SAN DIEGO DEFENSE LAWYERS

THE UPDATE

WINTER 2014

Reaping Rewards

ESTABLISHING STANDARDS FOR LAW FIRM BONUS PROGRAMS

By Ed Poll

Compensation is a common area of focus in law firms of all sizes. For partners, it's a matter of how year-end financial results affect their direct payouts in a small firm, or the decisions of the compensation committee in a large firm. For associates and bonus-eligible staff, the focus is somewhat different, and often centers on one question: "How big will my bonus be?" And that can create definite problems. The real question should be, "Do I deserve to get a bonus?" If that question isn't being asked, the firm's leadership should evaluate how it approaches the whole concept of bonuses.

WHAT IS A BONUS?

A bonus is, or should be, additional compensation to reward a level of performance that goes beyond mere satisfaction, but the nature and degree of "exceeding" can be hard to define. For starters, associates may have their expectations set too low about how they have outperformed the standard, particularly when the firm did not explain clearly what kind of performance is expected as a baseline. In this sense, lack of a clear definition for "exceeding expectations" represents a communications failure.

From the associate's standpoint, actually exceeding expectations when the standards are fluid creates a different dilemma. Human nature being what it is, partners will expect even greater exertion and achievement next time. At some point, it becomes impossible to continually exceed what the firm seems to want; the best the associate can do is meet expectations. And by any reasonable definition, merely meeting expectations does not merit a bonus.

CONTROLLING EXPECTATIONS

In firms that give associate bonuses, people tend to expect what was. The problem with that, from a legal perspective, is that it virtually becomes part of their compensation. And if any members of your firm think they are not receiving parts of the "salaries" they believe they are entitled to, a lawsuit or discrimination claim could result. It's important for the firm to short-circuit such an entitlement mentality by making it clear that a bonus is not an automatic part of associate compensation.

That can be problematic for those firms that don't believe in sharing financial information with associates. Their operative mentality seems to be, "We're paying associates enough as it is, and if they know how much we're actually bringing in, they're going to want even more." Associates do tend to focus only on the big picture – revenue – and forget to take into account bottom-line items like collections and overhead expense. More importantly, they tend to

continued on page 4

IN THIS ISSUE

President's Message

by Benjamin J. Howard
Neil Dymott

As I write this, I am in the final weeks of my tenure as SDDL's President. Rather than feeling bittersweet, however, I feel a sense of deep satisfaction and optimism. By every benchmark, SDDL has had a wonderful year. SDDL continued the successes of its social events, over-delivered on its CLE commitments, and hosted a first-ever joint mixer with the Association of Southern California Defense Counsel. Additionally, our 2013 Installation Dinner, Golf Tournament, and Mock Trial competitions attracted more people than ever before, resulting in the largest donation to the Juvenile Diabetes Research Foundation since 2007: $10,001. Most importantly, SDDL's future has never looked brighter. David Roper (Lorber Greenfield & Polito) is taking over as President, with Sasha Selfridge (The Greenfield Law Firm) as President-Elect. Both Dave and Sasha have been directly responsible for the successes SDDL enjoyed this past year, and I know they will deliver an even better product to SDDL's constituents in 2014.

My past President's Messages have touched on SDDL's core values of civility and integrity, and here I will address balance. Past-President (and 2013 SDDL Attorney of the Year) Ken Greenfield had this to say about the inclusion of the word balance in the Spring 2008 Update: "We are san Diego's defense lawyers. We are an essential part of the legal system. Although we rarely, if ever, get the kind of glory that consumer attorneys get with their million dollar verdicts, we do something equally important. We provide the balance. We temper the system by rejecting the frivolous claims, and we provide the funds to respect the genuine ones. And, we do it all with a sense of professionalism."

While we temper the plaintiffs' expectations in the legal arena, don't forget to provide balance in your own life. I subscribe to Aristotle's belief of "Moderation in all things," as well as Oscar Wilde's caveat, "Including moderation." In a profession marked by six-minute increments, never forget Seneca's admonition "Nothing…is ours, except time." Make the most of it, both as an attorney and a person.

Thank you for allowing me the privilege of leading this wonderful organization, and I look forward to seeing you all at The Prado for the 2014 Installation Dinner. ■

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

Editor | David D. Cardone
Asst. Editor | Samir R. Patel
Design | April Woodard Design
www.aprilwdesign.com

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.

SDDL UPDATE
c/o David D. Cardone
Butz Dunn & DeSantis, APC
101 West Broadway, Suite 1700
San Diego, CA 92101-8289
P | 619-233-4777
dcardone@butzdunn.com

"LUNCH AND LEARN" PROGRAMS

Class Actions and Related Actions Against Government Entities

by Robert Mardian
Henderson, Caverly, Pum & Charney LLP

The December installment of SDDL's monthly Lunch and Learn CLE series was presented by Eric J. Benink, partner at the law firm of Krause, Kalfayan, Benink & Slavens LLP. Mr. Benink's practice focuses on class actions and securities litigation. Unlike most of our Lunch and Learn presenters, Mr. Benink comes from the plaintiffs' bar, and his talk provided a unique insight into the strategies and perspectives of our colleagues on the other side.

Mr. Benink gave a two-part presentation discussing, first, recent developments in class action law and the challenges presented to the plaintiffs' bar in the current class action climate. For example, a recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), held that the Federal Arbitration Act preempts state law from outright precluding arbitration of a particular type of claim. Whereas before class-action plaintiffs could rely in having arbitration clauses declared unconscionable in matters involving allegations of fraud, this is no longer the case.

Mr. Benink also discussed the enhanced difficulties in obtaining class certification in Federal class actions under F.R.C.P. 23(a) and the impact of the holdings of *Dukes v. Walmart*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (U.S. 2013) on issues of commonality and causation.

The second part of Mr. Benink's presentation focused on cases brought against government entities which have

continued on page 23

Bottom Line

Case Title | Parkloft LLC v. International Association of Plumbing and Mechanical Officials (IAPMO) and IAPMO R&T

Case Number | GIC 880097

Judge | Hon. Ronald L. Styn

Plaintiff's Counsel (Cross-Complainants) | : Kevin Meade and Alex Remick

Defendant's Counsel | Clark Hudson and Catherine Zung

Type of Incident | Defective Cast Iron Pipes, Claims of Negligent Undertaking and Strict Liability

Settlement Demand | N/A

Settlement Offer | Waiver of Costs and Malicious Prosecution

Trial Type | Jury

Trial Length | 7 Days

Verdict | Non-suit granted at the end of Plaintiff's case

On November 27th, 2013, Clark Hudson and Catherine Zung obtained a non-suit on behalf of IAPMO and IAPMO R&T. The trial started on November 18th with the plaintiff pursuing claims for both Negligence and Strict Products Liability for defective cast iron pipe. The named plaintiffs were Parkloft LLC, Parkloft Holdings LLC, Douglas Wilson Development and Douglas Wilson Companies (Parkloft). (Parkloft settled the underlying construction defect lawsuit, and obtained an assignment of rights from the homeowners. Although pursing the claims in the name of Parkloft - the actual beneficiary of the assignment was The Insurance Company of the State of Pennsylvania.) After the first week of trial, the plaintiff dismissed the Negligence claims, and proceeded solely on a claim of Strict Products Liability. Plaintiffs conceded IAPMO

continued on page 5

(Cover Story Continued)
Reaping Rewards - Establishing Standards for Law Firm Bonus Programs

forget that they are part of the overhead, and that every new associate increases overhead expense.

THE PERSONAL P&L

Ultimately, sharing financial information with associates benefits the firm as a whole because it gives associates the means to understand their own personal profit and loss calculations, thereby better determining and understanding their worth to the firm. The information to share (which doesn't begin to encompass the cost of the time that the firm spent recruiting and training the associate) would include:

- their billable hours, for the latest month and year to date;
- how many hours the firm billed out for them, versus a markdown or write-off for some of the work (individually or as an average percentage applied to all associates);
- direct expenses for compensation (including bonus and benefits), clerical help, technology, office space, etc., related to the associate; and
- indirect expenses, or overhead (the percentage of rent, insurance, utilities, entertainment, and education that each associate accounts for).

A bonus is, or should be, additional compensation to reward a level of performance that goes beyond mere satisfaction.

The result should determine an individual net profit value to the firm:

Billings - [Associate's Total Compensation + Direct and Indirect Expenses] = Net Profit.

Creating a bottom-line figure like this can help resolve a not-uncommon dilemma. Say the firm has always given decent year-end bonuses to associates, but in the current year accounts receivable are uncomfortably high. Meanwhile, expenses (including associate salaries) are higher. If receivables are not received, the firm cannot afford to pay the bonuses that associates are accustomed to. Basing such an action on the bottom-line figures of the profit and loss sheet and making sure associates understand the reason for it can go a long way toward heading off hurt feelings and outright discontent.

STAFF BONUSES AND JOB STANDARDS

The payment of bonuses becomes an even trickier issue when they are awarded to a firm's staff members. This can be anything from a significant payment to an annual "holiday bonus." If a lawyer takes the initiative to win a new client or begin a new practice area, the "bonus" comes from the increased revenue and profitability generated by the lawyer's efforts. Staff members, by contrast, rarely have any direct influence on the outcome of firm revenue and expenses. If someone has no control over a particular activity yet receives a bonus because the organization overall is doing well, it typically results in one of three responses:

- The bonus doesn't register, because the staff person cannot relate personal effort to it.
- The bonus creates a feeling of entitlement, because the staff person has nothing at risk.
- The lack of a bonus, if firm performance slips, creates disappointment and cynicism, because the staff member could not control the outcome. This is especially true if the

perception exists that the partners' income is not reduced in amounts corresponding to the decrease in the firm performance.

Having a comprehensive job description for every staff position in the law office is a prerequisite to an objective and efficient bonus program. The absence of such descriptions promotes inconsistency and threatens objectivity. Descriptions should include the specific, significant tasks of each position and the performance standards by which the accomplishment of these tasks is judged. When employees understand what they should be doing and how they are evaluated, their performance is more likely to be positive – and they are less likely to question the fairness or appropriateness of any bonus payments.

THE BEST APPROACH

Experience shows that the best approach to law firm staff bonuses is the creation of a pool that reflects the firm's year-end financial statement. One approach is to identify the net profit after all expenses and all attorneys are paid, and then assign staff members a fixed or variable percentage of that pool. Another approach is to pay bonuses based on revenue and assigning bonuses based on a revenue pool – which has the advantage that most people understand the concept of revenue and believe it cannot be "manipulated" as can profit.

Of course, the firm could prefer not to be tied down to a specific formula, instead saying that because performance this year exceeded a three-year average, individual staff efforts are being rewarded by cash payments of varying amounts. The key to success here is to have accepted standards in place to judge "performance."

'SKIN IN THE GAME'

Clients increasingly reward lawyers for having "skin in the game" – a personal financial stake in the outcome of a matter as reflected in fees that go up when the results justify it. Law firms should take the same approach to the payment of bonuses, making it clear that the payment reflects over-and-above effort and not just the time of year on the calendar.

Being clear on the standards for and nature of bonus rewards is fundamental to making bonuses a meaningful compensation tool.

About the Author

Ed Poll is the Principal of LawBiz Management and an internationally recognized coach, law firm management consultant, and author. His LawBiz Coach column appears regularly in Legal Management. He has also written 11 books, Contact him at edpoll@lawbiz.com or (800) 837-5880. Visit his Web site, www.lawbiz.com, to subscribe to his free monthly newsletter, LawBiz Tips, or his blog, www.lawbizblog.com. ■

Bottom Line

continued from page 4

was not involved in the manufacturing of the cast iron pipe, but maintained they were an integral link in the chain of commerce. Plaintiffs claimed total damages for defective pipe of $6.7 million.

At the end of the plaintiff's case Judge Styn entertained the defense motion for non-suit. Following argument, Judge Styn ruled there was no legal authority allowing a cause of action in Strict Products liability against a Certification Body/Listing Agency - and therefore granted the non-suit and granted Judgment on behalf of both IAPMO and IAPMO R&T. ■

SLAPPS: Legitimate Civil Demand Letter Or Criminal Extortion?

by James J. Moneer, Esq.

