluntarily dismissed with prejudice *before* the defendant files the anti-SLAPP motion. *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374. Plaintiff can also amend at any time before the SLAPP motion is filed. Once the SLAPP motion is filed, however, the plaintiff is trapped in a vice grip. A recent case held that where a plaintiff propounds special interrogatories, deposition notices, and document production demands and where the defendant fails to timely respond to any of the discovery, the subsequent filing of the anti-SLAPP motion retroactively moots all pending motions to compel and motions for sanctions and preserves the defendants' objections to discovery. *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112.

KETCHUM: SLAPP FEES CAN BE TWICE AS NICE IF THEY ARE CONTINGENT

A. NO FEE ENHANCEMENT FOR FEE MOTION TIME

In *Ketchum v. Moses*, the California Supreme Court recently held that mandatory fee awards to defendants who prevail on a special motion to strike under CCP § 425.16(c) are properly subject to lodestar enhancements. *Ketchum v. Moses* (2001) 24 Cal.4th 1122. In *Ketchum*, the trial court awarded an initial lodestar figure of $70,106.00 to the prevailing defendant's attorney *Id.*, at 1129. In addition, the trial court augmented the lodestar figure with a multiplier of 2.00 to compensate for the contingent risk assumed, the superior skill displayed in presenting the case, and the attorney's expertise in anti-SLAPP law. *Id.*

The *Ketchum* Court reversed and remanded the award on two grounds. First, the Court held that a multiplier for contingent risk cannot be applied to the lodestar amount awarded for legal services performed on the fee application because such fees are not contingent - payment of "fees on fees" is certain as the defendant has already prevailed at this point. *Id.*, 1141-1142. The Supreme Court also reversed and remanded the award for clarification of the extent to which the attorney has already been compensated for his expertise and superior display of skill in the initial lodestar figure, holding that the application of a multiplier for superior skill and expertise was improper if these factors were already taken into account in the attorney's hourly rate. *Id.* If, however, the 2.00 multiplier was awarded solely to compensate the attorney for the contingent risk assumed in performing services on the special motion to strike, then the award may properly be upheld. *Id.*

B. CONTINGENT RISK MULTIPLIERS ARE APPROPRIATE IN SLAPP CASES

Our High Court reasoned that the purpose of a fee enhancement for contingent risk is to bring the financial incentives for attorneys enforcing important constitutional rights, such as those protected under the anti-SLAPP provision, into line with incentives they have to undertake claims for which they are paid on a fee-for-service basis. *Id.*, at 1132-1133. "A contingent fee must be higher than the fee for the same legal services as they are performed. The contingent fee compensates the lawyer not only for the services he renders but also for the loan of those services. ... A

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Options to Reduce Physician Shortages:
Assessing Advanced Practice Nurses as Primary Caregivers

By Kevin C. Murphy
MURPHY JONES, LLP

Many of us are familiar with the phrase, "Is there a doctor in the house?" With national physician shortages, we may very well start to hear, "Is there a nurse-doctor in the house?" Advanced practice nurses are prime candidates to take over the role of primary caregivers and allow physicians to transition into a profession of specialized fields of medical practice.[1]

The national physician shortages are constantly escalating and have been well documented. Many young aspiring doctors "increasingly choose the better pay and balanced lifestyle promised by specialty practice" which has an effect on patients "that translates into long waits, long drives, or in worst cases, postponed care that eventually lands them in the emergency room." (Aleccia, 2009). The Association of Medical Colleges reports that the U.S. may be facing a 150,000 doctor shortage by 2025. (Chapman, 2010). The American Medical Association estimates the doctor shortage to equal a deficit of 85,000 by the year 2020. Regardless of the actual number of physicians needed to serve the American populous, the data is evident that doctors are facing extraordinary understaffing difficulties at the same time they are facing dramatic increases in patient loads.

Advanced Practice Nurses (APNs or nurse practitioners[NPs]) are highly trained Registered Nurses (RNs) who possess a graduate degree in a specialized nursing discipline, typically a Masters degree or doctorate, and have advanced education and experience in the diagnosis, treatment and management of common illnesses. (Parker, 2010). Significantly, the executive director of the American Association of Colleges of Nursing, Polly Bednash, Ph.D, RN, FAAN, has stated that a Doctorate, or "DNP," will be the standard degree for all graduate nurse practitioners by the year 2015. (Maher, 2010).

Nurse practitioners are already playing an integral role as primary caregivers, filling the void left by increasing patient hospitalization admissions rates in relation to massive physician shortages, and "approximately eighty percent of Nurse practitioners provide primary care services in the United States." (Stuart, 2010). Currently, twenty-eight States have introduced legislation designed to expand the role of advanced practice nurses to that of primary caregiver. (KJRH-TV, 2010). Several states already allow APNs to act independently of physician supervision. Many other states are currently seeking to fill the void left by a lack of physicians, including Oklahoma, Oregon, Washington, California, and New York. (Coburn, 2010; Johnson, 2010; and Gordon, 2010). The American Academy of Nurse Practitioners indicates that 95% of APNs already prescribe medications, writing an estimated 19 prescriptions per day.

HEALTHCARE REFORM IMPACT ON DOCTOR SHORTAGES

As a result of the recently passed Affordable Care Act healthcare reform legislation more than thirty-two million additional Americans are anticipated to be included in the healthcare patient pool. (DelawareOnline, 2010). This large number of additional patients will further exacerbate physician shortages across the country. Medicare typically reimburses NPs at a lower rate than doctors are reimbursed. The expansion of APNs as primary caregivers has the potential to save millions of dollars at a time when our economy is in dire need of reducing government spending. Maryland columnist Jay Hancock believes that nurse practitioners should be allowed to practice completely independently from physician supervision, pointing to the fact that APNs are already allowed to practice independently in Washington, Oregon, Alaska, and Washington D.C. (Hancock, 2010.)

