



SAN DIEGO  
DEFENSE LAWYERS

# THE UPDATE

## SPRING/SUMMER 2016

# You Snooze – You Lose: The Effect of a Delay in Accepting a Tender of Defense

By Paloma Ramirez & Elizabeth Terrill  
TYSON & MENDES LLP

The law as it related to an insurer’s obligations to additional insureds for defense counsel retention and funding of defense fees of the insured’s independent counsel continues to be turbulent and fluid.

Recently, a California federal court ruled, in two underlying cases, Travelers lost its ability to select counsel to defend Centex Homes because Travelers waited too long to assume the defense responsibilities. The underlying cases were filed by homeowners in Bakersfield and Heber, California. After the homeowners notified Centex of alleged construction defects, Centex tendered its defense of the suits to Travelers pursuant to various policies which Centex believed itself to be an “additional insured.” By the time Travelers accepted the tender, Centex had retained Newmeyer & Dillion. Travelers sued Centex in 2011 for declaratory relief seeking a ruling by the Court stating Travelers had the right to control the defense for Centex in the underlying cases, among others. In

2012, the Court ruled the delay by Travelers undermined its right to select defense counsel. This ruling was reversed in April 2013,

but, based upon the ruling in the *J.R. Marketing LLC* case, the Court returned to its original stance. It remains unclear the current status of the law in this situation.

In the case of *Hartford Casualty Insurance Company v. J.R. Marketing LLC*, 190 Cal.Rptr.3d 599 (August 10, 2015), the California Supreme Court examined whether an insurer may seek reimbursement directly from counsel when, in satisfaction of its duty to fund its insured’s defense in a third party action against the insured, the insurer paid bills submitted by the insured’s independent counsel for the fees and costs of mounting this defense and has done so in compliance with a court order expressly preserving the insurer’s post-litigation right to recover “unreasonable and unnecessary” amounts.

The Hartford issued CGL policies to Noble Locks and J.R. Marketing LLC. In September



of 2005, an action was filed in Marin County Superior Court against J.R. Marketing, Noble Locks and several of their employees. JR Marketing and Noble Locks tendered the matter to the Hartford on September 26, 2005. In early January 2006, Hartford disclaimed a duty to defend or indemnify on the grounds the acts complained appeared to have occurred prior to the policies’

inception dates. The defendants in the action then filed a coverage action against Hartford. Hartford subsequently agreed to defend JR Marketing, Noble Locks and several individual defendants effective January 19, 2006, subject to a reservation of rights. Hartford, however, declined to pay defense costs prior to that date and declined to appoint independent counsel rather than its panel counsel.

In July 2006, the trial court in the coverage

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# President's Message

By Stephen Sigler  
NEIL DYMOTT

**G**reetings to the SDDL members: This is my first chance as President to say hello to the many defense counsel out there I have not had an opportunity to speak with outside of our luncheon educational meetings, our happy hours or the January Installation dinner. Let me begin with a heartfelt "thank you" to Sasha Selfridge. Not only has she been a great leader, but she continues to lead from the shadows as we have adapted a new process wherein our immediate Past President remains on the board in an advisory position. I could not ask for a better predecessor or more useful resource.

I can happily report that we have not let any grass grow under the Board's proverbial feet. We have been hard at work securing guest speakers and we have already completed four heavily attended Lunch and Learn programs. Special thanks to attorney Elizabeth Skane for her standing room only "Reptile" presentation, the Hon. A. Michael Cutri's discussion of Administrative Law Hearings and cross-over issues, Christopher Todd and Dr. Andrew R. Robbins' radiology breakdown and most recently Kate Kowalewski, Esq., CPA on using Forensic Accounting. We held our first quarter Happy Hour event planned by Colin Harrison in March at the Half Door Brewery

and had a great mix of new members alongside some heavy-hitter senior attorneys who came out to join us. And in the spirit of cross-bar relations,

we had another great Happy Hour in May at Bar Basic, co-hosted by our very own San Diego Defense Lawyers in conjunction with Consumer Attorneys of San Diego. We are lucky to have active, engaged leaders in the various Bar-related organizations and we hope to see more joint activities in the near future. Finally, mark your calendars for the upcoming SDDL Golf Tournament. We have real treat in that this year's event will take place at the Coronado Golf Course on September 9, 2016. Let me know if you have any questions or concerns and I will be more than happy to address them. See you at the next event. ♦



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## MEMBERSHIP INFORMATION

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$160/year. The dues year runs from January 1 to December 31. Applications can be downloaded at: [sddl.org](http://sddl.org)

## THE UPDATE

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

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## SDDL 2016 Calendar of Upcoming Events

**August 9, 2016** – Lunch & Learn CLE: Colin Harrison. "Litigating Cases under the Elder Abuse and Dependent Adult Civil Protection Act: Plaintiff and Defendant Perspectives" by Ramon Lewis and Dawn Phleger.

**August 19, 2016** - 5th Annual SDDL Tailgate Party and Padre Game

**September 9, 2016** – SDDL Golf Tournament at Coronado Golf Course

**September 13, 2016** – September 13: "Automotive Event Data Recorder Systems & Uses – A Technical and Legal Discussion" by Jon Landerville & David Daren

**September 24, 2016** – 32<sup>nd</sup> Annual Red Boudreau Trial Lawyers' Dinner at U.S. Grant (co-hosted by SDDL)

**October 20-22, 2016** – 26<sup>th</sup> Annual SDDL National Mock Trial Competition – Presenting Sponsor: Judicate West

# Past President's Message

By Alexandra "Sasha" N. Selfridge  
THE LAW OFFICES OF  
KENNETH N. GREENFIELD

I am honored to have been San Diego Defense Lawyers' 2015 President. It was such a pleasure to serve this organization and the San Diego defense community this year, as well as during my last five years as a member of the Board of Directors. In 2015, SDDL provided 18 hours of continuing legal education credits to its members. Nine of the speakers at our seminars were women. In addition, we hosted quarterly social events, including our first annual joint happy hour with CASD. This year, we successfully raised \$10,000 for the Juvenile Diabetes Research Foundation at our Annual Golf Tournament. Twenty different teams competed at SDDL's Annual Mock Trial Competition, which distinguished itself yet again with an original fact pattern. SDDL has continued publishing the Update, which has featured some exceptional articles, important legal updates, and many of our trial victories.

Over the past few years, I have been lucky enough to get to know our current President, Stephen Sigler. In addition to being a fun person to grab a drink with, Stephen is someone I was able to turn to for advice

during my term as President. I consistently find that his input is always thoughtful and wise. He has incredible judgment, and SDDL is in very good hands with him.