The illegality as a matter of law doctrine, expounded by our High Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299, is, perhaps, the most overused and abused exemption from anti-SLAPP motions. While illegality can be a lifesaver for plaintiffs in those rare cases where it is an appropriate bar to a SLAPP motion, very often, illegality ends up being the typical SLAPP plaintiff's argument of last resort but ultimately unavailing. The general rule is that the anti-SLAPP statute is to be construed broadly. [CCP § 425.16, subd. (a)]. But the corollary to this rule is that exemptions from the anti-SLAPP statute, like illegality and those under CCP § 425.17, must be construed narrowly. *Members for an Honest Election Club v. Sierra Club* (2008) 45 Cal.4th 309; *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 543-545. *Malin v. Singer* (filed 7/16/13; No. B237804) illustrates the extreme narrowness of *Flatley's* illegality doctrine in distinguishing the pre-litigation demand letter in *Malin* from the criminally extortionate demand letters in *Flatley and Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799. Malin, Moore, and defendant Arazm are general partners of Geisha House, LLC (company). In 2011, Arazm consulted her attorney, Martin Singer, regarding Malin and Moore's alleged misappropriation of company assets. Singer sent Malin a demand letter and draft of Arazm's proposed complaint. The demand letter contained what Malin contends was an extortionate threat to disclose certain personal information if he did not pay to settle Arazm's claims.

The demand letter stated in pertinent part: "As a result of your embezzlement, conversion, and breach of fiduciary duty, you have misappropriated more than a million dollars from my client. As a result, my client intends to file the enclosed lawsuit against you, Moore and [others]. `As alleged in the complaint', you, Mr. Moore, and [others] have been embezzling and stealing money from Ms. Arazm and Geisha House for years." In substance, the letter went on to detail the allegations of the civil complaint regarding the schemes Malin and Moore devised to embezzle money, information regarding insurance scams defendants perpetrated as part of the complaint, and illegal transfers of money embezzled in an effort to avoid taxing authorities. Finally, the letter set forth the allegation of the complaint charging Malin had misused company resources to arrange sexual liaisons with older men, including an unidentified L.A. Superior Court Judge (retired) (name intentionally left blank but provided a photo of judge and stated that the name would not be blank if the complaint were filed).

After he received the demand letter, Malin sued Singer and Arazm for civil extortion, violation of civil rights, and intentional and negligent infliction of emotional distress. The latter two causes of action were based on illegal computer hacking and wiretapping tapping activities. The *Malin* court held that the latter two causes of action were based on activity that was illegal as a matter of law relying on *Gerbosi v. Gaims, Weil, West & Epstein* (2011) 193 Cal.App.4th 435, 445-446. In contrast, Malin found that the civil extortion claim based on the demand letter did not constitute criminal extortion as a matter of law, that the demand letter constituted protected petition activity under the anti-SLAPP statute, and that the claim was barred by the litigation privilege on CC § 47(b) on prong two. *Malin* reversed the trial court order denying the SLAPP motion as to the civil extortion claim but affirmed in all other respects.

Malin distinguished a similar demand letter in *Flatley*, which constituted criminal extortion as a matter of law. Criminal extortion is defined as "obtaining of property from another, with his consent... induced by a `wrongful' use of force or fear ... (Pen. Code § 518). Fear for purposes of extortion may be induced by a threat, either:... 2. to accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, 3. To expose, or impute to `him or them' ... any deformity, disgrace or crime; or, 4. To expose any secret affecting `him or them'. (Pen. Code § 519). ~Every person who, with intent to extort money or other property from another, sends or delivers to any person any letter or writing, ... expressing or implying... any threat such as specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat. (Pen. Code § 523). Indeed, the Rules of Professional Conduct specifically prohibit attorneys from `threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Flatley, at 327.

Michael Flatley, "the Lord of the Dance" was threatened with rape allegations by Ms. Robertson. Her attorney, Mauro, sent Flatley a demand letter, which expressly threatened to go public (to the media worldwide) with rape allegations and report him to various immigration, taxing, and other authorities if Flatley did not pay $1,000,000 for Mauro and Robertson's silence within 30 days. This threat was reiterated in a phone call to Flatley's attorney.

The *Flatley* exemption holds that the plaintiff must show that the defendant has either "effectively conceded, or that the evidence `conclusively' establishes, that the assertedly protected speech or petition activity was illegal `as a matter of law'" - such there can be no factual dispute on the point. If such a showing is made, the defendant is barred from using the anti-SLAPP procedure to dismiss the case regardless of merit. Moreover, the illegality established must constitute a violation of a specific criminal statute. *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606.

The *Flatley* court found that Mauro's demand letter constitutes criminal extortion as a matter of law and thus Mauro could not challenge Flatley's complaint with a SLAPP motion even though the court assumed, without deciding, that the litigation privilege of CC § 47(b) applied. *Flatley* observed that the two statutes are not co-extensive. *Flatley*, at 322.

A key to understanding the *Malin/Flatley* distinction is the precise relationship between the anti-SLAPP statute's official proceeding prongs and the litigation privilege of CC § 47(b). An informed anti-SLAPP analysis must begin with the general rule, articulated by our *High Court in Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1115 that where a communication is privileged under CC § 47(b), it will ordinarily be subject to a special motion to strike under the official proceeding prongs of subds. (e)(1),(2) of CCP § 425.16 as both statutes were intended to protect certain aspects of the First Amendment right of petition albeit in different ways. *Malin*, at 10. In contrast, the illegality exception in *Flatley* and *Mendoza* merely holds that simply because liability is based on a privileged communication under CC § 47(b), that does not, by itself, necessarily mean that the communication qualifies as a protected act under the anti-SLAPP statute and vice versa. *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-325. While the two statutes do not target precisely the same activity, there is significant overlapping coverage.

Malin observed that the "secret" that would allegedly expose Malin and others to disgrace was inextricably tied to Arazm's pending civil complaint. The demand letter accused him of embezzling money and simply informed him that Arazm knew how he had spent these funds. We cannot conclude that Malin's alleged activities [arranging sexual liaisons with old men] would subject him to any more disgrace than the claim that he was an embezzler. Second, to the extent Malin claims the threatened disclosure of secrets affecting a third party, his alleged sexual partner, necessarily constitutes extortion, he is mistaken. The third party - a retired judge - was neither a family member nor a relative under PC § 519. Most importantly, the *Malin* court concluded "We see a critical distinction between Singer's demand letter, which made no overt threat to report Malin to prosecuting authorities or the IRS, and the letters in Flatley and Mendoza, which contained those express threats and others that had no reasonable connection to the underlying dispute."

James J. Moneer, Esq. has been representing plaintiffs and defendants at all stages of anti-SLAPP litigation since 1994. His website is www.slapplaw.com. ■

RECENT APPELLATE DECISIONS

By Brittany Bartold
Lewis Brisbois Bisgaard & Smith LLP

Nevarrez Elder Abuse Opinion After Rehearing

In July 2013, the Court of Appeal granted plaintiff's petition for rehearing in *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (June 5, 2013, B235372) ___ Cal.App.4th ___, to address whether the jury's $7,000 award ($500 for each of the 14 violations) in favor of the plaintiff was authorized by Health and Safety Code section 1430, subdivision (b). On November 4, 2013, the Court of Appeal published its opinion after rehearing and again concluded that section 1430, subdivision (b) "allows a single award of up to $500 per lawsuit." (Slip opn., p. 26.) In other words, "the $500 maximum in section 1430, subdivision (b) applies per civil action rather than per violation." (*Id.* at p. 36.) The court agreed with the defendants that it could not read the phrase "per violation" into section 1430, subdivision (b) since the Legislature did not include it in section 1430, subdivision (b), but did include it in statutes providing for civil penalties in other contexts. (*Id.* at p. 28.) As a result, the court reversed the monetary award in favor of the plaintiff. (*Id.* at p. 2.) The appellate court also reversed the jury's verdict as to the negligence and elder abuse causes of action because the trial court abused its discretion in admitting into evidence a class A citation and a statement of deficiencies issued by the state Department of Public Health. (*IbId.*)

New CA Supreme Court Opinion Regarding the Federal Arbitration Act & Unconscionability

On October 17, 2013, a new California Supreme Court opinion was published addressing unconscionability and the United States Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] as it relates to employment arbitration agreements. The Supreme Court in *Sonic-Calabasas Inc. v. Moreno* ___ Cal.4th ___ (Oct. 17, 2013, S174475), held that "the [Federal Arbitration Act (FAA)] preempts [a] state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment." (Slip opn., p. 1.)

The court previously held in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, ("*Sonic I*"), that an employer could not require an employee, as a condition of employment, to waive the right to a *Berman* hearing-a dispute resolution forum established by the Legislature to assist employees in recovering wages owed. (Slip opn., p. 1.) The *Sonic I* court found that a waiver of a *Berman* hearing was unconscionable and contrary to public policy. The United States Supreme Court granted certiorari and remanded the case for consideration in light of Concepcion, which clarified the limitations that the FAA imposes on a state's capacity to enforce its rules of unconscionability on parties to arbitration agreements. (*Id.* at pp. 1-2.)

The California Supreme Court held that the FAA preempted its state-law rule that categorically prohibits an adhesive arbitration agreement from requiring an employee to waive access to a *Berman* hearing. (Slip opn., pp. 2, 70.) The court explained that "[u]nder *Concepcion*, the FAA preempts Sonic I's rule that waiver of a *Berman* hearing necessarily renders an adhesive arbitration agreement unconscionable regardless of what the terms of the agreement provide or how the agreement was formed. State law may not categorically require arbitration to be preceded by an administrative hearing because the hearing interferes with arbitral efficiency by substantially delaying arbitration. Thus, the fact that arbitration supplants an administrative hearing cannot be a basis for finding an arbitration agreement unconscionable." (*Id.* at p. 32.)

In addition, the court held that "state courts may continue to enforce unconscionability rules that do not 'interfere[] with fundamental attributes of arbitration.'" (Slip opn., p. 2 quoting *Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1748].) Indeed, Concepcion "recognized that the FAA permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (Slip opn., p. 64.) Thus, "[a]lthough a court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a *Berman* hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer." (*Id.* at p. 2.) According to the court, "Concepcion plainly did not hold that the FAA preempts all unconscionability rules; it held that the FAA preempts unconscionability rules that interfere with fundamental attributes of arbitration." (*Id.* at p. 64.) Therefore, unconscionability remains a valid defense to a petition to compel arbitration after *Concepcion*. (*Id.* at pp. 28, 32.) The court concluded that "[t]he crucial issue is whether the rule undermines the procedural essence of arbitration in some way - that is, whether the rule 'interferes with fundamental attributes of arbitration.'" (*Id.* at p. 67, citation omitted.) The FAA prohibits categorical rules that create an immovable obstacle to a streamlined arbitral process and that favor a

particular form of dispute resolution-in this case the *Berman* hearing-over arbitration. (*Id.* at p. 38.) Where, "an unconscionability rule that is equally applicable to arbitration and nonarbitration agreements does not interfere with fundamental attributes of arbitration, the rule cannot be said to discriminate against arbitration simply because it applies more often to arbitration agreements." (*Id.* at p. 67.)

Court of Appeal Opinion Addresses Section 998 Offers and the Acceptance Requirement

On October 7, 2013, the California Court of Appeal, Fourth Appellate District, Division Three (Orange County) issued an opinion in *Rouland v. Pacific Specialty Insurance Company* (Oct. 7, 2013, G047919) ___ Cal.App.4th ___, analyzing whether defendant's settlement offers satisfied Code of Civil Procedure section 998's requirement that the offers include a provision allowing the plaintiffs to accept the offers "by signing a statement that the offer[s are] accepted." (Slip opn., p. 5 quoting Code Civ. Proc., § 998, subd. (b).) The court held that the defendant's offers satisfied section 998's acceptance provision requirement by directing the plaintiffs to file an "Offer and Notice of Acceptance" with the trial court if they accepted the proposals. (Slip opn., p. 9.)

Defendant's offers stated, "[i]f you accept this offer, please file an Offer and Notice of Acceptance in the above-entitled action prior to trial or within thirty (30) days after the offer is made." (Slip opn., p. 7.) The plaintiffs contended this statement failed to satisfy section 998's acceptance provision requirement for two reasons: (1) it had no line for them to accept the offers by signing them "as included in Judicial Council form CIV 090"; and (2) it "had no language . . . which stated that [the plaintiffs] shall accept the offer[s] by signing a statement that the offer[s are] accepted." (*Id.* at pp. 7-8.)

The court concluded that defendant's offers satisfied the 998 acceptance requirement because they informed the plaintiffs how to accept the offers (file an "'Offer and Notice of Acceptance'" with the trial court) and the identified means of acceptance satisfied the statute's requirements for a valid acceptance (a writing signed by the plaintiffs' counsel). According to the court, "[t]he statute merely requires the section 998 offer to identify a manner of acceptance that complies with the statute's additional requirement of a signed acceptance by the party or its counsel." (Slip opn., p. 2.) Although the offers did not expressly require a written acceptance signed by the plaintiffs' counsel, that requirement was implicit in the identified means of acceptance because any acceptance the plaintiffs sought to file with the court necessarily would have to be in writing and signed by their counsel. (*Id.* at p. 9.) Further, the court noted that although the California Judicial Council has approved a form entitled "Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998," it is not a mandatory form. (*Id.* at p. 8.) As a practice pointer, the Judicial Council Form should be used to avoid any uncertainty as to the acceptance requirement.