Doctors have already begun to mount an opposition to such measures arguing that allowing NPs to usurp physicians' roles will place patients at risk. The President of the Medical Society of Virginia, Dr. Daniel Carey, publicly stated, "When you talk about increasing the scope of practice of nurse practitioners…we have problems with that. They are not acknowledging the significant difference in training." (Smith, 2010). The American Medical Association (AMA) President, Dr. James Rohack, opines that, "increasing the responsibility of nurses is not the answer to the physician shortage." (Bagg, 2010). Significantly, it has been reported that, "Doctors have shown up in white coats to testify against nurse practitioner bills. The AMA, which supported the national health care overhaul, says that a doctor should supervise an NP at all times and in all settings. Just because there is a doctor shortage, the AMA argues, is no reason to put nurses in charge and endanger patients."(Maher, 2010). One critic of the expansion of the role of APNs claims, "doctors went to their medical schools for a reason, and allowing a nurse to take over their roles is a short-sighted way of solving these shortages." (Joyner, 2010).

NPs have accumulated their own support, and are beginning to form their own professional associations across the nation. (Gallagher, 2010). University of Southern Indiana Professor Daniel Lucky describes that the difference between NPs and Physicians is not education or professional qualifications,

but instead it is their healthcare approach:

"NP practice is based on the nursing model of care — not the medical approach…Nursing teaches us that we should not reduce human beings to mere signs and symptoms, place a disease on someone, give them a pill and send them off. As nurses we are trained to look at the entire patient from a holistic perspective and then, actively partner with the patient and family to not only correct problems, but also enhance optimal health. Nursing care places the patient — not the provider — as the central focal point." (Beaulieu, 2010).

In fact, the Josiah Macy Jr. Foundation recently released a report recommending immediate removal of legal and financial barriers preventing APNs from providing primary care. (Glenn, 2010). NPs assert that they are not trying to infringe on doctors' specialties, but are a critical resource in providing patient care in this country's time of dire need. (West, 2010). In actuality, research indicates that NPs do not commit malpractice as often as physicians or, at least, they are not sued as often — only 1.4% of NPs are named as a primary defendant in medical malpractice lawsuits. (Stuart, 2010).

CONCLUSION – LET THE NURSES DOCTOR!

As a health care attorney, I support the expansion of NPs' primary care roles provided that they do not usurp the proper functions of physicians. Other legal scholars and medical professionals familiar with APNs as primary caregivers have full confidence in their ability to render superb healthcare to patients. Physicians are adept at dealing with advanced diseases and treatments for complex disorders, whereas NPs are completely capable of diagnosing common diseases, and disorders, and prescribing medications to treat patients. The Journal of the American Medical Association published a study in 2000 which determined that patients of NPs recovered as well, or better than, patients under the supervision of a primary care physician. (Cleary, Friedewald, Kane, Lenz, Mundinger, Shelanski, Siu, Totten & Tsai, 2000). The greatest benefit of expanding NPs' roles is that they not only manage patients with current illnesses, APNs can simultaneously teach healthy patients how to stay healthy. This is exactly the type of care America needs if we are going to improve the overall health of our citizens and concurrently lower health care costs. Often times patient satisfaction is higher among patients receiving care from an APN as opposed to a licensed physician. (Anderson, Horrocks & Salisbury, (2002).

As evidenced by happier and healthier patient results, coupled with reduced costs and government spending, I believe allowing NPs to utilize their knowledge to better serve patients' needs while simultaneously reducing the national debt is common sense and good business judgment. According to an old adage, "*Doctors diagnose, Nurses HEAL*!" Clearly, the only practical solution to our massive physician shortage is to let qualified APNs diagnose, treat and heal our increasing patient population.

UPDATE

When I initially wrote this article, and had it published in late 2011, I never suspected that my premise would come to fruition in such a short time span. However, due to the US Supreme Court's decision upholding the Affordable Care Act ("ACA"), and the 2014 deadline for implementation, states are 'under the gun' to resolve the primary caregiver shortages and are scrambling to timely address the issues. There have been constant ongoing developments supporting my thesis and pushing for the expansion of Advanced Practice Nurses' ("APN") scope of practice. Significantly, just last week the Washington Post published a piece outlining the current state-of-affairs of APN's independence nationwide and highlighted that eleven (11) states have pending legislation authorizing nurses with Master Degrees, or equivalent or higher degrees, to "order and interpret diagnostic tests, prescribe medications and administer treatments without physician oversight…Similar legislation is likely to be introduced soon in three other states."[2]

More importantly for our state of California, the lack of available primary caregivers in relation to our huge populous poses a serious threat to patient healthcare. The ACA allocates $11 billion to expand and/or build new healthcare clinics to serve U.S.A. indigents, but "California has a very significant [physician] workforce crisis… Community health centers are really feeling this…They are having challenges with recruiting physicians; they are having challenges with retaining physicians as there's increased competition now because everybody's trying to expand and gear up for healthcare reform…It's not just the community centers, but the entire healthcare industry is facing the impact of this crisis" said Carmela Castellano-Garcia, Director of the California Primary Care Association."[3]