I look forward to continued involvement with this great organization, as I will be assisting SDDL's Board of Directors in an advisory capacity as the immediate past president. Thank you to the 2015 Board of Directors: Stephen Sigler, Beth Obra-White, Pat Kearns, Robert Mardian, Gabe Benrubi, Eric Deitz, Andy Kleiner, Colin Harrison, Ben Cramer, Ken Purviance, and Dianna Bedri. Without this incredible group of people, SDDL's membership, and our vendors, we could not have achieved so much in 2015. Thank you. ♦

## LUNCH AND LEARN

# Judge Michael Cutri on Administrative Law

By Stephen Sigler  
NEIL DYMOTT

Michael Cutri is the Presiding Administrative Law Judge (ALJ) of the San Diego branch of the California Unemployment Insurance Appeals Board. He took time from the San Diego Office of Appeals to speak to the San Diego Defense Lawyers regarding the administrative law forum and to explain how his cases can directly or indirectly bleed into civil matters. Finally, he also addressed the typical situations where he sees civil defense lawyers navigating his hearings. His introduction included a brief background and tied in how it was not that long ago that he worked in civil defense representation. Presiding ALJ Cutri's varied legal background included significant time at

both Neil Dymott and Sullivan Hill in a wide range of litigation and related civil work. He shifted gears in 2009 and transitioned into being a full-time ALJ.

Since that time, ALJ Cutri has risen to assume the position as Presiding ALJ. His discussion with San Diego Defense Lawyers focused on the California Administrative Procedure Act and dealt with differences in presenting a case under various administrative courtrooms and/or under various agencies rules. Peppared in with examples showing the how different agencies handle elements such as foundation or authentication, he explained how relatively simple issues can affect larger

*continued on page 25*

# Bottom Line

**Case Title:** Kelly Lenarcic v. Beverly Standifer

**Case No:** San Diego Superior Court; Case No. 37-2013-00063116-CU-PA-CTL

**Judge:** Judge John S. Meyer

**Type of Case:** Personal Injury Action / Motor Vehicle Negligence

**Type of Trial:** Jury

**Trial Length:** 5 Days

**Verdict:** \$16,800 to plaintiff

**Plaintiff's Counsel:** Robert Jackson, Esq.

**Defense Counsel:** Robert Tyson, Esq.; Jacob Felderman, Esq.

**Plaintiff's Settlement Demand:** \$250,000

**Defendant's Settlement Offer:** \$50,000 ♦

\*\*\*\*\*

**Title of Case:** Michelle Starkey v. La Pacifica R.V. Resort

**Case No:** 37-2014-00027298-CU-PO-CTL

**Judge:** Hon. Timothy B. Taylor; Dept. 72

**Type of Action:** Premises Liability

**Type of Trial:** Court / Jury Trial

**Trial Length:** 4 days

**Verdict:** Defense

**Attorney for Plaintiff:** F.X. Sean O'Doherty, Esq.

**Attorney for Defendant:** Christopher M. Lea, Esq.

**Damages and/or Injuries:** Broken Ankle resulting from Alleged Dangerous Condition of Premises

**Settlement Demand:** C.C.P. § 998 Offer for \$184,999.00 by Plaintiff.

**Settlement Offer:** C.C.P. § 998 Offer for \$20,000 by Defendant. ♦



# Howell Update: Full Medical Bills Allowed Before a Jury Again

By Bob Tyson and Cayce Greiner  
TYSON & MENDES LLP

Late last year, for the second time in just four months, a California appellate court dealt insurance companies a significant setback in the fight against juries considering inflated medical bills. The California Court of Appeal issued another partially published decision in October 2015 interpreting and applying *Howell* to an uninsured plaintiff's claim for past medical damages in *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996. On the heels of *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, published in June 2015, *Uspenskaya* held plaintiff's full medical bills are admissible to determine the reasonable value of an uninsured plaintiff's medical treatment received pursuant to a lien agreement. Below we also discuss how defendants should arm themselves to combat both of these adverse rulings.

## Third-Party Medical Finance Company Purchased Uninsured Plaintiff's Liens

In this appeal from a jury trial and judgment of the Superior Court of Sacramento County, defendant's vehicle collided with plaintiff's vehicle at an intersection. Plaintiff sustained injury in the accident and ultimately underwent surgery to repair a herniated disc in her lumbar spine. Plaintiff was uninsured and entered into contracts with her medical providers to receive treatment on a lien basis based on her potential recovery in the lawsuit. The lien agreements provided plaintiff was "DIRECTLY, PERSONALLY, AND FULLY responsible to make payment in full" to the medical providers or their assignees, regardless if she prevails in the lawsuit.

In an unpublished section of the opinion, the Court explained MedFin Managers, LLC (MedFin), a third party medical finance company or "factor," subsequently purchased plaintiff's lien from the medical providers for less than the full amount of plaintiff's medical liens.

## Trial Court Denied Defendant's Howell Motion in Limine

Defendant filed a pre-trial motion *in limine* citing *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 to exclude the

higher, full billed amounts of plaintiff's past medical treatment. Defendant argued the lower amounts MedFin paid to purchase plaintiff's liens were the only admissible evidence of the reasonable value of plaintiff's medical treatment. Defendant requested "an order that plaintiff shall not introduce or reference in any fashion the billing statements or amounts for medical care provided beyond those amounts that were accepted by the providers as payment in full." (*Uspenskaya, supra*, 2015 WL 6510915 at \*2.)

Plaintiff opposed defendant's motion by distinguishing *Howell*, which involved an insured plaintiff. Citing a pre-*Howell* decision in *Katiuzhinsky v. Perry* (2007) 152 Cal. App.4th 1288, plaintiff argued she remained liable for the full medical bills under her lien agreements. Plaintiff asserted MedFin simply assumed the right to receive lien payments by purchasing her liens from the medical providers for cash.

Ultimately, after taking defendant's motion *in limine* under submission, the trial court denied the motion, citing *Katiuzhinsky*.

## Jury Awarded Plaintiff the Full Amount of Past Medical Bills

Throughout the trial, defendant moved to admit evidence of the amounts MedFin paid to purchase plaintiff's liens through testimony of plaintiff's medical providers' billing administrators. Defendant admitted it had no other evidence, such as medical billing records or expert testimony, to establish MedFin's lien purchase price was the reasonable value of plaintiff's medical treatment.

Plaintiff opposed defendant's request to admit evidence of lower paid amounts, arguing MedFin's payments were inadmissible under the collateral source rule. In oral argument, the parties informed the court they entered into a stipulation after the court's first motion *in limine* ruling that plaintiff's full medical bills were "reasonable in amount and were incurred by plaintiff." The defense explained it stipulated to this issue with the understanding it could file a motion to reduce the verdict to the amount paid and accepted for plaintiff's past medical expenses if warranted after entry of the jury's verdict.

The trial court denied defendant's request

to admit evidence of MedFin's lien purchase payments on the basis the amounts alone, without any expert testimony to support them, would lead the jury to speculate whether those payments are the reasonable value of plaintiff's medical treatment. The jury ultimately found defendant liable and awarded plaintiff a total of \$429,773.71 in damages, including the full amount of her past medical bills of \$261,773.71. Defendant did not file a post-trial motion to reduce the verdict.