New CA Court of Appeal Opinion re: Bad Faith Failure to Settle

On October 7, 2013, the California Court of Appeal, Second Appellate District, Division Eight (LA) issued an opinion in *Reid v. Mercury Insurance Company* (Oct. 7, 2013, B241154) ___ Cal.App.4th ___, analyzing "whether the insurer, in the absence of any demand or settlement offer from the third party claimant, must initiate settlement negotiations or offer its policy limits, and if so how quickly it must do so, to avoid a claim of bad faith failure to settle." (Slip opn., p. 2.) The Court of Appeal held that "[a]n insurer's duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, . . . there is no liability for bad faith failure to settle." (*IbId.*)

The case arose out of injuries sustained in a multi-vehicle collision. (Slip opn., p. 2.) The collision was caused when Huang failed to stop at a red light and collided with a car driven by plaintiff Re*Id.* (*IbId.*) Plaintiff sued Huang and recovered more than $5.9 million after a bench trial. (*Id.* at p. 6.) During that lawsuit, Huang declared bankruptcy and her potential rights against her

continued on page 24

Bottom Line

Case Title | *Earl Avigdor v. Sprouts Farmers Markets*

Case Number | 37-2012-00096760-CU-PL-CTL

Judge | Lisa Schall

Plaintiff's Counsel | Michael Feldman

Defendant's Counsel | Richard Guido

Type of Incident/Cause of Action | Plaintiff struck his right foot on the corner of a produce stand in Sprouts Farmers Market. He broke the second toe. Plaintiff sought medical attention at Sharp Chula Vista Hospital. He did not receive further treatment. He did see James McClurg MD on a referral from his attorney. Dr. McClurg recommended surgery to repair a Mallet Toe condition that developed subsequent to the incident. The theory of liability was premises liability.

Settlement Demand | $9,999.00

Settlement Offer | $5,000

Trial Type | Jury

Trial Length | Three days

Verdict | Defense (unanimous - jury deliberated for under one hour) ■

Bottom Line

Case Number | 37-2011-00090124

Judge | Hon Jay Bloom

Plaintiff's Counsel | Otto Haselhoff (Santa Monica) and Guy Levy (San Diego)

Defendant's Counsel | Robert E. Gallagher, White, Oliver, Amundson & Gallagher

Type of Incident/Cause of Action | Pedestrian/commercial van. Defendants carpet cleaning van was heading to a location to do clean up work. After pulling onto the street where the plaintiff lived, the driver encountered a road block by police and fire personnel dispatched to a house file on the same street. After stopping the driver's van, and in response to verbal and physical gestures from police/firemen in the street, the driver began to slowly back up the van in order to complete a "K" turn, to turn the van around, and exit the scene. Plaintiff was on the opposite side of the street, and left the sidewalk as the van was moving slowly in reverse, and attempted to cross behind the van while it was moving.

Plaintiff alleged that the van driverwas negligent in not seeing the plaintiff in time to avoid the accident. Plaintiff also alleged that the employer/owner of the van was negligent as a matter of law as the rear windows of the van were covered with a company decal. Plaintiff also alleged that the employer/owner of the van was negligent as a matter of law, as the van was not equipped with a backup warning device. Defendant's motions in limine to exclude the last two causes of action were granted by the trial court. Further, plaintiff's motion to amend the complaint to assert punitive damages as the driver

continued on page 11

Insurance Law Update

By Jim Roth
The Roth Law Firm

In California, 2013 resulted in a variety of cases that extended and clarified the body of insurance law, including two decisions acknowledging questions of first impression.

INSURANCE BROKERS OWE A LIMITED DUTY TO THEIR CLIENTS, WHICH IS ONLY TO USE REASONABLE CARE, DILIGENCE AND JUDGMENT IN PROCURING THE INSURANCE REQUESTED BY AN INSURED

In *Travelers Property Casualty Company v. Superior Court (Michael M. Braum)* (2013) 215 Cal.App.4th 561, 155 Cal.Rptr.3d 459, the Court of Appeal, Second District, Division 3, held that absent evidence that a developer specifically asked its insurance broker to obtain the insurance required by the construction loan agreement and the developer's separate agreement to provide insurance to the construction lender, an insurance broker owed no duty to the construction lender as loss payee under a homeowners' association's condominium policy.

Developer, Joy Investment Group (Joy), obtained a construction loan from East West Bank (EWB), and began construction on a multi-unit condominium complex. EWB required Joy to maintain builder's risk insurance (i.e., a construction general liability policy) on the property and to identify EWB, and its successors and assigns, as the loss payee. Joy apparently did so. Eventually, when the condominium complex was near completion, Joy fell behind in its payments on the loan. After Joy's default, EWB sold the loan to an investor, Michael M. Braum, Trustee of the Braum Lalehzarzadeh Living Trust (Braum), who would ultimately foreclose on the property. After the assignment to Braum, but before the foreclosure sale, Joy's construction insurance policy lapsed and Joy sought a new policy. Joy represented to its insurance broker, Koram Insurance Center, Inc. (Koram) that a homeowner's association had been created, and that most of the condominium units had been sold. Given those facts, Koram discussed the possibility of replacing the builder's risk policy with a condominium policy issued to the homeowners association. Joy agreed and obtained a condominium policy for the homeowner's association from Travelers Property Casualty Company (Travelers) for which Koram was an authorized agent. However, it would subsequently be revealed that no certificate of occupancy was ever issued and no units were ever occupied — any sales which may have been pending failed to close.

Shortly after the new policy issued, the property was allegedly damaged by theft and vandalism. Joy thereafter filed for bankruptcy and Braum obtained the property through foreclosure. Braum then filed a claim against Travelers for the losses from the theft and vandalism. Travelers denied the claim because the condominium policy excluded coverage for such losses if incurred when the property was vacant. Braum filed suit against Travelers for breach of contract, and against Koram (and Travelers, as the broker's principal) for professional negligence.

Both Travelers and Koram moved for summary judgment, and their motions were denied. They then filed petitions for writs of mandate, challenging the trial court's rulings. The appellate court concluded that the trial court should have granted both motions for summary judgment.

The appellate court noted that under California law, insurance brokers owe duties to their clients to procure the insurance requested by the client.

Koram's client, Joy, was the developer. Braum did not contend that Koram breached a duty to Joy. The court acknowledged that the investor might have been able to recover as a third party beneficiary of the contract between Joy and Koram if Joy had instructed Koram to obtain insurance that complied with the insurance terms of the loan agreement. But the evidence suggested otherwise. The court refused to interpret Joy's forwarding of the request for insurance information from the original lender's representative as a request that Koram review the policy and loan contract's insurance provision to ensure compliance.

ATTORNEYS HIRED BY THE INSURERS TO DEFEND A DISSOLVED CORPORATION MAY OBTAIN PERMISSION FROM THE INSURER TO WAIVE THE CORPORATION'S ATTORNEY-CLIENT PRIVILEGE IN ORDER TO VERIFY DISCOVERY RESPONSES

In *Melendrez v. Superior Court of the State of California* (2013) 215 Cal.App.4th 1343, 156 Cal.Rptr.3d 335, the Court of Appeal, Second District, Division 3, held that California Evidence Code § 953, which provides that the attorney-client privilege of a corporation no longer in existence passes to its "successor, assign, trustee in dissolution, or any similar representative" is broad enough to encompass an insurer when the insurer's policy is the corporation's only remaining asset and the insurer is defending a claim asserted against the corporation that is covered under that policy.

Mary Melendrez, individually and as personal representative of the Estate of Lario David Melendrez; Mario Melendrez; Phillip Melendrez; David Melendrez; and Veronica Pueyo (collectively, Melendrez) prosecuted a wrongful death action against numerous entities, including Special Electric Company, Inc. (SECO), alleging that the decedent died of mesothelioma as the result of exposure to asbestos. Years prior to the action being filed, SECO filed a Chapter 11 bankruptcy petition, which the Bankruptcy Court approved, which reduced SECO to a shell for the sole purpose of defending asbestos lawsuits. Pursuant to the reorganization plan, a registered agent was appointed for the service of asbestos claims, who then forwarded those claims to SECO's insurers. The insurers, in turn, were required to defend and/or settle the claims "in accordance with and in a manner consistent with the language of the applicable [i]nsurance [p]olicies and applicable state law."

Pursuant to the reorganization plan, Melendrez's suit was defended on behalf of SECO by its insurers. Counsel was retained by the insurers to represent SECO for the purpose of providing such defense. During the litigation, Melendrez served SECO's counsel with requests for admission and special interrogatories, seeking the admission and identification of many facts which would result in a judgment in Melendrez's favor. Counsel for SECO prepared unverified responses signed by counsel. As case law provides, an unverified response is tantamount to no response at all. Melendrez moved for an order deeming the matters specified in the RFAs admitted and later for an order to find the unverified responses to the interrogatories deemed answered in Melendrez's favor.

Claiming its lack of officers, directors, employees, and agents to verify the discovery responses, SECO successfully opposed the motions. Melendrez then filed a petition for writ of mandate, challenging the trial court's rulings deeming verified the responses to the RFAs and the form interrogatory.

The appellate court framed the issue before it as follows: "Who can waive the privilege on behalf of a dissolved corporation with no officers, directors, or employees?" While the court agreed with SECO that its attorneys could not waive the privilege on its behalf, it disagreed with SECO's assertion that, as SECO has no officers or directors, it could never waive the privilege. The court noted that at the time of the discovery responses, SECO was operating pursuant to the reorganization plan approved by the bankruptcy court. Although SECO's earlier named director and president had since resigned, the court believed that a means may have existed for the election or appointment of a new director by determining if any shareholders still existed and then request them elect or appoint a new director. Therefore, explained the court, the proper course of action would have been to attempt to obtain a director for SECO, who could determine whether to waive the privilege. The Court distinguished between a dissolved corporation and one no longer in existence. If a means exists to appoint or to elect a director for a dissolved corporation, the corporation still exists. If not, then Evidence Code § 953(d) would apply.

The court rhetorically asked: what if SECO no longer existed in any real sense? Resorting to Evidence Code §

continued on page 12

Bottom Line

continued from page 10

was in a hurry to get to the next job for pecuniary reasons, was denied by the Court, based on defendants opposition to the motion for leave to amend.

Settlement Demand | Plaintiff made a statutory offer to compromise for the policy limits of $2,000,000 before trial. Defendant elected to allow the statutory offer to compromise to expire by operation of law.

Settlement Offer | $750,000

Trial Type | Jury

Trial Length | 2 days. The case settled following motions in limine, as a jury panel was called to the department in the sum of $850,000. ■

Bottom Line

Case Title | Rodolfo Alvarez, individually, and as Successor in Interest of Martha Avendivar De Alvarez, deceased, Marcela Alvarez, and Carlos Alvarez v. Trevor D. Nelson, M.D., LJR Medical Group, Scripps Health and Scripps Chula Vista

Case Number | 37-2011-00101108-CU-PO-CTL

Judge | Hon. Ronald L. Styn, Dept. 62

Type of Action | Medical Malpractice / Wrongful Death

Type of Trial | Court/Jury Trial

Trial Length | 9 Days

Verdict | Defense Verdict with a finding of no negligence.

Plaintiff's Counsel | R. Christian Hulburt, Esq. Hulburt & Bunn, LLP

Defendant's Counsel | Daniel S. Belsky, Esq. and Carolyn B. McCormick, Esq. for Trevor D. Nelson, M.D. and La Jolla Radiology Medical Group – Diagnosis, Inc.

Damages and/or Injuries | Wrongful Death

Settlement Demand | In July 2012, Plaintiffs served Defendants with a C.C.P. §998 Offer for $200,000. In November 2012, Plaintiffs raised their settlement demand to $250,000.

Settlement Offer | In December 2012, Defendants served Plaintiffs with C.C.P. §998 Offers for zero dollars and a waiver of costs.

Plaintiff's Attorney Asked the Jury for | $1,002,457 ■

continued from page 11

Insurance Law Update

953(d), the court answered its question: the privilege would be held by SECO's "successor, assign, trustee in dissolution, or any similar representative." The next question posed by the court was who, under Evidence Code § 953(d) qualified as SECO's "successor" or "assignee" for purposes of asserting the privilege. Without specifically deciding the question, the court suggested that, depending on factual determinations on remand, the likely answer was SECO's liability insurers. Assuming that SECO's unsecured creditors' trust had been dissolved and the assets therein disposed, SECO's only remaining asset would be its insurance policies. While SECO existed in name only so that it could pass the claims on to the insurance companies for resolution of the claims pursuant to the policies, the result of that status was that SECO's insurance policy assets had been assigned to the insurance companies, as had been the claims against those assets. As SECO's de facto assignee, the insurers would hold SECO's attorney-client privilege, and have the authority to waive it, with respect to the asbestos actions against SECO's policies.