Significantly, California state Senator Ed Hernandez's introduced S.B. 491 on February 21, 2013, calling for expansion of the role of nurse practitioners.[4] Sen. Hernandez is pushing for the expansion of APNs, in addition to optometrists and pharmacists, "We're going to be mandating that every single person in this state have insurance…What good is it if they are going to have a health insurance card but no access to doctors?"[5] In support of this legislative action, Beth Haney, President of the Cal. Association for Nurse Practitioners, said, "We don't have enough providers…so we should increase access to the ones we have."[6]

Lastly, there is a petition on the White House website open through April 22, 2013, designed to show support for legislation expanding the scope of practices of Advanced Practice Registered Nurses ("APRNs"). The petition is titled, "Remove Barriers that Prevent Advanced Practice Nurses from Practicing to their Full Scope" and can be signed online by interested citizens.[7]

As we rapidly approach the ACA

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Options to Reduce Physican Shortages

implementation 2014 deadline, many states are looking to APN practitioners to assume the role of primary caregiver, despite staunch opposition by physician-oriented groups. Regardless of opinions on the advisability or possible harmful effects of allowing APN professionals to treat patients independently, we are going to implement creative solutions or face a pool of "insured" individuals unable to get medically necessary treatment.

[1] *Aizenman, N.C. (March 24, 2013). "Nurses can practice without physician supervision in many states." Washington Post. Retrieved from http://articles.washingtonpost.com/2013-03-24/national/37989896_1_nurse-practitioner-physician-primary-care-practices*

[2] *KXJZ News (March 4, 2013). "California Clinics Grow, But Hiring Doctors May Not Be Easy." Capitol Public Radio. Retrieved from: http://www.capradio.org/articles/2013/03/04/california's-clinics-grow,-but-hiring-doctors-may-not-be-easy*

[3] *Senate Bill 491 text: http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0451-0500/sb_491_bill_20130221_introduced.html*

[4] *Mishak, M. (February 9, 2013). "State lacks doctors to meet demand of national healthcare law." Los Angeles Times. Retrieved from: http://articles.latimes.com/print/2013/feb/09/local/la-me-doctors-20130210*

[5] *Id.*

[6] *Id.*

[7] *See: https://petitions.whitehouse.gov/petition/remove-barriers-prevent-advanced-practice-registered-nurses-practicing-their-full-scope/WSJdg1P3*

End Note

This article was originally published in Vol. 14 of the Journal of Nursing Law, Volume 14 (2011). It has been reproduced with permission. When this article was originally published, it was unexpected that its premise would come to fruition in such a short time span. However, due to the United States Supreme Court's decision upholding of the Affordable Care Act ("ACA"), and the 2014 deadline for its implementation, states are under pressure to resolve the primary caregiver shortages and are scrambling to timely address the issues. There have been ongoing developments supporting the thesis presented in this article and pushing for the expansion of Advanced Practice Nurses' ("APN") scope of practice. Significantly, the Washington Post recently published a piece outlining the current state-of-affairs of APN's independence nationwide and highlighted that eleven (11) states have pending legislation authorizing nurses with Master Degrees, or equivalent or higher degrees, to "order and interpret diagnostic tests, prescribe medications and administer treatments without physician oversight...Similar legislation is likely to be introduced soon in three other states."

More importantly for our state of California, the lack of available primary caregivers in relation to California's large population poses a serious threat to patient healthcare. The ACA allocates $11 billion to expand and/or build new healthcare clinics to serve U.S.A. indigents, but "California has a very significant [physician] workforce crisis... Community health centers are really feeling this...They are having challenges with recruiting physicians; they are having challenges with retaining physicians as there's increased competition now because everybody's trying to expand and gear up for healthcare reform...It's not just the community centers, but the entire healthcare industry is facing the impact of this crisis" according to Carmela Castellano-Garcia, Director of the California Primary Care Association."

Significantly, California state Senator Ed Hernandez's introduced S.B. 491 on February 21, 2013, calling for expansion of the role of nurse practitioners. Sen. Hernandez is pushing for the expansion of APNs, in addition to optometrists and pharmacists, "We're going to be mandating that every single person in this state have insurance...What good is it if they are going to have a health insurance card but no access to doctors?" In support of this legislative action, Beth Haney, President of the Cal. Association for Nurse Practitioners, said, "We don't have enough providers...so we should increase access to the ones we have."

Lastly, recently there was a petition on the White House website that was designed to evidence support for legislation expanding the scope of practices of Advanced Practice Registered Nurses ("APRNs"). The petition was titled, "Remove Barriers that Prevent Advanced Practice Nurses from Practicing to their Full Scope".

As the ACA's 2014 implementation deadline approaches, many states are looking to APN practitioners to assume the role of primary caregiver, despite staunch opposition by physician-oriented groups. Regardless of opinions on the advisability or possible harmful effects of allowing APN professionals to treat patients independently, we are going to implement creative solutions or face a pool of "insured" individuals unable to get medically necessary treatment.

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lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is being paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Id.* Where contingent risk multipliers are requested by the prevailing SLAPP defendant, expert declarations are crucial especially since the amount at stake has just doubled.

C. ATTORNEY SUED AS CO-DEFENDANT ENTITLED TO RECOVER FEES

Where an attorney is sued as a co-defendant along with her non lawyer clients, she may recover all of her attorney's fees for all time she spent in assisting the special anti-SLAPP counsel with the defense of the nonlawyer co-defendants. In *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 522-525, specially retained counsel successfully represented two nonlawyer environmental activists and their environmental attorney, Julie Hamilton, Esq., from a SLAPP suit. Although attorney Hamilton was a co-defendant in the action, she was not listed as a "proper". She was, instead, listed as "general counsel" for the two nonlawyer co-defendants. Declarations were filed showing that attorney Hamilton at all times assisted special anti-SLAPP counsel with the representation of the two nonlawyer clients. Special counsel represented all three defendants including Hamilton. The specially retained counsel recovered all of his fees with a contingent risk multiplier. But Hamilton was also entitled to recover fees for all of her time on the case *with a contingent risk multiplier of 1.50* based in part on an expert declaration attesting to the reasonable amount of attorney's fees on the SLAPP motion and appeal. In affirming the fee award, the Court of Appeal recognized the specially retained counsel as an "expert in California anti-SLAPP jurisprudence." *Id.*, at 523-525.