## Court of Appeal Affirms Judgment and Holds Full Billed Amounts Relevant to Determining Reasonable Value of Uninsured Plaintiff's Medical Treatment When Medical Liens Sold to Third Party Factor

The Court of Appeal upheld the trial court's evidentiary rulings, noting the trial court did not rule MedFin's payments were "categorically inadmissible" to establish reasonable value of plaintiff's medical expenses. (*Uspenskaya, supra*, 2015 WL 6510915 at \*5.) Instead, the appellate court confirmed the "MedFin payments are relevant because they have a tendency in reason to prove reasonable value." (*Id.* at \*6.) However, without expert testimony to explain and support the defense argument MedFin's payment amounts are the reasonable value of plaintiff's past medical treatment, the probative value of the payment amounts alone were substantially outweighed by the likelihood they would confuse the jury and cause the jurors to speculate. The Court cited *Howell* to explain even if evidence of payment amounts are relevant, "under Evidence Code section 352 the probative value of a collateral payment must be carefully weighed against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations." (*Id.* (citing *Howell, supra*, 52 Cal.4th at p. 552) (internal quotations and citations omitted).)

The Court further distinguished *Howell* and *Corenbaum*. (See *Howell, supra*, 52 Cal.4th 541; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308). The Court explained MedFin's purchase of plaintiff's liens was a purchase of an asset, not a transaction for health care treatment between a patient (or their health insurer) and a medical provider. Accordingly, the amount MedFin paid

plaintiff's medical providers for plaintiff's lien "is not necessarily based on the reasonable value of the health care, but rather on collectability factors that are unrelated to reasonable value." (*Uspenskaya, supra*, 2015 WL 6510915 at \*8.)

Furthermore, the Court accepted as fact that, unlike the insured plaintiffs in *Howell* and *Corenbaum* whose medical providers accepted insurance payments in full satisfaction of plaintiffs' medical bills, this plaintiff remained liable for her medical providers' full medical bills regardless of her recovery in the lawsuit. Accordingly, plaintiff was in danger of prejudice if the jury was "misled" and awarded plaintiff the lower amount paid by MedFin to purchase the "asset – the right to collect plaintiff's total debt – based on the unsubstantiated notion that such payment reflects the reasonable value of the medical services provided to plaintiff." (*Uspenskaya, supra*, 2015 WL 6510915 at \*8.)

The Court acknowledged the defense's argument, citing the recent case of *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311 and *Howell*, the reasonable value of medical treatment is the "market or exchange value," i.e. what consumers on the open market pay for medical services. (*Uspenskaya, supra*, 2015 WL 6510915 at \*8.) However, the Court

reinforced plaintiff's medical providers sold an asset to MedFin, of which the purchase price was based on "collectability factors," and not necessarily the value of plaintiff's medical treatment. (*Id.*)

The Court further cited *Bermudez* to support its conclusion the reasonable value of an uninsured plaintiff's medical treatment is not limited to the full billed amounts of plaintiff's liens when a third party factor has purchased plaintiff's liens from the medical provider for a lesser amount. In these instances, defendant must proffer additional evidence beyond the lower paid amount "showing the nexus between the amount paid by the factor and the reasonable value of the medical services." (*Id.*) As additional evidence regarding reasonable value was not offered at trial, the Court affirmed the trial court judgement.

**What Does This Mean For Defendants?**

In the wake of *Bermudez* and *Uspenskaya*, how should defendants combat plaintiffs' exorbitant liens at trial?

*Bermudez* and *Uspenskaya* confirm expert opinion is essential for establishing the reasonable value of medical treatment. Designate a medical billing expert to establish the amount accepted by medical providers

as payment in full is the reasonable value of medical treatment.

Subpoena medical billing records and deposition testimony from medical providers and their billing administrators regarding payments accepted from private health insurance, government benefits, uninsured individuals, and factoring companies in full satisfaction of medical bills for the same treatment at issue in the case.

File motions *in limine* to exclude plaintiff's full medical bills at trial. Object to admission or mention of the amount of plaintiff's full medical bills at trial to preserve issues for appeal. If necessary, file post-trial motions to reduce a verdict based on full billed amount of plaintiff's past (or future) medical treatment.

Use caution when stipulating plaintiff's medical bills are either reasonable or incurred when plaintiff aims to admit the full amount of past medical bills at trial.

As this area of law continues to develop, defendants must vigilantly argue and establish plaintiff is entitled to recover no more than amounts accepted by his or her medical provider as payment for plaintiff's medical treatment, even when plaintiff receives treatment on a lien basis. ♦

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## LUNCH AND LEARN

# Eliminating Gender Identity and Sexual Stereotyping in the Workplace

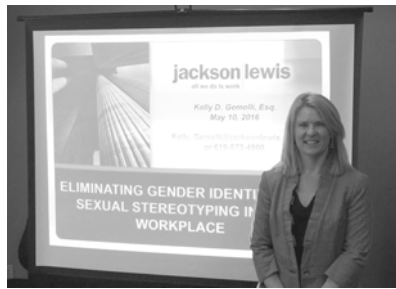
By E. Kenneth Purviance  
HUGHES & NUNN

**H**ey, what's going on? Rockers Bruce Springsteen and Ringo Starr cancelled planned appearances in North Carolina, objecting to the State's recent passage of HB2, the Public Facilities Privacy and Security Act, which limits transgender use of public bathrooms to the sex on their birth certificates. Aging rock stars are not the only ones chiming in on the issue. On Monday, May 9, 2016, North Carolina and the U.S. Justice Department filed dueling lawsuits over HB2. The Justice Department accuses North Carolina of codifying transgender discrimination, while North Carolina's governor says his state is protecting the privacy of non-transgender citizens and the federal government is grossly overstepping its authority.

The viability of HB2 will be threshed out in the courts, but considerable insight about the issue was provided by Kelly D. Gemelli at SDDL's May 10, 2016 Lunch and Learn Seminar. Ms. Gemelli (USD School of Law 2000) is of Counsel with the nationwide employment law firm Jackson/Lewis and represents and counsels employers in all areas of employment law. She has litigated a broad range of employment matters.

Ms. Gemelli defined pertinent terms, such as gender identity ("a person's innate, internal sense of his or her gender"); gender expression (the "way in which a person presents his or her gender to the outside world"), transsexual (a "person who changes or seeks to change their physical characteristics to a gender different than their biological sex"), and transgender ("an umbrella term referring to a person whose gender identity presentation falls outside gender norms and may seek to change their physical appearance through hormones, gender reassignment surgery or other actions").

No federal statute specifically prohibits discrimination based on gender identity or expression. A proposal to expressly make such discrimination illegal, the Employment Non-Discrimination Act, has not as yet



been passed by Congress. However, Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of... sex." In addition, state and local laws prohibiting

discrimination based on disabilities may provide significant protection for transgender employees, since the term "disability" refers to a wide range of serious health conditions and these statutes are meant to protect against discrimination based on stereotypes and ignorance about medical conditions and disability.

Initially, Title VII was held inapplicable in transgender cases. (See, e.g., *Ulane v. Eastern Airlines, Inc.* (7th Cir. 1984) 742 F.2d 1081.) However, in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, the U.S. Supreme Court held that Title VII prohibited employment discrimination against a woman who failed to conform to her employer's gender stereotypes. The employer told the employee she should dress and behave "more femininely." Justice Brennan, writing for the plurality, held that, "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

In *Nichols v. Azteca Restaurant Enterprises, Inc.* (2001) 256 F.3d 864, the Ninth Circuit considered workplace sexual harassment claims of a man who was subjected to insults, name-calling, and vulgarities, such as being called "she" and "her", and being taunted as a "f\_\_king female whore." The Ninth Circuit determined, "the systematic abuses directed at Sanchez reflected a belief that Sanchez did not act as a man should act... We conclude the verbal abuse was closely linked to gender."