What was left unanswered was the breadth and scope of the privilege which a dissolved corporation's insurers may assert. Is there a foreseeable factual scenario in which the appointment of Cumis counsel becomes an issue?

INSURANCE CODE § 533.5 DID NOT BAR INSURER FROM DEFENDING AND INDEMNIFYING INSURED NAMED IN FEDERAL CRIMINAL INDICTMENT

In *Mt. Hawley Insurance Company v. Lopez* (2013) 215 Cal.App.4th 1385, 156 Cal.Rptr.3d 771, the Court of Appeal, Second District, Division 7, held that outside the special area of Unfair Competition Law and False Advertising Law actions brought by state or local prosecuting agencies, there is no public policy in California against insurance policies providing a defense to insureds facing criminal charges, as opposed to indemnification for those convicted of criminal charges.

The United States Attorney for the Central District of California filed a grand jury indictment charging Dr. Richard Lopez alleging criminal conspiracy, false statements, concealment and falsification of records. The indictment further alleged that Lopez, who was the medical director of the St. Vincent's Medical Center Comprehensive Liver Disease Center (St. Vincent's), conspired with another doctor and other hospital employees in the liver transplant program to transplant a liver into the wrong patient. The indictment claimed that Lopez engaged in a cover-up by directing his co-conspirators to restore the second patient's name to the transplant waiting list (even though the second patient had received the liver designated for the first patient), create a false pathology report for the first patient based on data in the second patient's pathology report, and alter medical reports to support a claim "that the transplant program had made an honest mistake confusing the names." The indictment included alleged violations of title 18 USC § 371 (conspiracy), § 1001 (making false statements), and § 1519 (destruction, alteration, or falsification of evidence in federal investigations).

Daughters of Charity Health Systems, Inc., which owned St. Vincent's, purchased a "Not For Profit Organization and Executive Liability Policy" pursuant to which Mt. Hawley Insurance Company (Mt. Hawley) agreed to "pay on behalf of the Insureds, Loss which the Insureds are legally obligated to pay as a result of Claims ... against the Insured for Wrongful Acts...." The policy defined "Loss" as "monetary damages, judgments, settlements, including but not limited to punitive, exemplary, multiple or non-contractual liquidated damages where insurable under applicable law, ... and Defense Expenses which the Insureds are legally obligated to pay as a result of

a covered Claim." The policy further provided that Mt. Hawley "shall have the right and duty to defend any Claim covered by this Policy, even if any of the allegations are groundless, false or fraudulent...." An endorsement defined "claim" to include "a criminal proceeding against any Insured commenced by the return of an indictment" or "a formal civil, criminal, administrative or regulatory investigation against any Insured...." The policy's definition of "insured" included employees of St. Vincent's such as Lopez.

Lopez tendered the defense to the charges to Mt. Hawley, which, through its attorneys, sent a letter to Lopez declining to defend or indemnify Lopez, and on the same date filed a coverage suit against Lopez. Mt. Hawley's coverage suit alleged that Lopez "engaged in an elaborate cover-up of the 'switch,' which included falsification of documents and encouragement of others to participate in the cover-up." Mt. Hawley further alleged that it had no duty to defend Lopez for reasons including the applicability of Insurance Code § 533.5 (which bars coverage for criminal actions and proceedings). Mt. Hawley sought a declaration from the trial court that it did not owe Lopez a duty to defend or indemnify in connection with the indictment. Lopez filed a cross-complaint against Mt. Hawley for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief.

The trial court overruled Lopez's demurrer to the first amended complaint. Relying upon Insurance Code § 533.5, Mt. Hawley subsequently filed a motion for summary judgment or in the alternative for summary adjudication, which the trial court granted. The appellate court reversed the order granting summary judgment, and affirmed a trial court order overruling defendant's demurrer.

The appellete court determined that § 533.5 was unclear and ambiguous because it was susceptible to at least three reasonable interpretations: (a) that it addressed separately criminal actions generally, and actions pursuant to specific statutes; (b) that it applied to a criminal action for a fine or penalty sought by the listed state and local agencies, or to an unfair completion action; and (c) that it applied to any claim in which the recovery of a fine or restitution was sought specified state or local officials. Having determined the statute was ambiguous, the court examined the legislative history of Insurance Code § 533.5, which in the court's view, indicated that the goal of the statute was to preclude insurers from providing a defense in civil and criminal unfair competition law actions brought by the Attorney General, district attorneys, city attorneys or county counsel. The legislative history did not, in the court's view, establish an intent to address federal prosecutions.

The court then acknowledged that the maxims of statutory construction seemingly indicated that Insurance Code § 533.5 prevented an insurer from defending "any claim in any criminal action or proceeding." However, the court declined to allow technical rules of grammar and construction to defeat what it viewed as the clear legislative intent behind § 533.5, which was to address the problem that insurers were providing their insureds with an indemnity and defense in unfair competition law actions brought by state and local public entities. Extending the reach of § 533.5 beyond unfair competition lawsuits brought by state and local prosecutors would conflict with state laws such as Corporations Code § 317, authorizing a corporation to indemnify its agents against fines and settlements, and Government Code § 990, allowing a local public entity to insure against the expense of defending a claim brought against the entity or its employee where liability arose from an act or omission in the scope of the employee's employment. The court also noted that its interpretation of § 533.5, allowing insurers to provide a defense to certain kinds of criminal charges, such as federal charges, was consistent with the goal of encouraging individuals to serve on boards of directors and trustees of corporations and charities, and with the principle that insureds charged with crimes begin with a presumption of innocence.

LIABILITY INSURER'S RESERVATION OF RIGHTS IN PROVIDING A DEFENSE TO AN INSURED BUILDER, AND LIABILITY INSURER'S SEPARATE ACTION AGAINST ITS INSURED BUILDER FOR A DECLARATORY JUDGMENT THAT THE POLICY DID NOT COVER THE CLAIMS AGAINST INSURED BUILDER, REQUIRED THE APPOINTMENT OF INDEPENDENT CUMIS COUNSEL, SINCE THERE WAS AN ACTUAL CONFLICT OF INTEREST BETWEEN THE INSURER AND ITS INSURED AS TO WHETHER THE WORKERS THE INSURED HIRED WERE EMPLOYEES OR INDEPENDENT CONTRACTORS BECAUSE THE POLICY DID NOT COVER WORK PERFORMED BY INDEPENDENT CONTRACTORS

In *Schaefer v. Elder* (2013) 217 Cal.App.4th 1, 157 Cal.Rptr.3d 654, the Court of Appeal, Third District, Division 3, held that a liability insurer's reservation of rights issued to its builder insured and a concurrent separate action against the builder for a declaratory judgment that the policy did not cover the claims against the builder, required the appointment of independent Cumis counsel, since there was an actual conflict of interest between the insurer and its insured builder as to whether the workers the builder hired were employees or independent contractors because the policy did not cover work performed by independent contractors.

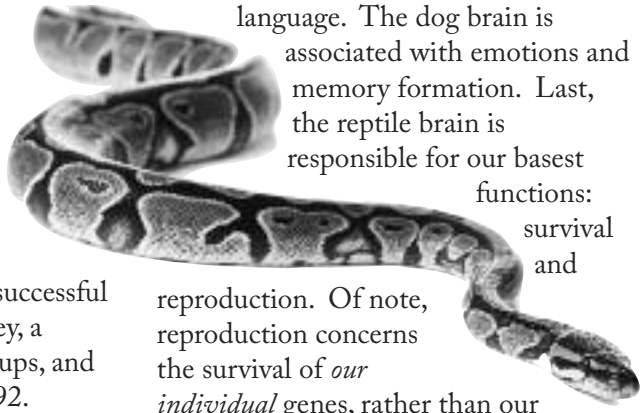
Plaintiff Steve Schaefer contracted with defendant Kelly Elder, doing business as Elder Construction, to design and build a residence for Schaefer. Later, Schaefer sued Elder for alleged construction defects in the construction of his residence, prosecuting causes of action for breach of contract, negligence, breach of implied warranty, strict liability, money

continued on page 16

A Field Guide to Southern California Snakes:

IDENTIFYING AND COLLECTING PLAINTIFF'S REPTILE THEORY IN THE WILD

By Benjamin J. Howard
Neil Dymott



In 2009, Don Keenan and David Ball released a how-to manual for the plaintiff's bar entitled, "REPTILE: The 2009 Manual of the Plaintiff's Revolution." Don Keenan is a successful Atlanta-based plaintiff's attorney, a pioneer in the field of focus groups, and the president of ABOTA in 1992. David Ball is a North Carolina based trial consultant and the author of the bestselling "David Ball on Damages." At the close of 2013, Reptile advocates have self-reported over $4.8 billion in verdicts and settlement attributed to the Reptile Theory.

Although "the Reptile" is approaching five years of age, it has only been spotted in Southern California in the past two years. Despite the Reptile's youth, its habitat has been expanding rapidly. Along with this identification guide, sightings of the Reptile are only expected to increase. Although this author disagrees with the Reptile's methods, common ground can always be found. In this case, "Defense attorneys will be doing everything in their power to keep you from using these methods." (p. 15) This article will explain the where the Reptile came from, how to identify it, and how we can eradicate its presence in Southern California.

Where did the Reptile Come From?

The Reptile Theory was conceptualized in the 1960s by Paul McLean, M.D.'s classification of the "Triune Brain." Dr. McLean believed human brains consist of three areas: the neomammalian complex (the "ape brain"), the paleomammalian complex ("dog brain"), and the reptilian complex ("reptile brain"). The ape brain is used for high cognitive functions such as spatial reasoning, conscious thought, and language. The dog brain is associated with emotions and memory formation. Last, the reptile brain is responsible for our basest functions: survival and reproduction. Of note, reproduction concerns the survival of *our individual* genes, rather than our species' genes.

Despite the recent popularity of the Reptile theory, the plaintiff's bar believes the Reptile has been lurking in our courtrooms for years. However, instead of being used by the plaintiff, Keenan and Ball believe the defense bar has utilized tort "deform" to manipulate the Reptile for its own use. By leading the public to believe torts undermine the quality and availability of healthcare, threaten the local economy by endangering jobs, make products more expensive, and weaken research and development expenditures, the Reptile has long viewed the plaintiff's case, rather than the defense, as a threat to its survival. With their book Keenan and Ball attempt to turn the Reptile onto the defense, where our purported mantra is always, "Give danger a pass." (p. 27)

The Reptile's Major Axiom is, "When the reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." (*Id.*) Keenan and Ball posit, "[W]hen something we do or don't do can affect – even a little – our safety or the propagation of our genes, the Reptile takes over", and "The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you." (p. 17) The Reptile believes community safety is personal safety's cousin, and asks the juror to project the defendant's act or omission onto a larger community canvas. In a perversion of The Golden Rule ("[W]here counsel asks the jury to place itself in the victim's shoes and award such damages as they would charge to undergo equivalent pain and suffering," *Collins v. Union Pacific Railroad Co.* (2012) 207 Cal. App. 4th 867, 861), the Reptile wants to punish the Defendant so he cannot endanger the community the Reptile is part of.

Why this Reptile is Different from Native Species

The Reptile is not content using only the evidence available from her case. In order to apply her facts to the community's sense of well being, the plaintiff "awakens" the reptile in each juror by asking, and answering, three questions. Notably, these questions all involve presenting information to the jury outside the facts of the case. First, the Reptile asks how likely was it that the act or omission would hurt someone, or more importantly, *anyone*. After addressing the injury in the present case, the Reptile does not stop. Rather, it continues on to address the frequency with which the act or omission occurs, and the resulting harm, on a broader scale. Keenan and Ball use an automobile negligence case to illustrate this point. Rather than telling the jury, "If you follow a vehicle to closely…you may hit it," the Reptile states, "4,295 injury wrecks were caused last year by people following too closely." (p. 32)

Second, the plaintiff will ask the jury to envision how much harm the act or omission could have caused. Again, the Reptile is not content with stopping with the plaintiff's actual injury. Instead, the Reptile tells the jury, "The valid measure is the *maximum* harm the act *could* have caused" (emphasis in original. p. 33). So if an auto accident involving speeds in excess of 100 mph only resulted in a split lip, the Reptile will not ask the jury to

address the plaintiff's facial injury. Rather, the Reptile will ask whether the accident could have caused brain damage or a fatality.

Third and last, the Reptile will ask the jury how much harm the act or omission could have caused in other situations. (p. 34) Using the auto accident example from above, assume the accident occurred on a highway. The Reptile takes the car that caused the accident, has the driver take an off ramp into the juror's community, and only stop the car after it has threatened a few local schools and the community's retirement home.