D. *MAUGHAN V. GOOGLE* - SLAPP PLAINTIFF'S BEST FRIEND

Maughan v. Google (2006) 143 Cal.App.4th 1242, 1248-1253 is the go to case if you are a SLAPP plaintiff hit with a massive SLAPP fee request by a large reputable law firm with multiple billing attorneys. The lesson of *Google* is that detailed billing statements showing that a reasonable number of hours were spent performing tasks reasonably necessary to win the SLAPP motion, especially by so-called SLAPP experts, is essential to obtaining an optimal SLAPP fee award. The *Google* court decimated a SLAPP fee request of $110,000.00 for a simple SLAPP motion in the trial court where no discovery was sought, no contingent risk was assumed, no appeal time was spent, and the case was disposed of on a clean kill Communications Decency Act privilege defense for third party publishers of internet communications. [47 U.S.C.A. § 230(c)(2)] The partner, Timothy Alger, Esq., of Quinn Emanuel, billed for all of his time at $500.00 per hour, the time sheets were vague, and the court found it hard to believe that these SLAPP experts spent 200 hours on a SLAPP motion that was disposed of on technical privilege grounds. There were no voluminous pleadings or exhibits from prior proceedings to analyze and there were multiple attorneys on the case. Here, the Court decimated the Quinn Emanuel firm's fee request from $110,000.00 to a meager $23,000.00 in a case where the anti-SLAPP motion was successful in striking all causes of action.

Finally, the hourly rate must be reasonable in light of the attorney's knowledge, training, experience, and skill *in the relevant area of the law*. *Graciano v. Robinson Ford Motor Co.* (2006) 144 Cal.App.4th 140. In

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LUNCH AND LEARN:

Building Blocks for the Courtroom: The Effective Use of Trial Technology and Demonstrative Evidence in Construction Defect Litigation

As part of the 2013 Lunchtime Learning series, SDDL hosted an MCLE event on May 7th the focus of which was the usefulness of technology and demonstrative evidence specifically in the arena of construction litigation. The panel included Elizabeth A. Skane, Esq., of Skane Wilcox LLP, Fred Gordon, Esq., of Gordon & Holmes, Ted Bumgardner from the Xpera Group and Erik Thorsnes, of Thorsnes Litigation Services. The panel discussed a variety of ways of making understandable for jurors and laypersons the sometimes quite complicated subjects of construction defects. Through the use of modern technology and with enough time to prepare, Mr. Bumgardner and Mr. Thorsnes demonstrated how they are able to partner with attorneys to prepare dramatic presentations of construction systems and defects that would otherwise be very difficult to envision. Ms. Skane and Mr. Gordon addressed tools they have used with success in the courtroom when trying construction matters, including the effective use of videotaped deposition testimony, a tactic applicable to all manner of litigation.

SDDL thanks Esquire Solutions for graciously hosting the event and providing lunch to the attendees. >

INSURANCE LAW UPDATE

RECENT CALIFORNIA APPELLATE DECISIONS

By James M. Roth
THE ROTH LAW FIRM

As 2012 wound to a close, and as 2013 began, the appellate courts in Southern California evaluated three cases of first impression.

INTERINSURED EXCLUSION IN LIABILITY POLICY DOES NOT PRECLUDE COVERAGE FOR NAMED INSURED TENANT'S LIABILITY TO ADDITIONAL INSURED LANDLORD.

In the case styled *Gemini Insurance Co. v. Delos Insurance Co.* (2012) 211 Cal.App.4th 719, 149 Cal.Rptr.3d 889, the Second District, Division 5, held on December 5, 2012, a liability policy's exclusion of coverage for any claim by one insured against another insured did not bar coverage for a claim by a landlord which was an additional insured under the policy, based on a fire caused by the insured tenant's negligence on the leased premises, where the policy provided that the landlord was an additional insured only when and where it faced liability arising from the tenant's acts undertaken in the course of the tenant's operations on the leased premises, and no one had ever sought to hold landlord liable for the fire.

Delos Insurance Company issued a liability policy to restaurateur, Bobby's Focsle (Bobby's). The policy's declarations page listed Bobby's landlord as an additional insured, and the policy's definition's section defined "insured" to include organizations designated on the declarations page. Additionally, the policy contained a "Managers or Lessors" Additional Insured endorsement, which modified the definition of "insured" to include organizations listed on the declarations page "but only with respect to such person or organization's liability which both (1) arises out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule, and (2) occurs on that part of the premises leased to you and shown in the Schedule, and (3) results from and by reason of your act or omission or an act or omission of your agent or employee in the course of your operations at that part of the premises leased to you and shown in the Schedule." The scope of Delos Insurance Company's coverage for the landlord was relevant within the meaning of the policy's "Interinsured Claims and Suits Exclusion" – which precluded coverage for any claims or suits brought against any insured by another insured under the policy. The coverage dispute arose out of a fire at Bobby's, damaging the landlord's property and the property of another nearby business, Arena Yacht. Gemini Insurance Company (Gemini), the property insurer for both the landlord and Arena Yacht, paid their claims – $65,088 to Arena Yacht and $288,259 to the landlord – and then brought a subrogation action against Bobby's, alleging that Bobby's negligence caused the fire. Delos defended Bobby's while contending that the Interinsured Exclusion precluded coverage for Bobby's liability to the landlord. Gemini and Bobby's eventually settled for the full amount of Gemini's claims with Delos's knowledge and consent. Under the terms of the settlement, Delos paid Gemini $65,088 for Arena Yacht's damage, and Gemini agreed not to enforce the remainder of the settlement against Bobby's. Delos and Gemini agreed to litigate Delos's obligations to Bobby's between them.