Cases that have considered employer liability for discrimination against transgenders include *Enriquez v. West Jersey Health Systems* (New Jersey 2001) 342 N.J.Super. to1, 777 A.2d 365 (employer liable for its treatment of male employee transitioning to female); EEOC V.R.G.

*Harris Funeral Homes* (E.D. Mich. 2015)100 F.Supp.3d 594 (EEOC stated a sex-stereotyping gender-discrimination claim under Title VII for fired employee who had notified employer he was transitioning from male to female); *Goins v. West Group* (Minn. 2001) 635 N.W.2d 717 (overruling court of appeals determination that employer discriminated against a transgender employee within the meaning of Minnesota statute by using biological gender-based bathroom designations); *Macy v. Holder*, EEOC April 20, 2012 (applicant for job with the Bureau of Alcohol, Tobacco, Firearms and Explosives who presented as a male but shortly thereafter stated he was transitioning to a woman and was then informed the position had been filled could state a discrimination claim on theories that the Bureau believed biological men should present as male or that it was willing to hire a man but not a woman).

Eighteen states, including California, protect against gender identity or gender expression discrimination in employment anti-discrimination laws; courts and government agencies in six others have ruled that their anti-discrimination laws protect transgenders. Also, numerous municipalities have enacted ordinances prohibiting workplace discrimination based on gender identity or expression.

Ms. Gemelli identified examples of harassing conduct, including refusal to hire for a position requiring customer interaction; preventing appropriate bathroom usage; failure to address employee by proper name and pronoun, i.e. Mr./Ms.; his/her; invasive inquiries about medical history; and allowing teasing or intimidating behavior.

An employer, when informed of an employee's plan to transition to another sex, should meet with the employee (with assistance of house counsel) to develop a transition plan and provide information about the employer's guidelines, expectations and resources. The employer should follow an inter-active process regarding the timing, logistics, staff announcements, restroom usage, leaves of absence, employee transgender sensitivity training, and so forth. Everyone at the company transitions when a transgender person "comes out" in the workplace. The process is not just practical; it is inherently an emotional and psychological process for everyone.

So, what's going on? For one thing, the trend of the decisions appears to favor the Department of Justice, not North Carolina, as to HB2. For another, any employer faced with an employee gender transition should proceed carefully to avoid a discrimination claim. That transition may include sensitivity training for co-workers. ♦



# The 32nd Annual San Diego Defense Lawyer's Installation Dinner



The San Diego Defense Lawyers honored Bruce Lorber of Lorber, Greenfield & Polito as Defense Lawyer of the Year at the 32nd Annual Installation Dinner on January 30, 2016, at the U.S. Grant Hotel. Emceed by the incomparable Brian Rawers, the event also featured SDDL's annual presentation of its donation to the Juvenile Diabetes Research Foundation (JDRF) in the amount of \$10,000. Accepting the donation on JDRF's behalf was Natalie Gunn. Ms. Gunn spoke at the event to share her experience in battling diabetes and to explain how important the donation dollars are to JDRF to help develop new treatments and, ultimately, a cure.



*Bruce Lorber*



*Christine Dixon*

The event also featured the installation and swearing in of this year's Board of Directors for SDDL and the 2016 president, Stephen T. Sigler of Neil Dymott. Raffle prizes were awarded to lucky attendees and a night of good food and good friends was had by all. ♦



*Brian Rawers*



*Natalie Gunn and Sasha Selfridge*

## Past Defense Lawyers of the Year

Bruce Lorber Joins an Elite Group of San Diego Attorneys Recognized as San Diego Defense Lawyer of the Year:

- Hon. Michael Bollman
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- Hon. Lawrence Irving
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- Sidney Stutz
- Sheila Trexler
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and

The Founders of SDDL: Hon. Adrienne Orfield, Hon. Michael Orfield, Hon. David Danielsen, Hon. Ron Johnson, Buz Sulzner and Jack Winters ♦

# JUDICATE WEST

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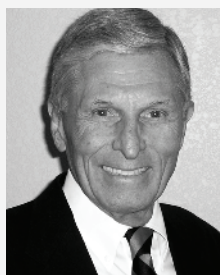
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# SDDL Happy Hour at Half Door Brewing Company

**O**n March 15, 2016, at Half Door Brewing Company. The event was well attended by SDDL members who enjoyed the opportunity to share some good legal “war stories” and discuss the polarizing political landscape in America. The food and drinks were incredible, including a diverse selection of local brewed beers. As always, the Happy Hour proved to be another excellent opportunity to take a few hours away from the office to meet and mingle with colleagues from the defense bar. We would like to thank Rimkus Consulting Group, Inc. for sponsoring the event. ♦



## SAN DIEGO DEFENSE LAWYERS 26TH ANNUAL MOCK TRIAL TOURNAMENT

Presented by JUDICATE WEST

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# California Civil Law Update

By Monty McIntyre  
ADR SERVICES, INC.

## UNITED STATES SUPREME COURT

### Employment

*CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission* \_ U.S. \_ (2016), 2016 WL 2903425: The United States Supreme Court reversed the ruling of the Court of Appeals for the Eighth Circuit concluding that a Title VII employment discrimination defendant is a prevailing party entitled to attorney fees only if it obtains a ruling on the merits. The United States Supreme Court ruled that a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed and is entitled to attorney fees. (May 19, 2016.)

*Green v. Brennan* \_ U.S. \_ (2016), 2016 WL 2945236: The United States Supreme Court vacated the judgment of the Tenth Circuit Court of Appeals and remanded for further proceedings. When an employee resigns in the face of intolerable discrimination and claims they have been constructively discharged, under Title VII, the matter alleged to be discriminatory includes the employee's resignation, and the 45-day clock for a constructive discharge begins running only after the employee resigns. (May 23, 2016.)

## CALIFORNIA SUPREME COURT

### Torts

*Webb v. Special Electric Company, Inc.* (2016) \_ Cal.4th \_ , 2016 WL 2956882: The California Supreme Court affirmed the Court of Appeal's ruling reversing the trial court's entry of a judgment notwithstanding the verdict in an asbestos case because substantial evidence demonstrated that defendant breached a duty to warn Johns-Manville Corporation (Johns-Manville) and foreseeable downstream users like plaintiff about the risks of asbestos exposure. The California Supreme Court formally adopted the sophisticated intermediary doctrine as expressed in the Restatement Second of Torts. Under this rule, a supplier may discharge its duty to warn end users about known or knowable risks in the use of its product if it: (1) provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger,

and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product. Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings. Defendant forfeited the sophisticated intermediary defense by not presenting it to the jury. Although the record clearly showed Johns-Manville was aware of the risks of asbestos in general, no evidence established it knew about extreme risks posed by the crocidolite asbestos supplied by defendant. Moreover, the record was devoid of evidence that defendant actually and reasonably relied on Johns-Manville to warn end users like plaintiff about the dangers of asbestos. (May 23, 2016.)