By asking and answering these three questions, the plaintiff wants the Reptile to plant three seeds in the jurors' minds: the defendant's conduct threatens everyone's safety; a proper verdict will reduce the danger; and, if a proper verdict for the plaintiff is not given, the danger in the community will be increased. (p. 39)

Identifying the Reptile in the Wild, and "Rules" for Identification

The Reptile attempts to circumvent the applicable legal standard by presenting an alternative "rule" to the jury. If the defendant violated this rule, the implication is the defendant did not meet the legal standard. In each of the three questions above, the Reptile explicitly refers to an "act or omission" by the defendant. Keenan and Ball admonish the plaintiffs bar never to refer to the underlying incident as an accident or a mistake, (p. 53) as accidents do not endanger the community. Instead, these incidents should be characterized as follows: "Every wrongful defendant act derives from a choice to violate a safety rule." (*Id.*) Not only was this safety rule important to the plaintiff in the case, but is important to the community going forward.

The Reptile's rule must be a simple one for it to work, and must meet six criteria: the rule must prevent danger, it must protect people in a wide variety of situations, it must be clear and concise, it must explicitly state what a person must do or not do; it must be practical; and the rule must be one the defendant agrees with (or looks foolish for disagreeing with). Examples include "physicians should do no harm," "a company must not needlessly endanger their employees," or even "an accountant should not needlessly endanger his client's financial well being." The word "needlessly" is always used, because "If you omit 'needlessly,' the defendant can escape, because there are almost always unavoidable risks." (p. 56)

Once the Reptile has established its rule, the plaintiff's attorney will ask your client or expert to agree to the rule, ask them to agree violating the rule can hurt *anyone* (this is important, because anyone includes the jury and their community), and ask them to agree the plaintiff was acting like *everybody* else when the incident occurred. By doing so, and without explicitly violating The Golden Rule, the Reptile will have placed the jury/community into the plaintiff's shoes.

Often, the first sign the Reptile is present occurs during written discovery. When our clients are asked to produce Policies or Procedures, it may be the Reptile. If our clients are asked to agree to rules in Requests for Admission, the Reptile is already coiled around your case. Frequently, the first time the Reptile rears its head is at your client's deposition when he or she is asked to agree with the attorney's "rules." If your client is asked to agree with rules at their deposition, the topic will be revisited with your experts, but it is possible you experts will be asked about it independent of your client.

Eradicating the Reptile

If the Reptile is present in your case, it needs to be eradicated. Most of the time it can be identified during the discovery phase, but from time to time advocates of the Reptile theory are brought into the case to only try the case and the Reptile's themes are not introduced until the mini-opening or *voir dire*. Regardless of whether or not the Reptile is present, preparation of the case should include a defense to the Reptile.

Prior to their depositions, clients and experts should be made aware they may be asked to agree to a rule, and then asked to extend this specific rule to a general rule encompassing the case. If the deponent is savvy enough to avoid this, they should still be prepared to answer questions explaining how a violation of the specific rule can cause harm in *other* contexts. Depending on how well the witness handles themselves under questioning, they should also be prepared to differentiate the facts of the present case with the rule the plaintiff is promoting. If applicable, the deponent should also be able to explain why the plaintiff's conduct and/or condition is different from the general public. For the expert, they may be able to create a rule of their own, such as "Patients should always follow post operative instructions to prevent needlessly endangering themselves," or "Employees should be honest when applying for a job to prevent needlessly endangering of their co-workers and customers."

The Court should be educated on the plaintiff's Reptile theory, and should be asked to instruct the plaintiff's counsel not to apply it. If the Reptile appeared during discovery, explain it in your trial brief. If the Reptile shows up at trial, submit a pocket brief. In either case, follow up with specific motions *in limine*. Asking the Court to exclude "the Reptile theory" does not give the Judge enough information to base a ruling on. Asking the Judge to exclude references to the attorney's made-up rule, to exclude facts not relevant to the case, and to prevent plaintiff from referring to the jury "as the conscience of the community" are unambiguous and more likely to end in a favorable ruling.

If the Reptile is present, opposing counsel will fight to let it remain. Keen and Ball devote a full 19% of the book, 63 of 330 pages, to countering defense arguments regarding violations of the Golden Rule. Of those 63 pages, five are devoted to California, more than any other state. Keenan and Ball specifically claim, "Our method is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving. Jurors are often

continued on page 16

continued from page 13
Insurance Law Update

lent, diversion of funds, failure to enter into a written contract, and excessive down payment.

Elder tendered the defense of the action to his insurer, CastlePoint National Insurance Company (CastlePoint), and CastlePoint appointed counsel of its choice to represent Elder, subject to a reservation of rights. CastlePoint also filed separately a declaratory relief action against Elder to determine whether the insurance policy provided coverage for the claims Schaefer made against Elder. The coverage dispute focused upon whether Elder breached his policy's "contractor's special condition," which excluded coverage for work performed by independent contractors unless the insured general contractor first obtained indemnity agreements and certificate of insurance from the subcontractors, which did not occur.

Elder hired his own attorneys to move to disqualify the law firm appointed by CastlePoint and to determine Elder's right to independent counsel. CastlePoint opposed the motion. The trial court granted Elder's motion, disqualifying the CastlePoint's appointed defense counsel and determined that under Cumis, Elder has a right to independent counsel at CastlePoints expense.

The appellate court noted that because the manner in which the Schaefer lawsuit was defended by counsel could influence the outcome of the coverage dispute, Elder was entitled to independent counsel. The applicability of the policy's "contractor's special condition" turned on whether the workers responsible for the alleged construction defects in Schaefer's home were Elder's employees or independent contractors. Because determination of the coverage issue would depend on whether Elder had sufficient control over the workers, the manner in which evidence was developed and presented be counsel representing Elder in the Schaefer litigation could affect the outcome of the coverage dispute. The fact that Elder was liable regardless of whether the workers were employees or independent contractors did not eliminate the conflict. If CastlePoint's appointed defense counsel was in a position to influence coverage, Elder was entitled to control the litigation through independent counsel selected by Elder and compensated by CastlePoint. As the court explained, CastlePoint's appointed counsel were caught in an intractable conflict of interest: "Put simply, the … [CastlePoint appointed counsel] had an ethical duty to Elder to try to establish that the workers were employees and, at the same time, had an ethical duty to CastlePoint to try to establish that the workers were independent contractors."

AFTER SETTLING HIS PERSONAL INJURY CLAIM AGAINST THE INSURED, THIRD PARTY PLAINTIFF MAY SUE INSURED'S LIABILITY INSURER FOR BREACH OF CONTRACT AND BAD FAITH WHEN THE INSURER FAILED TO SETTLE WITH PLAINTIFF UNDER THE MEDICAL PAYMENTS PROVISIONS OF THE INSURED'S POLICY

In *Barnes v. Western Heritage Insurance Company* (2013) 217 Cal.App.4th 249, 159 Cal.Rptr.3d 25, the Court of Appeal, Third District, held that a liability insurer's settlement of a personal injury lawsuit against its tortfeasor insured did not extinguish any rights the third party plaintiff had under the medical payments provisions of the insured's policy, permitting the plaintiff to sue the insurer for bad faith breach of the insured's policy's medical payment provisions after settling his personal injury claim against the insured.

Plaintiff Justin Barnes was injured when a table fell on his back during a recreational program co-sponsored by the Shingletown Activities Council (the Activities Council). Barnes made a claim against the Activities Council. But when Barnes subsequently requested payment from the Activities Council's insurer more than one year after the accident for consultation with a medical specialist, the insurer, Western Heritage Insurance Company (Western Heritage), denied the request. Western Heritage asserted that to qualify for medical payment coverage under the applicable policy, Barnes had to report a claimed medical expense to Western Heritage within one year of the accident.

Barnes settled a separate personal injury lawsuit against the Activities Council and other local entities regarding his medical expenses. Western Heritage was not a party to that lawsuit. Barnes later initiated suit against Western Heritage for breach of contract and breach of the implied covenant of good faith and fair dealing based on the denial of his request for medical payment coverage.

The trial court granted summary judgment in favor of Western Heritage. Among other things, the trial court ruled Barnes's lawsuit against Western Heritage was barred by collateral estoppel because he settled his claims in the underlying personal injury action, including any claim for medical expenses; allowing Barnes to recover under the medical payment provision of the policy would result in impermissible double recovery; and Western Heritage was not equitably estopped to assert the policy's one-year deadline as a defense because Western Heritage had no duty to disclose the deadline to Barnes and Barnes did not rely to his detriment on any failure to disclose.

Barnes's appeal contended that collateral estoppel did not bar his action because the issues raised, litigated and necessarily determined in the personal injury action were different from those raised, litigated and to be determined in his action against Western Heritage; permitting Barnes to recover under the medical payment provision would not result in double recovery because Western Heritage owed him a separate and direct duty under the medical payment provision; and Western

Heritage was equitably estopped from asserting the one-year deadline in the policy because it did not inform him of the deadline.

Liability policies often contain a medical payments provision obligating the insurer to pay medical bills of persons injured on the insured's premises without regard to the insured's fault. Medical payments provisions typically have a special sublimit much lower than the policy's liability limits and obligate the insurer for a finite period of time, usually one year after the claimant is injured. Medical payment provisions have the constructive purpose of engendering good will with the claimant and thereby avoiding lawsuits against the insured.

In revering the trial court, the appellate court first noted that Justin's claim against Western Heritage raised a question of first impression in the California appellate courts: "whether an injured plaintiff who receives some payment for medical expenses from a tortfeasor's insurer under the medical payment provision of an insurance policy, and who also settles a personal injury lawsuit against the tortfeasor and receives payment from the tortfeasor's insurer under the liability provision of the insurance policy, is thereafter precluded from separately suing the tortfeasor's insurer based on its alleged breach of direct duties owed to the plaintiff under the medical payment provision of the policy."

The appellate court disagreed with the trial court's position that allowing additional recovery under the medical payments provision would result in double recovery. The court observed that other courts, including the appellate division of a trial level court in California, have reached the same result as the trial court in this case by applying the collateral source rule. The collateral source rule provides that compensation an injured party receives from sources "wholly independent" of the tortfeasor should not be deducted from the damages the injured party collects from the tortfeasor. In *Jones v. California Casualty Indemnity Exchange* (1970) 13 Cal.App.3d Supp. 1, the Santa Clara Superior Court's appellate division denied recovery under a policy's medical payments after the injured party obtained a tort judgment against the insured on the ground that the medical payments provision in the tortfeasor's policy was "not wholly independent from, and collateral to" the tortfeasor. Here, however, the court rejected the Jones opinion's focus on the tortfeasor insured in determining whether medical payments provision was a collateral source. The court stressed that in a suit to recover under a medical payments provision, the insurer, not the insured, is the alleged wrongdoer. "The policy at issue," observed the court, "was not maintained by the insurer to provide coverage for its wrongdoing, and hence the insurance policy was collateral to the alleged wrongdoer in" that case.

The court concluded that Barnes still had rights to assert under the medical payments provision after settling with the Council unless the policy's one-year limitations period applied. Finding triable issues of fact regarding whether Western Heritage was equitably estopped from invoking the limitations period, the court ruled that the trial court improperly granted summary judgment for the insurer. In the unpublished portion of the opinion, the court explained that the insurer's failure to bring the one-year limit to the plaintiff's attention may preclude the insurer from relying on the limitations period, even though Justin was represented by counsel.

This case of first impression emphasizes the importance for liability insurers of being expressly included among the parties released in a settlement agreement and/or when the settlement is made on the record when a personal injury claim is settled. ■

continued from page 15

A Field Guide to Southern California Snakes

emotionally moved, and we always want jurors to 'feel' strongly that we should win. But the Reptile gets jurors to that point not on the basis of sentiment, but what is safe." (p. 39) Pointedly, in defending their theory, Keenan and Ball refer to a subjective "what is safe" standard rather than the law.

In order to separate the Reptile's theory from the law, jury instruction should include Ev. Code § 210 ("Relevant Evidence"), Ev. Code § 350 ("Only Relevant Evidence Admissible"), CACI 200 ("Evidence," regarding the burden of proof), CACI 400 ("Substantial Factor"), CACI 1602 and 1620 ("Intentional/Negligent Infliction of Emotional Distress," even if not claimed by the plaintiff), CACI 3924 ("No punitive Damages"), and CACI 5000 ("Duties of the Judge and Jury"). Where relevant, CACI 505 ("Success not Required") and CACI 506 ("Alternative Methods of Care") are appropriate.

Keenan and Ball are acutely aware the Reptile does not belong on the *terra firma* of the law. They admit, "We are often asked, 'How does this negligence stuff relate to causation and damages?' It relates in the most important way: It give jurors a personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer." (p. 39) With this quote, the Reptile's own creators shed their skin and reveal the Reptile for what it is: a subversion of the law. The Reptile wants the juror to make a decision based on a "personal reason," (in violation of Ev. Code §§210, 350 and contrary to CACI 400 and 5000). Likewise, the Reptile wants to "imperil" the jury and "make them safer" (violating the Golden Rule).