The trial court defined the issue to be resolved was the applicability of the Interinsured Exclusion, and ruled as a matter of law on stipulated facts that the landlord was not insured and thus the exclusion did not apply.

In affirming, the California Court of Appeal, Second District, explained that the Additional Insured Endorsement to Delos's policy extends coverage to the landlord only when and where it faces liability arising from Bobby's acts and undertaken in the course of Bobby's operations on the leased premises. No one ever sought to hold the landlord liable for damage resulting from the fire. To the contrary, the landlord sought to hold Bobby's liable. The court therefore ruled that the landlord was not an additional insured within the meaning of the Interinsured Exclusion.

UNDER THE PROPER CIRCUMSTANCES, SUBMISSION OF AN INSURANCE CLAIM CAN CONSTITUTE PRE-LITIGATION CONDUCT PROTECTED BY THE ANTI-SLAPP LAW.

In the case styled *People ex rel. Fire Insurance Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 150 Cal.Rptr.3d 224, the Second District, Division 3, held on December 6, 2012, that the fact that some claims filed by counsel on behalf of clients matured into litigation did not bring carriers' action against attorneys, for their alleged submission of false claims for smoke and ash damage arising from several wildfires, and alleged use of "cappers" to obtain insureds willing to pursue such claims, within scope of the anti-SLAPP statute, insofar as the gravamen of the carriers' complaint was "capping" and the submission of false claims only.

Fire Insurance Exchange and Mid Century Insurance Company (collectively the carriers) alleged that an insurance fraud ring engaged in submission of false and/or inflated claims for smoke and ash damage arising from several California wildfires. The carriers brought a *qui tam* action against several members of the alleged fraud ring, including two attorneys who purportedly submitted false insurance claims on the part of the carriers' insureds. The complaint alleged that the attorneys submitted false claims and used cappers to obtain insureds willing to pursue such claims. The attorney defendants brought motions to

strike the complaint under California's anti-SLAPP statute, arguing that their pursuit of insurance claims and acts in obtaining clients constituted pre-litigation conduct protected by their First Amendment right to petition. The trial court denied the motions on the basis that the attorneys had failed to establish protected conduct, specifically relying on authority holding that the submission of insurance claims does not constitute protected conduct under the anti-SLAPP law. The attorneys appealed, arguing that the underlying insurance claims were submitted in expectation of litigation against the carriers for the anticipated bad faith denial of the claims.

In affirming, the California Court of Appeal, Second District, concluded that the defendant attorneys' "bald" assertions that the insurance claims were submitted with the subjective intent that litigation would follow were insufficient, without more, to constitute *prima facie* evidence that the claims constituted pre-litigation conduct. As the attorneys submitted no additional evidence in the case, they failed in their burden to show that the anti-SLAPP statute applied, and their motions were properly denied. The court explained that the anti-SLAPP law protected communications or conduct in furtherance of a person's right of speech or petition, including a statement made before a judicial proceeding or in connection with an issue under consideration or review by a judicial body. The court rejected the attorneys' argument that the submission of an insurance claim constituted protected petitioning conduct under the anti-SLAPP law as both a necessary prerequisite to litigation and a pre-litigation demand letter. Relying upon the case law cited by the trial court, the court noted that submission of documents to an insurer in support of a claim was not pre-litigation conduct when the reports were sent to the insurer to demand performance. Thus, submission of contractual claims in the regular course of business was not an act in furtherance of the right of petition. However, if a claim was instead submitted merely as a necessary prerequisite to expected litigation or was submitted as the equivalent of a pre-litigation demand letter, it could constitute protected petitioning activity. In rejecting the defendant attorneys' arguments, the court noted that the attorneys' subjective intent in submitting the claim did not transfer the claim from a simple claim for payment in the usual course of business into protected pre-litigation conduct. The court also rejected the attorneys' alternative arguments that the submission of the claims constituted protected petitioning activity. The alleged capping and submitting of false claims formed the basis of the carriers' complaint, based on the attorneys' acts, regardless of the motive for which the complaint may have been brought. Similarly, the attorneys' conduct in obtaining clients also did not constitute petitioning activity because, said the court, the attorneys failed to establish that the clients were contacted for anything other than filing claims.

A TRIPARTITE RELATIONSHIP EXISTS WHETHER THE CARRIER RETAINS COUNSEL TO DEFEND OR PROSECUTE AN ACTION ON BEHALF OF ITS INSURED AND COMMUNICATIONS BETWEEN EITHER THE CARRIER OR THE INSURED AND COUNSEL ARE PROTECTED BY BOTH THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

In a recent decision captioned *Bank of America, N.A. v. Superior Court (Pacific City Bank)* (2013) 212 Cal.App.4th 1076, 151 Cal.Rptr.3d 526, the Fourth District, Division 3, held on January 15, 2013, that when a carrier retains counsel to defend its insured, a tripartite attorney-client relationship arises among the carrier, the insured, and retained defense counsel and as a consequence, confidential communications between either the carrier or the insured and counsel are protected by the attorney-client privilege, and both the carrier and insured are holders of the privilege; additionally, counsel's work product does not lose its protection when it is transmitted to the carrier.