*Winn v. Pioneer Medical Group, Inc.* (2016) \_ Cal.4th \_ : The California Supreme Court reversed the Court of Appeal's ruling reversing the trial court's order sustaining a demurrer without leave to amend. The California Supreme Court ruled that the definition of neglect (see Welfare & Institutions Code section 15610.57) under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act, Welfare & Institutions Code section 15600 et seq.) does not apply to a health care provider delivering care on an outpatient basis who fails to refer an elder patient to a specialist unless the defendant had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant – not the defendant's professional standing – that makes the defendant potentially liable for neglect. Because the defendants did not have a caretaking or custodial relationship with the decedent, plaintiffs could not adequately allege neglect under the Elder Abuse Act. (May 19, 2016.)

## CALIFORNIA COURTS OF APPEAL

### Arbitration

*Baxter v. Bock* (2016) \_ Cal.App.4th \_ , 2016 WL 2995535: The Court of Appeal

affirmed the trial court's order confirming an arbitration award in a fee dispute case, but vacated and remanded the portion of the order awarding attorney fees to defendants for the confirmation hearing. The arbitrator in this case was not required to make a disclosure regarding his consulting practice, and plaintiff failed to prove his claim that the arbitrator was biased against attorneys. The Court of Appeal, however, found no reasonable basis for the difference in compensation assigned by the trial court to defendants' two attorneys who had similar experience and qualifications. The Court of Appeal vacated that portion of the attorney fee order and remanded for the trial court either to assign the two attorneys the same rate of compensation or to articulate a reasonable basis for any difference. (C.A. 1st, filed May 18, 2016, published May 24, 2016.)

*Rice v. Downs* (2016) \_ Cal.App.4th \_ , 2016 WL 3085995: The Court of Appeal reversed the trial court's order compelling arbitration of tort claims by plaintiff against defendant, his former attorney. While the parties consented to jurisdiction in state and federal courts sitting in California for "any action on a claim arising out of, under or in connection with this Agreement or the transactions contemplated by this Agreement", they agreed to arbitrate only "any controversy between the parties arising out of this Agreement." Viewing these adjacent provisions together, the Court of Appeal ruled that the parties intended to arbitrate only a limited range of claims, i.e., those arising out of the agreement, while litigating a much broader range of claims, i.e., any claim arising out of, under, or in connection with the agreement or transactions contemplated by the agreement. The Court of Appeal reversed the judgment confirming the arbitration award with respect to the claims of legal malpractice, breach of fiduciary duty, and rescission. (C.A. 2nd, June 1, 2016.)

### Attorney Fees

*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) \_ Cal.App.4th \_ , 2016 WL 2946199: The Court of Appeal, applying the abuse of discretion standard, affirmed the trial court's ruling following a successful anti-SLAPP motion that granted defendant attorney fees at a reduced hourly rate of \$275, for a reduced

total of 103.6 hours found to be reasonably related to the anti-SLAPP motion. (C.A. 4<sup>th</sup>, filed May 18, 2016, published June 16, 2016.)

### Civil Procedure

*Aghaji v. Bank of America, N.A.* (2016) \_ Cal.App.4th \_ , 2016 WL 3085551: The Court of Appeal affirmed the trial court's order sustaining demurrers, without leave to amend, to the omnibus third amended complaint. 222 plaintiffs filed 22 related mass actions against various financial institutions and mortgage loan servicers. Plaintiffs are homeowners from all over the country. Each mass action involves numerous plaintiffs whose loans originated with and/or were serviced by a single defendant or related affiliates. The defendants in the lead case were Bank of America, N.A. and several of its subsidiaries or divisions and affiliates or agents. Plaintiffs challenged only the trial court's denial of their request for leave to amend their unfair business practices cause of action to add factual allegations to support an entirely different theory than was suggested in the complaint. Plaintiffs failed to show that their proposed additional facts were sufficient to state an unfair competition law claim. Moreover, even if their proposed additional facts were sufficient, plaintiffs clearly demonstrated that the claim could not be prosecuted as a mass action because the 222 plaintiffs' claims do not arise out of the same transaction or occurrence as required by Code of Civil Procedure section 378. (C.A. 2nd, May 31, 2016.)

*Charton v. Harkey* (2016) \_ Cal.App.4th \_ , 2016 WL 2994747: The Court of Appeal affirmed the trial court's finding that one defendant was entitled to costs, but reversed its decision to reduce that defendant's cost award by 75% because she was one of several jointly-defended parties. The Court of Appeal concluded that, when the Legislature revised Code of Civil Procedure section 1032 in 1986, it intended to eliminate the unity of interest exception as a basis for denying a prevailing party the right to recover costs. Under section 1033.5, when less than all of a group of jointly represented parties prevail, the trial court must apportion the costs among the jointly represented parties based on the reason for incurring each cost and whether the cost was reasonably necessary to the conduct of the litigation on behalf of the prevailing parties. The court may not make an across-the-board reduction based on the number of jointly represented parties because doing so fails to consider the reason for incurring the costs and whether they were reasonably necessary for the prevailing party. (C.A.4th, May 24, 2016.)

*Daza v. Los Angeles Community College District* (2016) \_ Cal.App.4th \_ , 2016 WL 2620645: The Court of Appeal reversed the trial court's order sustaining a demurrer without leave to amend. A student sued defendant and plaintiff, a guidance counselor employed by defendant, alleging plaintiff sexually assaulted her when she went to his office for counseling services. Defendant refused to defend plaintiff, so he paid for his own defense and filed a cross-complaint denying the allegations of sexual assault and seeking indemnity and reimbursement for his defense. Defendant settled the main lawsuit without admitting liability and without a factual determination of whether plaintiff was acting within the scope of his employment, and the student dismissed all her claims with prejudice. Defendant then demurred to plaintiff's cross-complaint, arguing the student's allegations of sexual assault in the main lawsuit fell outside the scope of plaintiff's employment as a matter of law. While the Court of Appeal agreed with the trial court that the sexual assault alleged in the main lawsuit fell outside the scope of plaintiff's employment as a matter of law, under a proper interpretation of Government Code section 996.4, the determination of whether an employee acted within the scope of employment is factual and cannot be limited to the third party's allegations in the underlying lawsuit when the employee denies those allegations and the employee's version of events would demonstrate acts within the scope of employment. (C.A. 2nd, May 6, 2016.)

*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) \_ Cal.App.4th \_ , 2016 WL 3034674: The Court of Appeal affirmed the trial court's order sustaining a demurrer, but remanded the case to give plaintiffs the opportunity to amend the complaint. The trial court properly found that plaintiffs' claims for childhood sexual abuse by a priest had expired before their lawsuit was filed, the claims were not tolled under Insurance Code section 11583 by gifts the priest gave to plaintiffs, and the claims were not revived by legislative changes made over the years to the statute of limitations. Because the complaint alleged when the payments by the priest started but was silent as to when they stopped, the Court of Appeal remanded to allow plaintiffs an opportunity to amend the complaint to allege tolling under section 11583. (C.A. 2nd, May 26, 2016.)