Using these snake handling tools to better prepare yourself, our clients, and your case, and using the Reptile own words to educate the Courts, we can drive the Reptile back to the swamp. ■

California Civil Law Update

By Monty McIntyre
Mediations, Arbitrations & Motions

9TH CIRCUIT COURT OF APPEAL

Arbitration

Chavarria v. Ralphs Grocery Company _ F.3d _ (9th Cir. 2013): The Court of Appeal affirmed the district court's denial of a motion to compel arbitration in a class action alleging violation of the California Labor Code and Business and Professions Code sections 17200 et seq. The district court properly found the Ralph's arbitration agreement was unconscionable under California law and was not preempted by the Federal Arbitration Act. (October 28, 2013.)

Ferguson v. Corinthian Colleges, Inc. _ F.3d _ (9th Cir. 2013): The Court of Appeal reversed the district court's partial denial of defendant's motion to compel arbitration in a putative class action alleging a deceptive scheme to entice student enrollment. The district court had partially denied the motion regarding Plaintiffs' claims for injunctive relief under California's unfair competition law, false advertising law, and Consumer Legal Remedies Act relying on decisions by the California Supreme Court establishing the Broughton-Cruz rule (see *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303), which exempts claims for "public injunctive relief" from arbitration. Based on decisions of the United States Supreme Court including *AT&T Mobility LLC v. Concepcion*, 563 U.S. _ , 131 S. Ct. 1740 (2011) and *Marmet Health Care Center, Inc. v. Brown,* 556 U.S. _ , 132 S. Ct. 1201 (2012), the Court of Appeal concluded that the Broughton-Cruz rule is preempted by the Federal Arbitration Act. (October 28, 2013.)

Class Action

Ferguson v. Corinthian Colleges, Inc. _ F.3d _ (9th Cir. 2013): See summary above under Arbitration.

Copyright

Seven Arts Filmed Entertainment Limited v. Content Media Corporation PLC _ F.3d _ (9th Cir. 2013): The Court of Appeals affirmed the district court's dismissal of a copyright infringement lawsuit claiming copyright ownership of three movies. Where the gravamen of the copyright infringement lawsuit is ownership and a freestanding ownership claim would be time-barred, any infringement claims are barred. Because Paramount Pictures Corp. clearly repudiated the ownership claim of plaintiff more than three years before the lawsuit was filed, the district court properly dismissed the action. (November 6, 2013.)

Employment

Chavarria v. Ralphs Grocery Company _ F.3d _ (9th Cir. 2013): See summary above under Arbitration.

CALIFORNIA COURTS OF APPEAL

Arbitration

Goldman v. Sunbridge Healthcare, LLC (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's order denying defendant's motion to compel arbitration. Plaintiff sued two skilled nursing care facilities for improper care and treatment of her deceased husband. When the husband was admitted, the wife signed documents that contained arbitration agreements. The trial court properly found that the wife did not have authority to sign the documents for her husband and did not sign in her individual capacity, and properly denied the motion to compel arbitration. (C.A. 3rd, filed September 27, 2013, published October 28, 2013.)

Young v. Horizon West, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's order denying defendant's motion to compel arbitration. Plaintiff sued for damages for her treatment at a skilled nursing care facility. Her daughter signed the admission papers with an arbitration agreement. The trial court properly denied the motion because the daughter lacked authority to sign the arbitration agreement on behalf of her mother. (C.A. 6th, October 28, 2013.)

Civil Procedure/Anti-SLAPP/New Trial/Rules of Court/Verdict

Garcia v. Cruz (2013) _ Cal.App.4th _ : The Appellate Division reversed a judgment for the landlord following a bench trial in an unlawful detainer action. The trial court erred in denying the tenant her constitutional right to a jury trial after the tenant failed to post past-due rent pursuant to the court's order under Code of Civil Procedure section 1170.5. Section 1170.5 does not authorize the court to conduct a bench trial if the tenant fails to deposit money as ordered by the court. (Appellate Division of the Los Angeles County Superior Court, November 6, 2013.)

Hupp v. Freedom Communications, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's granting of defendant's anti-SLAPP motion to strike. The Court of Appeal found that the gravamen of plaintiff's complaint, alleging that defendant breached its user agreement by failing to remove unfavorable comments on its website, was based on protected activity. Plaintiff failed to show a probability of prevailing because the Communications Decency Act of 1996 (47 U.S.C. section 230) completely bars this type of lawsuit against an Internet Publisher. (C.A. 4th, November 7, 2013.)

Montoya v. Barragan (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's granting of a

new trial to plaintiffs in a medical malpractice wrongful death action. The court declared a mistrial after the jury failed to reach a verdict against two defendant doctors. The jury was polled. The responses revealed the jury was hung on the other doctor's negligence. The jury found Dr. Barragan was negligent, but he did not cause the death. The trial court granted a motion to enter judgment for Dr. Barragan, and plaintiffs then filed a motion for new trial. The motion for new trial was properly granted because no signed verdict had been returned as required by Code of Civil Procedure section 618, making entry of judgment for Dr. Barragan an irregularity in the proceedings. (C.A. 2nd, October 29, 2013.)

Vesco v. Superior Court (Newcomb) (2013) _ Cal.App.4th _ : The Court of Appeal granted a writ petition ordering the trial court to vacate its order granting a trial continuance and also ruled that plaintiff was entitled to notice, to view documents, and to an opportunity to be heard when the disabled defendant requested accommodations under California Rule of Court 1.100. (C.A. 2nd, November 6, 2013.)

Constitution/Free Speech

Steiner v. Superior Court (Volkswagen Group of America) (2013) _ Cal.App.4th _ : The Court of Appeal denied a writ petition, but ruled that the trial court improperly ordered an attorney to remove for the duration of a trial two pages from her website discussing similar cases to the case being tried. The Court of Appeal concluded the order was an unlawful prior restraint on the attorney's free speech rights under the First Amendment. Whether analyzed under the strict scrutiny standard or the lesser standard for commercial speech, the order was more extensive than necessary to advance the competing public interest in assuring a fair trial. Juror admonitions and instructions, such as those given by the trial court, were the presumptively adequate means of addressing the threat of jury contamination. Although the order was improper it was no longer in effect and no relief could be granted. The writ petition was therefore denied. (C.A. 2nd, October 30, 2013.)

Contracts

Eel River Disposal Resource Recovery, Inc. v. County of Humboldt (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's order denying a writ of mandate regarding the issuance of a government contract. The phrase "competitive bidding" was found to be ambiguous and the Court of Appeal ruled it had to be construed consistent with related statutes applying a "Lowest Responsible Bidder" requirement. (C.A. 1st, November 5, 2013.)

Corporations

Cal-Western Business Services, Inc. v. Corning Capital Group, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's judgment dismissing the action on its own motion. Because Cal-Western was the assignee of a judgment owned by a suspended corporation, Cal-Western lacked capacity to sue. (C.A. 2nd, November 6, 2013.)

Employment/Labor

Volpei v. County of Ventura (2013) Cal.App.4th _ : The Court of Appeal affirmed the trial court's denial of a motion to compel arbitration. The memorandum of agreement (MOA) between the County and the Venura County Deputy Sheriff's Association did not bind Volpei to arbitrate his claims for retaliation, harassment and discrimination under the Fair Employment Housing Act because the MOA did not provide for a clear and unmistakable waiver of Volpei's right to a judicial forum for his statutory discrimination claims. (C.A. 2nd, November 7, 2013.)

Yanez v. Plummer (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's summary judgment for defendants in a case alleging causes of action for wrongful termination, legal malpractice, breach of fiduciary duty and fraud. Yanez was fired for dishonesty because of a discrepancy between a witness statement and a deposition answer. At the deposition, Plummer represented both the employer and Yanez. Yanez claimed the alleged dishonesty was a simple miswording in his witness statement that Plummer, during the deposition, manufactured into something sinister for the employer's benefit. The Court of Appeal ruled that Yanez had raised an issue of material fact that he would not have been fired but for Plummer's conduct. (C.A. 3rd, November 5, 2013.)

Family

In re Marriage of Burwell (2013) _ Cal.App.4th _ : In a case including a husband's suicide and breach of fiduciary duty for failure to disclose a term life insurance policy, the Court of Appeal vacated the trial court's order that the "term life insurance policy was a community asset of the parties" and remanded for further evidentiary proceedings to determine the proper characterization and distribution of the term life insurance policy. The proper characterization of term life insurance proceeds depends on a number of factors. The proceeds are entirely community when the final premium is paid solely with community property. (The Court of Appeal followed the First District decision of Estate of Logan (1987) 191 Cal.App.3d 319 and declined to follow the Fourth District decision of *Biltoft v. Wootten* (1979) 96 Cal.App.3d 58.) The proceeds are entirely separate property when: (1) a separate estate has paid the final premium with separate funds; and (2) the insured spouse was insurable at the end of the last term paid for by community funds; and (3) either (a) the insured spouse's health was such that he or she could have purchased a comparable policy at a comparable price when the separate estate began paying the premiums, or (b) the policy did not contain a premium cap when the separate estate began paying the

continued on page 20

continued from page 19

California Civil Law Update

premiums. The proceeds are part community and part separate where (1) the separate estate has paid the final premium with funds that are part community and part separate; or (2) the insured spouse has become medically uninsurable before he or she began paying the premiums with separate property; or (3) the insured spouse could not have purchased a comparable policy at a comparable price when he or she began paying the premiums with separate property. (C.A. 5th, October 31, 2013.

In re Marriage of Davis (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's order establishing the date of separation under Family Code section 771. The Court of Appeal rejected the husband's argument that the decision of In re Marriage of Norviel (2002) 102 Cal.App.4th 1152 controlled and, for separation to occur, a spouse had to move out of the residence. The Court of Appeal found there was substantial evidence to support the trial court finding that the date of separation was June 1, 2006, not the date of physical separation on July 1, 2011. (C.A. 1st, October 25, 2013.)

Government

Eel River Disposal Resource Recovery, Inc. v. County of Humboldt (2013) _ Cal.App.4th _ : See summary above under Contracts.

Insurance

Farmers Insurance Exchange v. Superior Court (Bautista) (2013) _ Cal.App.4th _ : The Court of Appeal granted a writ petition ordering the trial court to set aside its denial of Farmer's motion for summary adjudication and issue a new order granting the motion for summary adjudication in a tragic case arising from the wrongful death of a toddler granddaughter who was accidently run over by her grandfather as he entered his driveway. The Court of Appeal concluded there was no coverage under the homeowners policy due to the vehicle exclusion. The grandmother's alleged negligent supervision of the granddaughter was sufficiently related to the grandfather's use of his vehicle that it fell within the motor vehicle exclusion. (C.A. 2nd, filed October 1, 2013, published October 28, 2013.)

San Diego Assemblers, Inc. v. Work Comp for Less Insurance Services, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's summary judgment for defendant. The summary judgment was proper under the superior equities doctrine because the broker had not caused the fire nor had it agreed to indemnify the insured for the fire. In addition, plaintiff failed to establish a duty of the broker to procure liability insurance with prior completed work coverage. (C.A. 4th, filed October 4, 2013, published October 28, 2013.)

Legal Malpractice

Wise v. DLA Piper LLP (US) (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court judgment for plaintiff following a jury trial for legal malpractice and directed that judgment be entered in favor of defendant DLA Piper. Plaintiff sued DLA Piper for malpractice because a judgment it had obtained was not extended and the client was not notified. The Court of Appeal found that the testimony of plaintiffs' expert was based upon an incorrect legal theory and was too speculative, and concluded there was no substantial evidence that the judgment against the judgment debtor was collectable. (C.A. 4th, filed October 8, 2013, published October 28, 2013.)

Yanez v. Plummer (2013) _ Cal.App.4th _ : See summary above under Employment.

Medical Malpractice

Montoya v. Barragan (2013) _ Cal.App.4th _ : See summary above under Civil Procedure.

Real Property

Garcia v. Cruz (2013) _ Cal.App.4th _ : See summary above under Civil Procedure.

Fowler v. M&C Association Management Services, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's summary judgment for defendant in a class action alleging that transfer fees charged upon the sale of homes managed by M&C for homeowner associations were improper because there was no prior recorded notice of the fee as allegedly required by Civil Code section 1098.5. The trial court properly found that no such notice was required. (C.A. 1st, October 28, 2013.)

Latinos Unidos Da Napa v. City of Napa (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's denial of a writ of mandate. When revising the housing element of its general plan, the city properly concluded that an environmental impact report (EIR) was not required because there were no new significant environmental effects that were not identified in the 1998 general plan program EIR. In addition, plaintiff waived its right to challenge the sufficiency of the evidence. (C.A. 1st, filed on October 10, 2013, published on November 5, 2013.)