Fidelity National Financial (Fidelity) insured Bank of America (BofA) under a lender's title policy insuring the priority of a deed of trust against a borrower's home. The policy provided that Fidelity would defend BofA in any litigation involving a covered claim and that Fidelity had the right to prosecute any action to establish the title or the lien of the insured mortgage. Without BofA's knowledge, Pacific City Bank (PCB) had recorded a deed of trust on the same property five days before the recordation of BofA's deed of trust. When PCB sent a notice of trustee sale, BofA tendered the claim to Fidelity, which hired a law firm to prosecute an action by BofA against PCB to protect BofA's security interest. During the litigation, PCB served subpoenas on Fidelity seeking communications between the law firm (hired by Fidelity to defend its insured, BofA) and Fidelity. The trial court denied BofA's motion to quash the subpoenas to exclude communications between the law firm and Fidelity on the grounds of privilege. The trial court held that the tripartite attorney-client doctrine did not apply because the law firm was retained to prosecute the underlying action rather than defending litigation. According to the trial court, Fidelity did not have a "favored position" or "sacred role" in the litigation. BofA and Fidelity then petitioned for writ of mandate or prohibition to challenge the court's order.

Finding that the trial court had abused its discretion, the California Court of Appeal, Fourth District, Division 3, ordered the trial court to grant BofA's and Fidelity's motion to quash. The court disagreed with the trial court's distinction between defending and prosecuting a lawsuit, especially given the nature of a title carrier's duty to defend. The policy obligated Fidelity to defend lawsuits against BofA, but also gave Fidelity the right to prosecute actions to establish the title or lien of the insured mortgage. The court characterized defending actions against the insured and prosecuting actions on behalf of the insured as "kindred duties" addressing the "same

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Turbo Charge Your Slapp Fee Motions and Oppositions With The Use of Expert Declarations

Graciano, it was consumer rights litigation. In SLAPP cases, the defendant's experience with handling anti-SLAPP motions, SLAPP fee motions, and SLAPP appeals is the relevant skill justifying a higher rate. The attorney's customary hourly rate and years of experience handling non-SLAPP cases is not entirely probative as to the reasonable rate for that attorney in a SLAPP case. The number and complexity of prior SLAPP cases handled, the number of published SLAPP appellate decisions where the attorney was lead counsel for one of the parties, prior SLAPP fee awards, SLAPP articles published, and teaching experience, and of course declarations from other attorneys in the community are highly probative in determining a reasonable hourly rate in SLAPP cases.

CONCLUSION

The use of expert declarations by a prevailing SLAPP defendant in support of a request for mandatory attorney's fees can be extremely helpful in boosting the defendants' bottom line - particularly in contingent fee cases where a discretionary multiplier is sought or where the number of hours billed is substantial. It is like adding a turbo charger to your SLAPP motions. But where an unsuccessful SLAPP plaintiff seeks to decimate a large SLAPP fee request, an expert declaration is essential. Because the unsuccessful SLAPP filer after appeal often becomes the target of a SLAPP fee request that is well in excess of $100,000.00, the use of an expert declaration by an attorney who has demonstrable experience and expertise in anti-SLAPP jurisprudence is indispensable. In light of the newly enacted SLAPPback provisions of CCP § 425.18, the SLAPP plaintiff's attorney becomes exposed not only to a legal malpractice action by his former client for the loss of the prior action and for the fee award but the attorney may also become subject to a SLAPPback malicious prosecution suit without a meaningful SLAPP defense.[1]

[1] See "Two SLAPP Don't Make a Right" by James J. Moneer, Esq. in California State Bar Journal: Litigation March 2007 Vol. 20, No. 1. Hence, a prudent SLAPP filer who unsuccessfully opposes a SLAPP motion would be wise to make the strongest record possible for reducing the fee award before it is too late.

Since 1994, the author, San Diego attorney James J. Moneer, has specialized in handling all aspects of anti-SLAPP cases for plaintiffs and defendants throughout California. Mr. Moneer has been teaching anti-SLAPP law to civil clinic students at USD Law School since 2001. His website is WWW.SLAPPLAW.COM. >

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Cover Story Continued – Binding Mediation: Blasphemous Paradox or Creative Solution to Court Funding Woes?

demand a jury trial instead of a court trial; it does not prevent parties from avoiding a civil trial altogether by some other means, including settlement or by use of arbitration or other non-judicial forum.

Thus, so long as the parties' intent is clear, and their agreement sufficiently certain to enforce, California law now establishes there is no legal impediment to utilizing "binding mediation" if the parties choose to do so.

In Favor of Flexibility and Finality

The policy reasons in support of binding mediation are numerous. The "mediation" part affords the parties an opportunity to first voluntarily resolve their disputes with the help of a mutually selected neutral. The "binding" part provides a cost-effective, timely, and efficient mechanism for finality if the voluntary route fails. Indeed, it may provide additional incentive for the parties to work hard to achieve a negotiated agreement to avoid the "finality" piece which is looming.

There is also much to be said for the flexibility of the process itself. Because binding mediation will be based entirely on the parties' agreement, it provides great latitude with regard to which issues will, and will not, be subject to the binding portion of the process. For example, after failed mediation in a contested liability matter, the issue of liability could be submitted for binding decision by the mediator, with the parties to reconvene after that decision to mediate further on the issue of damages. Or when the only issue submitted for binding determination is damages, the parties can choose whether to use a "baseball approach," tasking the mediator to choose either the final demand of the plaintiff or the last offer of the defendant, or instead empower the mediator to choose any number he or she believes is appropriate.