*Hassell v. Bird (Yelp, Inc.)* (2016) \_ Cal. App.4th \_ , 2016 WL 3163296: The Court of Appeal affirmed the trial court's order denying a motion by Yelp, Inc. (Yelp) to vacate

a judgment that ordered Yelp to remove defamatory posts by defendant on Yelp. The Court of Appeal concluded that (1) Yelp was not "aggrieved" by the defamation judgment entered against defendant, but was "aggrieved" by the removal order; (2) Yelp's trial court motion to vacate was not cognizable under Code of Civil Procedure section 663; (3) Yelp had standing to challenge the validity of the removal order as an "aggrieved party," having brought a nonstatutory motion to vacate that order; (4) Yelp's due process rights were not violated because of its lack of prior notice and a hearing on the removal order request; (5) the removal order did not violate Yelp's First Amendment rights to the extent that it required Yelp to remove defendant's defamatory reviews; (6) to the extent it purported to cover statements other than defendant's defamatory reviews, the removal order was an overbroad unconstitutional prior restraint on speech; and (7) Yelp's immunity from suit under the Communications Decency Act of 1996 (47 United States Code section 230) did not extend to the removal order. (C.A. 1st, June 7, 2016.)

*Lopez v. Sony Electronics, Inc.* (2016) \_ Cal. App.4th \_ , 2016 WL 2864800: The Court of Appeal affirmed the trial court's order granting summary judgment for defendant on the basis that the action was barred by Code of Civil Procedure section 340.4. The Court of Appeal agreed that the claim alleging that plaintiff's prenatal exposure to toxic substances caused her to suffer birth defects and permanent injuries. The Court of Appeal agreed with the trial court that section 340.4 was the applicable statute of limitations. Because section 340.4 is not tolled during plaintiff's minority, the complaint was untimely when filed. (C.A. 2nd, May 13, 2016.)

*McClatchy v. Coblenz, Patch, Duffy and Bass, LLP* (2016) \_ Cal.App.4th \_ : The Court of Appeal affirmed the trial court's order granting a motion to quash by the defendant law firm, after plaintiff amended his petition to name the defendant law firm as a doe defendant. The Court of Appeal found that substantial evidence supported the trial court's determination that, when plaintiff filed the original petition, he was not ignorant of the facts on which his claims against the defendant law firm were based, and the firm therefore could not be named as a doe defendant under Code of Civil Procedure 474. (C.A. 1st, May 10, 2016.)



## CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 11:

*Rand Resources, LLC v. City of Carson* (2016) \_ Cal.App.4th \_, 2016 WL 3085525: The Court of Appeal reversed the trial court's order granting an anti-SLAPP motion to strike. Plaintiff, formerly the defendant's exclusive agent sued for breach of, and interference with, the agency contract and related causes of action. The Court of Appeal concluded that the trial court erred because defendants' actions did not arise from an act in furtherance of their right of free speech or to petition for redress of grievances and were not in connection with an issue of public interest, and therefore fell outside the scope of the anti-SLAPP statute. (C.A. 2nd, May 31, 2016.)

*San Diegans for Open Government v. City of San Diego* (2016) \_ Cal.App.4th \_, 2016 WL 3162818: The Court of Appeal reversed the trial court's order denying sanctions under Code of Civil Procedure section 128.5, and affirmed its order finding plaintiff to be the prevailing party under Government Code section § 6250 et seq. and awarding it attorney fees and costs. The Legislature revised and revived Code of Civil Procedure section 128.5 effective January 1, 2015. The Court of Appeal concluded the current version of section 128.5 applies to any case pending as of its effective date; a party filing a sanctions motion under section 128.5 does not need to comply with section 128.7(c)(1) (the safe harbor waiting period); and the legal standard in evaluating a request for sanctions under section 128.5 is whether the challenged conduct was objectively unreasonable. (C.A. 4th, June 7, 2016.)

### Corporations (Records)

*Innes v. Diablo Controls, Inc.* (2016) \_ Cal. App.4th \_, 2016 WL 3381956: The Court of Appeal affirmed the trial court's order denying a writ petition seeking to compel production of corporate records in California. California Corporations Code section 1601 requires that corporate records be made available for inspection at the office where such records are kept. In this case, because the corporate records of the California corporation were kept in Illinois, they were only required to be produced there. (C.A. 1st, June 16, 2016.)

### Employment

*Gerawan Farming, Inc. v. Agricultural Labor Relations Board* (2016) \_ Cal.App.4th \_, 2016 WL 2732128: The Court of Appeal reversed

the trial court's order sustaining a demurrer without leave to amend on the basis that the trial court lacked jurisdiction because Labor Code section 1164.9 limited all judicial review of the Agricultural Labor Relations Board's (Board) rulings to the Court of Appeal or Supreme Court in cases where the mandatory mediation and conciliation process is followed. The Court of Appeal reversed, concluding that section 1164.9 was unconstitutional and did not preclude the trial court from exercising jurisdiction. The Court of Appeal also remanded to the trial court the determination of whether the Board's no-public-access policy violated a right of public access to civil proceedings protected under the federal or state Constitution, or both. (C.A. 5th, May 9, 2016.)

*Seibert v. City of San Jose* (2016) \_ Cal. App.4th \_, 2016 WL 3085205: The Court of Appeal reversed the trial court's order granting a writ of administrative mandamus to set aside a decision by the Civil Service Commission of the City of San Jose (Commission) denying plaintiff's appeal from a decision by the San Jose Fire Department (Department) to terminate his employment as a firefighter and paramedic. The Court of Appeal ruled that (1) the Commission was not deprived of jurisdiction by the belated filing of the notice of discipline on which the challenged dismissal was based; (2) the trial court properly concluded that the e-mail exchange as alleged in one charge, which made no reference to the recipient's age (16 years old), could not be found to violate any applicable rule or policy; (3) the court permissibly found, on conflicting evidence, that plaintiff lacked actual or constructive knowledge of the recipient's age; (4) the court erred by refusing to consider the contents of interview transcripts which constituted the chief evidence of misconduct toward a female coworker; and (5) the court should have directed that any further administrative proceedings be heard and determined by an administrative law judge. (C.A. 6th, May 31, 2016.)

*United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA v. California Unemployment Insurance Appeals Board (San Francisco Unified School District)* (2016) \_ Cal. App.4th \_, 2016 WL 3157324: The Court of Appeal affirmed the trial court's order denying a writ petition seeking unemployment benefits for school employees during the summer recess. The Court of Appeal noted that the claimants were requesting the government to provide them with a full year's income even though they agreed to work and be paid for only 41 weeks of each year. The rationale

for this limitation on benefits is that school employees can plan for those periods of unemployment and thus are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate. (C.A. 1st, June 6, 2016.)

### Evidence (Motions in Limine)

*Kinda v. Carpenter* (2016) \_ Cal.App.4th \_, 2016 WL 3157299: The Court of Appeal reversed the trial court's in limine ruling excluding social media evidence regarding a defamation claim and its later order granting a directed verdict for defendant on a defamation cause of action. Plaintiffs presented evidence that three Yelp complaints about their business appeared on the day of and shortly after plaintiffs obtained a temporary restraining order against defendant. Both Comcast and AT&T confirmed that the IP addresses that the Yelp posts came from had been owned by an officer of defendant. When a motion in limine is used to foreclose a cause of action, the court must apply the restrictive standard of a nonsuit, interpreting the evidence most favorably to plaintiffs' case and resolving all presumptions, inferences and doubts in favor of plaintiffs. The trial court erred by taking the opposite approach. The trial court also erred in granting the directed verdict because the evidence could, but not necessarily would lead a reasonable trier of fact to infer that defendant posted the Yelp reviews. (C.A. 6th, June 6, 2016.)