Lueras v. BAC Home Loans Servicing, LP (2013) _ Cal.App.4th _ : The Court of Appeal affirmed in part and reversed in part the trial court's order sustaining a demurer without leave to amend to the first amended complaint arising from an alleged wrongful foreclosure. The trial court rulings were affirmed as to defendant Fannie Mae and as to the causes of action for violation of Civil Code section 2923.5 and quiet title, but were reversed as to the remaining causes of action for negligence, breach of contract, fraud/misrepresentation and violation of Business and Professions Code section 17200. The Court of Appeal concluded the complaint alleged sufficient facts to state causes of action because it alleged that a mere 13 days before Bank of America foreclosed on Lueras's home, Bank of America falsely

represented in writing to Lueras that no foreclosure sale would occur while Lueras was being considered for "other foreclosure avoidance programs." The Court of Appeal also ruled that plaintiff should have been given another opportunity to amend the complaint. (C.A. 4th, October 31, 2013.)

South County Citizens for Smart Growth v. County of Nevada (KKP Lake of the Pines, LLC) (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's denial of a writ petition alleging CEQA violations in approving a commercial real estate project. The County did not err in not preparing and circulating a revised draft environmental impact report (EIR) adding a staff alternative because the staff alternative was not "significant new information" within the meaning of the CEQA Guidelines. No findings were required regarding the staff alternative because it was offered after the preparation of the final EIR and adequate alternatives were discussed in the EIR. (C.A. 3rd, filed October 8, 2013, published November 6, 2013.)

Torts/Elder Abuse/Personal Injury/Wrongful Death

Goldman v. Sunbridge Healthcare, LLC (2013) _ Cal.App.4th _ : See summary above under Arbitration.

Montoya v. Barragan (2013) _ Cal.App.4th _ : See summary above under Civil Procedure.

Nevarrez v. San Marino Skilled Nursing and Wellness Centre (2013) _ Cal.App.4th _ : The Court of Appeal affirmed in part and reversed in part a judgment following a jury verdict in an elder abuse case. The trial court properly rejected defendant's jury instruction on clear and convincing evidence and refused to instruct regarding state regulations on the use of restraints. However, the trial court abused its discretion in admitting into evidence a class A citation and a statement of deficiencies issued by the state Department of Public Health against San Marino, and this prejudiced the jury verdict on negligence and elder abuse. That portion of the verdict was reversed, as was the related award of damages. The verdict on the Patient's Bill of Rights was affirmed, but the monetary award was reversed because it exceeded the amount in Health and Safety Code section 1430(b). The attorney fee award was also reversed. (C.A.2nd, November 4, 2013.)

Pfeifer v. John Crane, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed a judgment for plaintiffs in an asbestos case, but modified it to correctly show the net recovery. The Court of Appeal ruled that the trial court properly denied defendant's requested instructions on its "sophisticated user" defense, which stated that employees of a sophisticated user are deemed to be sophisticated users. When a manufacturer provides hazardous goods to a "sophisticated" intermediary that passes the goods to its employees or servants for their use, the supplier is subject to liability for a failure to warn the employees or servants of the hazards, absent some basis for the manufacturer to believe the ultimate users know or should know of the hazards. (C.A. 2nd, October 29, 2013.)

State Department of State Hospitals v. Superior Court (Novoa) (2013) _ Cal.App.4th _ : The Court of Appeal granted in part and denied in part defendant's writ petition filed after the trial court overruled a demurrer to plaintiff's complaint seeking damages arising from the rape and murder of plaintiff's sister by a prisoner four days after he was released from prison. Defendant's petition was denied as to the third cause of action for writ of mandate because: public entities and employees have no immunity under Government Code section 845.8 for breach of mandatory duties, the complaint alleged defendants breached the mandatory duty to designate two psychologists or psychiatrists to evaluate an inmate identified by the Department of Corrections as likely to be a sexually violent predator, and plaintiff had standing to seek a writ of mandate in the Superior Court. However, the petition was granted as to the other causes of action because the Court of Appeal found plaintiff could not prove causation as a matter of law. The trial court was directed to sustain defendant's demurrer without leave to amend as to those causes of action. (C.A. 2nd, October 30, 2013.)

Young v. Horizon West, Inc. (2013) _ Cal.App.4th _ : See summary above under Arbitration. ■

Bottom Line

Case Title | ERNESTO BUES, Plaintiff, v. ACCOR NORTH AMERICA, INC. and DOES 1 to 30, Defendants.

Case Number | Los Angeles County Superior Court Case No. YC064607

Judge | Hon. Robert A. Dukes

Plaintiff's Counsel | Karen A. Clark of Law Offices of Karen A. Clark

Defendant's Counsel | John M. Fedor of Farmer Case & Fedor

Type of Incident/Causes of Action | Negligence/premises liability arising from slip/trip and fall on parking lot curb.

Settlement Demand | $150,000

Settlement Offer | $25,000

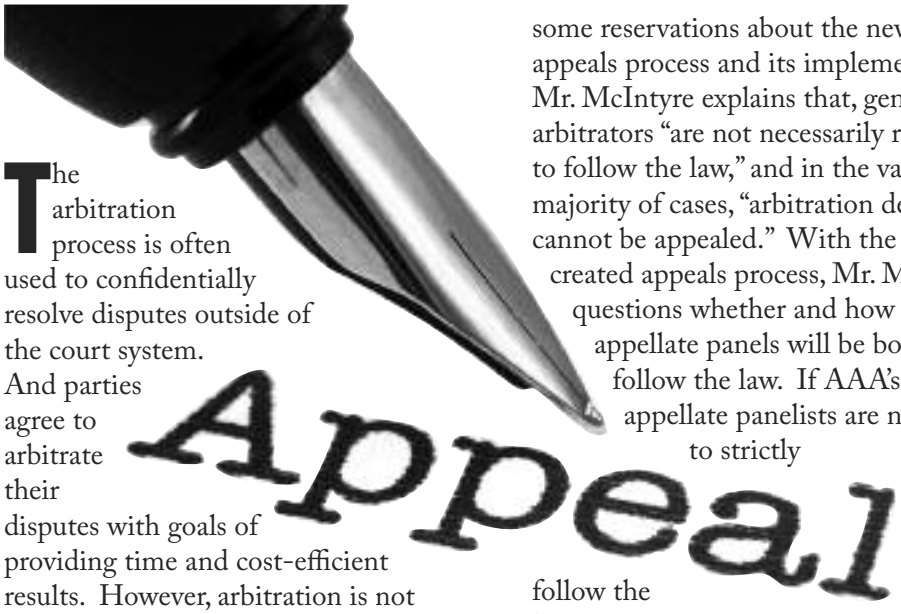
Trial Type | Jury

Trial Length | 6 days

Verdict | Defense Verdict (12-0 on liability) ■

AAA Adopts Arbitration Appeal Apparatus

*by Brett Johnson and Jenna Campbell**



The arbitration process is often used to confidentially resolve disputes outside of the court system. And parties agree to arbitrate their disputes with goals of providing time and cost-efficient results. However, arbitration is not without its drawbacks. It traditionally does not allow for appellate review of the underlying award, as one key example. However, the American Arbitration Association (AAA) recently created an optional appellate process. This appellate process is delineated in AAA's "Optional Appellate Arbitration Rules."

Under these new rules, appellate review can be invoked by parties to an arbitration agreement when both parties agree by contract or stipulation. Additionally, appeals are only permitted on claims that the underlying award is erroneous, material and prejudicial, or based on errors of law. Appeals will be determined based upon submission of written documents, without oral arguments. Finally, the appellate panel will be made up of former federal and state judges and individuals with strong appellate backgrounds. The AAA expects each appellate process to be concluded in approximately three months, keeping with the goal of expeditious results for parties who wish to forego traditional litigation.

These new rules undoubtedly generate many questions. Local arbitrator and attorney Mr. Monte McIntyre retains some reservations about the new AAA appeals process and its implementation. Mr. McIntyre explains that, generally, arbitrators "are not necessarily required to follow the law," and in the vast majority of cases, "arbitration decisions cannot be appealed." With the newly created appeals process, Mr. McIntyre questions whether and how AAA's appellate panels will be bound to follow the law. If AAA's appellate panelists are not bound to strictly follow the law, Mr. McIntyre questions whether the new process will be effective or useful, and that the new appellate process may be counterproductive to its goals of time and cost efficiency.

Moreover, there are other unknowns with regards to AAA's appeals process. What standard of review will be utilized? Mr. McIntyre predicts the appellate panel will apply similar standards of review to those applied by California's courts of appeal. Another unknown is whether the losing party on appeal can then appeal further?

Mr. McIntyre recommends parties considering the AAA process consider an alternative: Judicial Reference. Under the CCP's judicial reference process, decision makers are required to follow the law and parties have the right of appeal. Mr. McIntyre specifically prefers the use of judicial reference if there is an issue of fact, as opposed to an issue of law. From a tactical standpoint, at least one party will likely refuse to have an appeal, failing to satisfy AAA's bilateral agreement requirement for an appeal. However, McIntyre acknowledged that if there is a legal issue in dispute, then the AAA appeals process could greatly benefit certain parties, particularly those who place emphasis on confidentiality, which judicial reference cannot provide.

Mr. McIntyre points out that we will not know how these new appellate rules will ultimately be applied for some time. Only time will tell whether these new procedures will have a positive impact on the arbitration process, and whether these innovative procedural changes such as the Optional Appellate Arbitration Rules set forth by the American Arbitration Association will lead to a different direction for the arbitration process. Mr. McIntyre predicts that, as result of the new AAA appeals process, there will be a place for specialized counsel in appeals for arbitration.

**Mr. Johnson and Ms. Campbell are first-year students at the University of San Diego School of Law. They can be reached at bmjohnson@sandiego.edu and jennacampbell@sandiego.edu.* ■

On The Move

■ **David D. Cardone** has been welcomed as a shareholder of Butz, Dunn & DeSantis, APC. A graduate of The Pennsylvania State University and Duquesne University School of Law, Mr. Cardone joined Butz Dunn & DeSantis in 2008 after completing a two-year clerkship with the Pennsylvania Supreme Court. His practice focuses on the defense of professionals, complex civil litigation and business disputes, and employment law matters.

■ Local mediator **Monty McIntyre** is the 2014 President of the San Diego Chapter of ABOTA (the American Board of Trial Advocates).

■ **Bob Gallagher** is proud to announce the opening of The Gallagher Law Group, APC. The Gallagher Law Group is located at 401 West A Street, Suite 1100, San Diego, CA 92101. Bob can be reached 619-507-8979 [T], 619-324-4151 [F] or reg@reglawgroup.com. Bob will continue to represent his clients in the defense of commercial, insurance bad faith, public entity, construction and hospitality litigation. ■

continued from page 3

Lunch and Learn Programs: Class Actions and Related Actions Against Government Entities

the damages attributes of class action cases without the formal need for class certification. Mr. Benink highlighted cases where a Petition for a Writ of Mandate under C.C.P. § 1085 could be used to compel government entities to bring taxes, fees and other charges into compliance with the law. Here, actions could be brought by one plaintiff with "public interest standing" on behalf of all persons impacted by wrongful government actions without the need for class certification. If the action results in the enforcement of an important right affecting the public interest, then an award of attorneys' fees is available under C.C.P. § 1021.5.

Mr. Benink concluded his presentation by saying that his own practice has shifted from pure class actions more to mandamus actions against government entities because the lack of a class action certification requirement, and he expects more class action plaintiffs' attorneys to follow suit. ■

Bottom Line

Case Title | *Efrain Orosco Martinez v. City of Holtville, et al.*

Case Number | ECU07006

Judge | Jeffrey Jones

Plaintiff's Counsel | Michael Gilbert

Defendant's Counsel | Richard Guido

Type of Incident/Causes of Action | Defendant David Marini was given permission to conduct an agricultural burn on 1/16/12 by the Imperial County Air Pollution Control Board. The burn got out of control and spread to a field adjacent to Holt Road near Holtville, CA. Plaintiff was driving a tractor trailer southbound on Holt Rd and drove into the smoke. When he could no longer see plaintiff stopped his vehicle and walked around the front. A fire truck from Holtville FD was northbound on Holt Rd and struck the plaintiff and the tractor trailer head-on. Plaintiff suffered multiple fractures of the right femur and was life flighted to Desert Regional Medical Center in Palm Springs.

Settlement Demand | $448,000

Settlement Offer | $100,000

Trial Type | Jury

Trial Length | 6 days

Verdict | $152,941. City of Holtville settled before trial. Defendant Marini was found 15% at fault. Plaintiff was found 45% at fault. Judgment entered as to Marini for $69,118. ■

continued from page 9

Recent Appellate Decisions

insurance company were assigned to plaintiff. Plaintiff then sued defendant Mercury Insurance Company, Huang's insurance company, for breach of the covenant of good faith and fair dealing and breach of contract on a theory of bad faith failure to settle. (*IbId.*) Plaintiff alleged that defendant failed to make a reasonable offer within a reasonable time and rejected and discouraged settlement efforts. Defendant moved for summary judgment arguing that plaintiff could not prove breach of contract or bad faith because plaintiff never made a demand for settlement within the policy limits. (*IbId.*) The trial court granted defendant's summary judgment motion. (*Id.* at p. 8.)