The parties also have the ability to make the process as relaxed or formal as they desire. A joint session can be convened to allow direct and cross examination of witnesses, or the parties can stay in separate session and allow the mediator to convey information. Medical and technical opinions can be submitted by way of report, or experts can be brought to the session for live testimony and questioning. Opening statements and closing arguments can be made or waived. The beauty of fashioning the process to fit a particular case is that the design is limited only by the participants' creativity and parties' informed consent.

On a touchier subject, binding mediation can be a useful tool when counsel and client are having a hard time seeing eye to eye on the relative merits and risks involved in a particular case. The client can often feel his attorney has "gone weak" and isn't doing a good enough job arguing his position. The attorney can become frustrated that the client is not following sound legal advice and recommendations. Having a neutral third party render the decision may redirect client disappointment about the result away from the attorney, and go a long way to restoring the client's trust in counsel's loyalty and skill.

Finally, and perhaps most relevant in the current political climate, binding mediation is a way to get a case resolved efficiently and cost-effectively. In the absence of an arbitration clause governing the dispute, there has been little hope of getting a claim into a binding, non-judicial dispute resolution process. Binding mediation may be just the ticket for parties looking to quickly and inexpensively get a case resolved, one way or the other.

Blasphemous Paradox or Creative Solution?

The answer just depends on who you ask. So long as the parties' intent is clear, and the agreement to submit to binding mediation sufficiently certain, such an agreement may be a useful tool. As long as the parties have given informed consent and the process is handled in a manner consistent with applicable law or court order, the resulting decision should withstand a legal challenge. From a practical standpoint, binding mediation may be the next great trend in the field of alternative dispute resolution, offering a way to help alleviate delays and overcrowding caused by budget woes and resulting courtroom closures. But as with all new ideas, it should not be embarked upon lightly or without a thorough investigation of the myriad issues involved. Because most importantly, those participating in the process should come away believing justice has been served.

[1] Bowers v. Raymond J. Lucia Companies, Inc. (2012) 206 Cal.App.4th 724 (rehearing denied 6/10/12, review denied 8/29/12).

[2] The parties signed a stipulation for settlement following private mediation, however, there were two versions of it with varying language. One version, signed by most of the parties, referred to "binding arbitration" with the word "arbitration" being added over the word "mediation," which had been stricken. Another version, signed by one of the plaintiffs, did not have that language. In another paragraph, there was language requiring disputes about the agreement to be submitted to "binding mediation" by the retired judge who had mediated the case.

[3] Binding Mediation is No Mediation at All, by Alan G. Saler, Advocate Magazine, Journal of Consumer Attorney Associations for Southern California, January 2007 issue.>

How Dense Are You?

California's Breast Density Notification Law

By Eydith J Kaufman

Janina did not get to spend her 45th birthday as she planned. Instead of celebrating with cake and presents, Janina sat in her oncologist's office, receiving chemotherapy. Despite regular mammograms since the age of 40, Janina just found out before her birthday that all the mammograms had 'missed' a tumor in her left breast. It was during the understandable questions of "How?" and "Why?" that Janina learned from her physician, for the first time, that she had dense breast tissue that had hidden the tumor from detection on the earlier mammograms.

Janina's story is unfortunately not that uncommon. In fact, when similar circumstances happened to Nancy Cappello in Connecticut, she took action and testified before lawmakers, resulting in Connecticut becoming the first state to pass a breast density notification law in 2009.

Since Connecticut took action, other states began enacting or considering similar laws, including California. California has now followed Connecticut, New York, Virginia and Texas, to become the fifth state to pass a breast density notification law. Starting on April 1, 2013, California Health & Safety Code section 123222.3 provides that clinics performing mammograms in California will have to notify patients if their mammogram shows dense breast tissue, explain the significance of that finding, and advise the patients that alternate screening methods are available.

The rationale behind this law is clear. Breast cancer is a pervasive disease, with an estimated 226,870 new cases of breast cancer in 2012. (New York Times, New Laws Add a Divisive Component to Breast Screening by Denise Grady, October 24, 2012) It is estimated that 40% of women have dense breasts. Dense tissue gives a white appearance on mammography and can make spotting cancer, which also appears white, difficult or impossible to detect on a mammogram. Density can only be determined by imaging, and not through physical examination. It is relatively indisputable that at least some those with dense breasts, by some estimates up to 60% of those women, will risk having an otherwise detectable cancer missed on mammography. Stories about women like Janina or Nancy Cappello prompt lawmakers into action to try a proactive approach to preventing similar outcomes for other women.

There is some dispute within the medical community as to whether this notification law is advisable. For instance, the law was supported by the California Medical Association, California Radiological Society, the California Nurses Association, Planned Parenthood Affiliates of California, the California affiliates of the Susan G. Komen Foundation, and the Breast Cancer Fund. However, the law was opposed by the California Medical Association, the Association of Northern California Oncologists, the American Congress of Obstetricians and Gynecologists (District IX), the California Radiological Society, and the Medical Oncology Association of Southern California. (Radiology Today Magazine, Breast Density Notification by Kathy Hardy, Aug 2012, vol. 13, no. 8, p. 30) Some organizations, like the American College of Radiology, support voluntary, but not mandated, notification to patients with dense breast tissue.

Federal law has already required that a written report of all mammography results be sent to the patient. However, California Health & Safety Code section 123222.3 now requires that any such reports going to patients with dense breast tissue must also include the following language:

"Your mammogram shows that your breast tissue is dense. Dense breast tissue is common and is not abnormal. However, dense breast tissue can make it harder to evaluate the results of your mammogram and may also be associated with an increased risk of breast cancer.