### Probate (Conservatorship)

*Conservatorship of Bower* (2016) \_ Cal. App.4th \_, 2016 WL 1554844: The Court of Appeal reversed the trial court's order dividing a married couple's community property under Probate Code section 3089. The probate court erroneously proceeded on the premise that section 3089 is triggered by noncompliance with orders to pay professional fees directly to the conservator in a lump sum, rather than refusal to comply with an order to support the conservatee spouse. The order was reversed and remanded for application of the proper standard to the facts in question. (C.A. 4th, filed April 14, 2016, published May 16, 2016.)

### Real Property (CEQA, Wrongful Foreclosure)

*Brown v. Deutsche Bank National Trust Company* (2016) \_ Cal.App.4th \_, 2016 WL 2726229: The Court of Appeal affirmed the trial court's order sustaining a demurrer without leave to amend to a complaint seeking to stop a foreclosure. The complaint was the third lawsuit filed by plaintiff. One of the grounds for the trial court's order was

its determination that plaintiff's contention that defendants lacked authority to enforce the deed of trust was contradicted by matters subject to judicial notice. Plaintiff, however, failed to present any reasoned argument challenging that determination, so she forfeited any claim that the trial court erred. The Court of Appeal also found the trial court's order was correct, because it concluded that an FDIC to Chase purchase and assumption agreement contradicted the allegations that plaintiff relied upon to support her theory that defendant California Reconveyance Company lacked authority to foreclose. Finally, plaintiff failed to address how she could amend her complaint to assert a valid cause of action and therefore forfeited any argument that the trial court abused its discretion in sustaining the demurrer without leave to amend. (CA. 1st, May 9, 2016.)

*Center for Biological Diversity v. County of San Bernardino (Cadiz, Inc.)* (2016) \_ Cal. App.4th \_ , 2016 WL 2742824: The Court of Appeal affirmed the trial court's order denying a writ petition challenging a water project under the California Environmental Quality Act (CEQA). The Santa Margarita Water District was properly named as the lead agency. The project was consistent with the Environmental Impact Report's (EIR) purpose and objectives because it will conserve

water otherwise lost to brine and evaporation, and will improve water supplies throughout many areas of the State of California. The EIR set a definite length of time during which pumping under the project could occur, and the additional time permitted for pumping if contingencies require that the pumping be extended did not alter the total amount of water that may be withdrawn. Finally, the EIR and related documents do not permit withdrawal of water in excess of the amounts specified in the EIR. (C.A. 4th, May 10, 2016.)

*Delaware Tetra Technologies, Inc. v. County of San Bernardino (Santa Margarita Water District)* (2016) \_ Cal.App.4th \_ , 2016 WL 2742702: The Court of Appeal affirmed the trial court's order denying a writ petition challenging a water project. An environmental impact report (EIR) was not required for a memorandum of understanding signed by the County of San Bernardino (County) and other entities because the memorandum of understanding was not a project within the meaning of the California Environmental Quality Act. The Court of Appeal also found that the memorandum of understanding did not violate either the County's relevant groundwater management ordinance or common law. (C.A. 4th, May 10, 2016.)

*People for Proper Planning v. City of Palm Springs* (2016) \_ Cal. App.4th \_ , 2016 WL 1633062: The Court of Appeal reversed the trial court's order denying a writ petition challenging defendant's approval of an Amendment to the City's General Plan (Amendment) removing the minimum density requirements for each residential development. The Court of Appeal concluded the defendant could not rely on a categorical exemption from the California Environmental Quality Act (CEQA), instead it must proceed to the next step of the analysis and conduct an initial threshold study to see if the proposed Amendment would have a significant impact upon the

environment to determine whether a negative declaration may be issued. (C.A. 4th, filed April 22, 2016, published May 20, 2016.)

*Sciarratta v. U.S. Bank National Association* (2016) \_ Cal.App.4th \_ : The Court of Appeal reversed the trial court's order sustaining a demurrer without leave to amend. The Court of Appeal concluded that a homeowner who has been foreclosed on by one with no right to do so—by those facts alone—sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure. When a non-debtholder forecloses, a homeowner is harmed by losing her home to an entity with no legal right to take it. Under those circumstances, the void assignment is the proximate cause of actual injury and all that is required to be alleged to satisfy the element of prejudice or harm in a wrongful foreclosure cause of action. (C.A. 4th, May 18, 2016.)

#### Torts

*Bertsch v. Mammoth Community Water District* (2016) \_ Cal.App.4th \_ : The Court of Appeal affirmed the trial court's summary judgment for defendant in a wrongful death action. Decedent tragically lost his life while skateboarding with his brother in the resort town of Mammoth Lakes. The two were traveling downhill at a "pretty fast" speed, without helmets, when the front wheels of decedent's skateboard hit a small gap between the paved road and a cement collar surrounding a manhole cover, stopping the wheels and ejecting him from the board. The impact of decedent's skull with the pavement resulted in a traumatic brain injury and ultimately death. The trial court properly granted summary judgment based on the doctrine of primary assumption of risk. (C.A. 3rd, June 1, 2016.)

*Hetzel v. Hennessy Industries, Inc.* (2016) \_ Cal.App.4th \_ , 2016 WL 1745563: Finding the decision of the Second Appellate District in *Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133 to be directly on point and persuasive, the Court of Appeal reversed the trial court's summary judgment for defendant. Plaintiff raised a triable issue of fact regarding a duty to warn. Because virtually all brake linings during the relevant time period contained asbestos which resulted in defendant's machines being used 90 to 95 percent of the time to grind brakes producing asbestos dust, the intended use of the product inevitably created a hazardous situation, and a jury could reasonably conclude the inevitable



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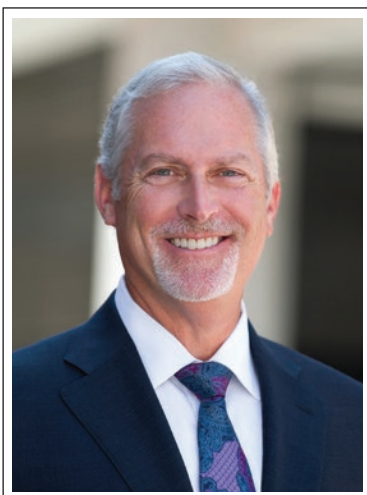
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# Your Path to Resolution



Richard has taken the leadership skills he honed while President of the SDCBA in 2015, along with his reputation for integrity and nearly 30 years of legal experience, into his new role as a full-time mediator. As a panel member exclusively with West Coast Resolution Group, Richard can help you resolve your toughest cases, from insurance bad faith to personal injury, employment, class actions or business matters.

To get your case on the path to resolution, please contact Richard's case manager Kathy Purcell at (619) 238-7282 or [kpurcell@westcoastresolution.com](mailto:kpurcell@westcoastresolution.com).