The Court of Appeal affirmed. The court held that bad faith liability cannot be founded solely upon an insurer's failure to initiate settlement discussions or offer its policy limit. (Slip opn., p. 9.) Rather, "for bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no 'opportunity to settle' that an insurer may be taxed with ignoring." (*IbId.*) The court explained that there was no settlement offer from plaintiff and no evidence from which a reasonable juror could infer that defendant knew or should have known plaintiff was interested in settlement. As a result, defendant could not be liable for bad faith failure to settle. (*Id.* at pp. 9-10.)

New Court of Appeal Opinion Re: Statute of Limitations in Malicious Prosecution Actions Against Attorney Defendants

On October 4, 2013, the California Court of Appeal, Fourth Appellate District, Division One (San Diego) issued an opinion in *Yee v. Cheung* (Oct. 4, 2013, D060989) __ Cal.App.4th ___, analyzing "whether the one-year statute of limitations set forth in [Code of Civil Procedure] section 340.6, subdivision (a) applies to a malicious prosecution action against an attorney, or instead, whether the general two-year statute of limitations set forth in section 335.1, which typically applies to claims for malicious prosecution, applies even where the malicious prosecution defendant is an attorney." (Slip opn., pp. 8-9.) The Court of Appeal held that the one-year statute of limitations applies to malicious prosecution actions against an attorney when that attorney's participation in the litigation forms the

basis of the malicious prosecution claim. (*Id.* at p. 9.)

Attorneys Wong-Avery and Kenneth Jensen represented Lin Wah in a case against Yee for fraud and conversion. (Slip opn., pp. 4-5.) The jury returned a verdict in favor of Yee. (*Id.* at p. 5.) Two years later, Yee filed a malicious prosecution and emotional distress action against Lin Wah, Jensen and Wong-Avery. (*IbId.*) Attorney Jensen demurred based on the one-year statute of limitations in section 340.6. (*IbId.*) Attorney Wong-Avery filed an anti-SLAPP motion arguing Yee could not show a probability of prevailing on the lack of probable cause element of his malicious prosecution claim. (*Id.* at p. 6.) The trial court sustained the demurrer without leave to amend and granted the special motion to strike. (*IbId.*) Yee appealed contending that the two-year statute of limitations for malicious prosecution claims applied and therefore his complaint was timely. (*IbId.*)

The Court of Appeal affirmed. The court held that "the one-year statute of limitations set forth in section 340.6, subdivision (a) applies to a claim for malicious prosecution brought against an attorney that is based on that attorney's participation in the litigation that forms the basis of the malicious prosecution claim." (Slip opn., p. 9.) According to the court, "[t]he plain language of section 340.6 applies to all actions, with the exception of those actions asserting fraud, that are brought against an attorney for that attorney's 'wrongful act or omission . . . arising in the performance of professional services.'" (*IbId.* citing Code Civ. Proc., § 340.6.) Yee's complaint fell within the one-year statute of limitations because the gravamen of the complaint was that Jensen engaged in wrongful acts in his performance of professional legal services. (Slip opn., p. 11.) Thus, Yee's complaint was untimely. (*Id.* at pp. 15-16.) The court recognized that the effect of applying the one-year statute of limitations in section 340.6 to a malicious prosecution against an attorney was that the limitations period applicable to an attorney defendant in a malicious prosecution action will be different from the limitations period applicable to other non-attorney defendants in the same action. However, the court could not conclude that such a result was absurd. Rather, the Legislature may have valid policy reasons for providing a more circumscribed limitations period to attorney defendants than to other defendants in malicious prosecution actions. (*Id.* at p. 15.)

The Court of Appeal further held that Yee did not demonstrate a probability of prevailing on the malicious prosecution claim. Indeed, the trial court denied Yee's motion for nonsuit in the underlying action. In doing so, the trial court expressly concluded that there was sufficient evidence to allow the fraud and conversion causes of action to go to the jury. According to the court, certain non-final rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying case on which a subsequent malicious prosecution action is based. (Slip opn., p. 20.) ■

SDDL Member List

Aceves, Sylvia S.
Allen, Sean D.
Allison, Christopher R.
Amundson, Steven Grant
Anderson, Kendra
Angeles, Michele M.
Angeletti, Ashleigh
Armstrong, Lorelei
Bae, Judy S.
Balestreri, Thomas A.
Barber, D. Scott
Bayly, Andrea P.
Beck, Teresa
Belsky, Daniel S.
Benedict, Amanda
Benrubi, Gabriel M.
Berger, Harvey C.
Bernstein, Robert
Bertsche, Corinne Coleman
Biddle, W. Lee
Bingham, Roger P.
Bitterlin, Dane J.
Blackwell, Kristi
Blair, Carmela
Boetter, Bruce W.
Bogart, Jeffrey H.
Boles, Darin J.
Bonelli, Eva
Boruszewski, Kelly T.
Brast, Dan
Brennan, Moira S.
Brewster, George
Bridgman, Lisa S.
Brubaker, Alan K.
Bryant, English R.
"Burfening, Jr. , Peter J.
Burke, David P.
Butz, Douglas M.
Buzunis, Dino
Calvert, Stanley A.
Cameron, Christina Marie
Campbell, John B.
Campbell, Rachael A.
Cannon, Paul B.
Cardone, David D.
Carney, Antonia
Carvalho, Jeffrey P.
Case, Anthony T.
Catalino, David
Cauzza, Jarod
Cercos, Ted R.
Chiruvolu, Rekha
Chivinski, Andrew R.
Cho, Sally J.
Ciceron, Keith S.
Clancy, Erin Kennedy
Clark, Kevin J.
Clements, Thomas V.
Clifford, John R.
Cramer, N. Ben
Creighton, Jennifer S.
Culver, Jr., John D.
Daniels, Gregory P.
Dea, Michael
Deitz, Eric R.
DeSantis, Kevin
Dickerson, Jill S.
Dixon, Deborah
Doggett, Jeffrey
Doody, Peter S..
Dorsey, Martha J.
Doshi, Jason
Dube, Douglas
Dunn, Elizabeth
Dyer, Roger C.
Ehtessabian, Jonathan R.
Eilert, Anita M.
Enge, Cherie A.
Everett, John H.
Fallon, Daniel P.
Farmer, John T.
Fedor, John M.
Felderman, Jacob
Feldner, J. Lynn
Fick, Ryan
Fischer, Jack S.
Florence, David M.
Fraher, John
Frank, Robert W.
Freistedt, Christopher M.
Freund, Lisa L.
Furcolo, Regan
Furman, Dana
Gabriel, Todd R.
Gaeta, Anthony P.
Gallagher, Robert E.
Gappy, Dena
Gardner, Joseph S.
Gentes, Stephen A.
Gettis, David E.C.
Gibson, Michael
Glaser, Tamara
Glezer, Iris
Gold, Carleigh L.
Gorman, James
Grant, Danny R.
Graves, Alan B.
Gravin, Peter
Grebing, Charles R.
Grebing, Stephen
Greenberg, Alan E.
Greenfield, Joyia C.
Greenfield, Kenneth N.
Greer, Jeffrey Y.
Grimm, W. Patrick
Guido, Richard A.
Hack, Philip L.
Hagen, Gregory D.
Hall, David P.
Hallett, David E.
Harris, Cherrie D.
Harris, Dana
Harrison, Robert W.
Harwell, Elaine F.
"Haughey Jr. , Charles S.
Healy, Kevin J.
Heft, Robert R.
Higle, Patrick
Hilberg, Scott
Hoang, Kha
Holmes, Karen A.
Holnagel, David B.
Horton, Sommer C.
Howard, Benjamin J.
Hudson, Clark R.
Hughes, William D.
Hulburt, Conor J.
Inman, Heidi
Isaacs, Jackson W.
Iuliano, Vince J.
Jacobs, Douglas
Jacobs, Michael W.
Jaworsky, Todd E.
Joseph, Dane F.
Kaler, Randall
Katz, Bruno W.
Kearns, Patrick J.
Kelleher, Thomas R.
Kenny, Eugene P.
Kish, Fernando
Kleiner, Andrew
Knutson, Lucy M.
Kolod, Scott M.
Kope, Jennifer
Landrith, Kevin S.
Lauter, Ronald James

Lea, Chris M.
Lee, Kathryn C.
Leenerts, Eric M.
Lenat, Nicole
Letofsky, Larry D.
Levine, Sondra
Liker, Keith A.
Lin, Arthur Ying-Chang
Lopez, Michelle
Lorber, Bruce W.
Lotz, Thomas
Mahady, Susana
Mangin, Margaret
Manzi, Jeffrey F.
Mardian, Robert
Martin, Michael B.
Martinez, Jennifer
McCabe, Hugh A.
McClain, Robyn S.
McCormick, Carloyn Balfour
McDonald, Sarah A.
McFall, James A.
McFaul, James A.
McKean, Dinah
McKenzie, Megan
McMahon, Kerry
Mendes, Patrick J.
Mercaldo, Beth M.
Mercaldo, Marco B.
Micheri, Jennifer I.
Miersma, Eric J.
Miller, Nelse
Minamizono, Susan
Miserlis, Mina
Mixer, Melissa K.
Morache, Matthew
Morales, Norma A.
Moriarty, Marilyn R.
Moriyama, Jamie
Mortyn, Russell
Mullins, Angela
Murphy, Jason Michael
Murphy, Kevin
Neil, Michael I.
Nicholas, Dana
Noland, Leslee A.
Noon, Timothy S.
Norman, Robert S.
Noya, Scott
Nunn, Randall M.
Oberrecht, Kim
Obra-White, Bethsaida
O'Connor, Adam P.
Oliver, Susan L.
Olsen, Thomas F.
O'Neill, Dennis S.
Oygar, Sezen
Paskowitz, Michael A.
Patel, Samir R.
Patton, Cara L.
Penton, Robyn
Peterson, Mark T.
Phillips, Charles A.
Picciurro, Andre M.
Piggott, Ashely A.
Plaskin, Leah A
Polito, Steven M.
Popcke, Michael R.
Potocki, Joseph
Preciado, Cecilia
Price, Virginia
Purviance, E. Kenneth
Ramirez, A. Paloma
Ramirez, David
Rasmussen, Konrad
Ratay, M. Todd
Rawers, Brian A.
Rawers, Kimberlee S.
Reinbold, Douglas C.
Rij, James J.
Risso, Sarah E.
Rodriguez, Robert C.
Rogaski, Michael
Roper, David B.
Rosing, Heather L.
Roth, James M.
Rowland, Zachariah H.
Roy, Richard R.
Ryan, Norman A.
Sams, Josh
Schabacker, Scott D.
Schill, Michelle
Schneider, Allison
Selfridge, Alexandra
Semerdjian, Dick A.
Serino, Denise M.
Shields, Robert A.
Sigler, Stephen T.
Silber, Scott
Singer, Sarah Elaine
Skane, Elizabeth A.
Skyer, David C.
Sleeth, Jack M.
Smith-Chavez, Elizabeth A.
Souther, Matthew R.
Spiess, Frederik
Stairs, Victoria G.
Stein, Dwayne
Stenson, Mark E.
Stephan, Gregory D.
Steward, Tiffany
Stohl, Matthew
Sulzner, Bruce E.
Terrill, Elizaabeth M.
Thaeler, Kent
Todd, Christopher W.
Townsend, Giles S.T.
Traficante, Paul
Tramontann, Alex J.
Trexler, Sheila S.
Trimmer, Harold
Turner, J.D.
Turner-Arsenault, Kathryn
Tyson, Robert F.
Umoff, Allie
"Van Nort , Kelly A.
VanSteenhouse, Tracey Moss
Velastegui, Marvin P.
Verbick, Todd E.
Verma, Joy
Vranjes, Mark E.
Wade, Jeffrey P.
"Wallace II , James J.
Wallington, Hilary
Walsh, John H.
Walshok, Janice Y.
Ward, Danielle
Washington, Merris A.
Weadock, Katherine T.
Weeber, Craig
Weinstein, Michael R.
Wells, Nicole
White, Daniel M.
White, Timothy M.
Wilson, Jessica G.
Winet, Randall L.
Woodhall, Blake J.
Woolfall, Brian D.
Worthington, Brian P.
Yaeckel, A. Carl
Yoon, Monica J.
Yurch, Amelia
Zackary, Fort A.
Zickert, Robert W.
Zimmerman, Alicia

San Diego Defense Lawyers
P.O. Box 124890
San Diego, CA 92112