This information about the results of your mammogram is given to you to raise your awareness and to inform your conversations with your doctor. Together, you can decide which screening options are right for you. A report of your results was sent to your physician."

In addition to requiring mammography clinics to notify patients directly, the breast density notification law in California is likely to bring more claims of malpractice against the physicians ordering the mammograms when a patient with dense breast tissue has an allegedly 'delayed' diagnosis of breast cancer. Although Health & Safety Code section 123222.3 creates no express duty or obligation except for requiring mammography clinics to provide notice to a patient of her dense breast tissue, it seems likely that the law can be interpreted as also requiring the physician ordering the mammogram to notify a patient that she has dense breast tissue and advise her about alternate screening options.

Of course, plaintiff attorneys will likely argue the law implies the ordering physician, typically the patient's primary care physician or obstetrician-gynecologist (OB-GYN), is essentially required to provide alternate

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screening methods to a patient with dense breast tissue or risk facing potential liability for failing to comply with the standard of care. (Indeed, at least one attorney in New York is already advertising that alternate screenings such as ultrasound and MRI can be used to "find all of the cancers that mammograms miss.") Plaintiff attorneys may also argue that the physician knew or should have know of the importance of dense tissue, as demonstrated by the notification law, if that physician failed to notify the patient. Radiology reports may be disregarded or misinterpreted by a patient; it seems to be up to the primary care physician to ensure that discussions about dense breast tissue take place with that patient.

The American College of Obstetricians and Gynecologists ("ACOG"), anticipating this argument, has gone on record to state it must be up to radiologists, not the OB GYNs, to determine whether mammograms are sufficient. ACOG notably opposed the bill requiring dense breast notification in New York. Donna Montalto, executive director of ACOG's New York chapter, stated her concern that OB GYNs will likely recommend that any patients with dense breast tissue now have ultrasounds because of the threat of malpractice suits if breast cancer is missed, which she says is "defensive medicine." (See Wall Street Journal, Health Journal, The Latest Mammogram Controversy: Density, by Melinda Beck)

While these are valid concerns, California's new notification law should not be interpreted to require physicians to recommend alternate screening such as ultrasound for every patient with dense breast tissue. Medical malpractice requires physicians to do what is reasonable, knowing what is known to the physician at the time, as opposed to what would have been ideal treatment looking back on the illness in retrospect. This means that even if a physician advised a patient against alternate screening after discussing the option with his or her patient, and that patient later was diagnosed with an advanced stage breast cancer, he or she may have acted reasonably.

Indeed, there is still much controversy over whether alternate screening for dense breast tissue patients is necessary. The American College of Radiology, while agreeing that women should be voluntarily advised of their dense breast status, says there isn't enough evidence to recommend that women with dense breasts have routine ultrasound screening. (ACR Statement on Reporting Breast Density in Mammography Reports and Patient Summaries

April 24, 2012 (available at : http://www.acr.org/About Us/Media Center/Position Statements/Position Statements Folder/Statement on Reporting Breast Density in Mammography Reports and Patient Summaries))

Doctors and medical groups are split over whether the law will result in dense breast patients having unnecessary tests which may have increased incidents of false positive diagnoses and treatment. There is also concern over possible subjective inconsistencies in classifying what radiological findings constitute 'dense' breast tissue. (New York Times, New Laws Add a Divisive Component to Breast Screening by Denise Grady, October 24, 2012) There is also concern that requiring more ultrasounds for patients will result in an increase in medical costs (although according to the American College of Radiology, the national average Medicare reimbursement for an ultrasound is approximately $40 less than the reimbursement for a digital mammogram.)

Despite this controversy, counsel representing primary care physicians, internists and OB-GYNs who order mammogram studies for their patients should advise their physician clients to be aware of these new dense breast reporting laws and make sure that, if a patient has breast dense tissue, that patient is personally notified by the physician. The physician should make sure to answer any questions the patient may have regarding the significance of having dense tissue, and advise the patient of the right to undergo alternate screening, such as ultrasound, tomosynthesis, or MRI. Lastly, physicians should be advised to document their actions and the discussions that have taken place with a patient regarding her dense breast condition.

Whether the dense breast notification law will be deemed to be more helpful than harmful remains to be seen. The law does bring to light the importance of breast density, and arguably creates a new responsibility for physicians ordering mammograms to hold meaningful discussions with their patients who have dense breasts. Such discussions can only benefit future patients who may have outcomes like Janina, and will serve to protect the physicians from potential liability related to Health & Safety Code section 123222.3. >

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RECENT CALIFORNIA APPELLATE DECISIONS

fundamental concern"— protecting the integrity of the insured's title is the same. Accordingly, the court found "no logical reason why a tripartite attorney-client relationship should exist in one case but not the other." The court also rejected Pacific's contention that a tripartite attorney-client relationship did not exist because Fidelity agreed to provide counsel for BofA subject to a reservation of rights. The court explained that not every reservation of rights creates a conflict entitling an insured to independent counsel. For example, there is no right to independent counsel when the carrier reserves rights to contest coverage on grounds not at issue in the underlying case, such as the insured's failure to notify the carrier in a timely manner, which was the basis for Fidelity's reservation. The court therefore found that the reservation of rights did not create a conflict requiring independent counsel, and the law firm retained by the carrier was not acting as independent counsel. Moreover, even if the law firm served as independent counsel, the attorney-client privilege would still apply to communications among the law firm, BofA, and Fidelity pursuant to California Civil Code § 2860(d). >

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Options to Reduce Physican Shortages

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