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**CALIFORNIA CIVIL LAW UPDATE  
CONTINUED FROM PAGE 13**

use of defendant's products would expose a worker like plaintiff to asbestos dust absent safety protection or adequate warning. (C.A. 1st, filed April 28, 2016, published May 17, 2016.)

*Jimenez v. Roseville City School District* (2016) \_ Cal.App.4th \_ : The Court of Appeal reversed the trial court's order granting summary judgment for defendant. Plaintiff was injured in an unsupervised middle school classroom where he attempted to do a flip while break dancing. School rules were violated in two ways: first, students had been ordered not to perform flips; second, the teacher who allowed the students to use his classroom for dancing violated school policy by leaving them unsupervised. The Court of Appeal concluded there were two viable theories of liability that could go to the jury: negligent supervision, and defendant's conduct increased the inherent risks of break dancing. (C.A. 3rd, May 19, 2016.)

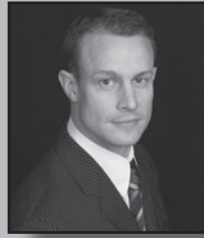
*Rondon v. Hennessy Industries, Inc.* (2016) \_ Cal.App.4th \_ , 2016 WL 3180979: The Court of Appeal reversed the trial court's summary judgment for defendant in an asbestos case. The Court of Appeal reversed, concluding that the recent decision in *Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133 was directly on point and persuasive. That opinion held that the proper test is not the "exclusive use" standard argued by defendant and relied on by the trial court, but whether the "inevitable use" of defendant's machines would expose a worker like plaintiff to asbestos dust absent safety protection or adequate warning. Because plaintiff produced sufficient evidence to raise a triable issue of fact as to whether the "inevitable use" standard was met, the trial court erred in granting summary judgment. (C.A. 1st, filed May 9, 2016, published June 7, 2016.)

*Vasilenko v. Grace Family Church* (2016) \_ Cal.App.4th \_ : The Court of Appeal reversed the trial court's summary judgment for plaintiff. The Court of Appeal concluded that the location of an overflow parking lot owned by defendant, which required defendant's invitees who parked there to cross a busy thoroughfare in an area that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk of injury offsite and this gave rise to a duty on the part of defendant. (C.A. 3rd, June 17, 2016.) ♦

# On the Move

## ◆ Trial Attorney Jacob Felderman promoted to Partner

Tyson & Mendes promoted Jacob Felderman to Partner on June 3. Mr. Felderman is an accomplished litigator and trial attorney with over 12 years' experience. He joined Tyson & Mendes in 2011.



Mr. Felderman has in-depth experience in a number of practice areas including: accounting and attorney malpractice, business litigation, commercial landlord-tenant disputes, catastrophic injury, real property disputes and general civil litigation. He leads a multi-attorney litigation team handling an expansive array of cases and regularly defending high exposure lawsuits.

In addition to leading a multi-attorney litigation team in California, Mr. Felderman is the Managing Partner of the firm's Colorado office. He is the fifth person to be named partner in the last twelve months, joining Mina Miserlis (San Diego), Jim Sell (San Francisco), Susan Oliver (San Diego) and Tom McGrath (Las Vegas). Tyson & Mendes employs 43 attorneys throughout California, Arizona, Nevada, and Colorado.

## ◆ Lorenzo Morales Joins Balestreri Potocki & Holmes

Lorenzo Morales has joined Balestreri Potocki & Holmes as an associate. Morales focuses his practice in the area of construction law, representing developers, general contractors, property owners, and subcontractors in a variety of civil litigation and transactional matters.



Morales received his Bachelor of Arts

from Colorado Mesa University in 2011 and his Juris Doctor, summa cum laude, from California Western School of Law in 2016.

A recipient of the Justice Anthony Kennedy Full-Tuition Scholarship, Morales graduated top of his class at California Western School of Law. He was senior editor and associate writer for the California Western Law Review and International Law Journal and was copy editor for The Commentary. Mr. Morales also received the Trustees' Award, one of California Western's highest honors, for his outstanding academic performance and service to the school.

## ◆ Heather Rosing Named CFO of the Year

Klinedinst Chief Financial Officer Heather L. Rosing was named winner of the 2016 CFO of the Year in the Small Privately Held Company category by the San Diego



Business Journal. This was her second time receiving the award.

In addition to serving as Klinedinst's CFO, Heather L. Rosing serves as the Chairperson of the the firm's Professional Liability Department, working with a team of Klinedinst lawyers across the state in the defense of professionals such as lawyers and accountants. Ms. Rosing's practice includes complex malpractice and fraud cases and in advising in the areas of ethics and risk management. Ms. Rosing also serves as a consultant and expert witness in the areas of fee disputes, professional responsibility, privileges, and attorney duties.

Ms. Rosing is certified as a specialist in Legal Malpractice Law by the State Bar of California Board of Legal Specialization. In addition to a number of other prestigious awards, Ms. Rosing was recognized as SDDL's Defense Lawyer of the Year in 2015.

◆  
over 30 years of experience as an arbitrator and mediator. Mr. McIntyre handles cases in the following areas: business, commercial, construction, employment, insurance, professional liability, real property and torts.

*Monty A. McIntyre is a full-time mediator, arbitrator, referee and special master at ADR Services, Inc., with 35 years of extensive civil trial experience representing both plaintiffs and defendants in a wide variety of business, insurance, real property and tort cases, and*

## COVER STORY CONTINUED FROM PAGE 1

action entered a summary adjudication order finding that Hartford had a duty to defend in the underlying action, effective the date of the original tender and, because of the reservation of rights, Hartford must also fund *Cumis* counsel to represent its insureds in the underlying action. The insureds retained Squire Sanders as *Cumis* counsel.

On September 26, 2006, the trial court in the coverage action issued an enforcement order, drafted by Squire Sanders, ordering Hartford to pay all defense invoices submitted to it as of August 1, 2006 and to pay all defense costs within 30 days of receipt. The order further stated that Hartford had breached its defense obligations by refusing to provide *Cumis* counsel until [www.tysonmendes.com](http://www.tysonmendes.com) ordered to do so and that, because of the breach, Hartford would not be able to invoke the rate provisions of California Civil Code Section 2680. Lastly, Hartford could only challenge fees and costs by seeking reimbursement after resolution of the underlying action.

The underlying action resolved in October 2009. The stay on the coverage action was lifted and Hartford filed a Cross-Complaint against Squire Sanders and others to whom it had made payments seeking reimbursement of a significant portion of approximately \$15 million, including approximately \$13.5 million paid to Squire Sanders. Squire Sanders demurred on behalf of itself and the other cross-defendants arguing Hartford could not assert a legal or equitable claim against “noninsureds, including an insured’s independent counsel” as the right to reimbursement depends on the contractual relationship between the insured and the insurer. The trial court sustained the demurrer without leave to amend, finding the right to reimbursement, if any, was from its insureds, not directly from *Cumis* counsel, and subsequently, dismissed Harrington and Squire Sanders from the Cross-Complaint.

Hartford appealed, arguing it was entitled to recover “unreasonable” and “excessive” fees and costs directly from *Cumis* counsel. It argued counsel, not the insureds, had been unjustly enriched by overcharging Hartford for the insureds’ defense.

The Court of Appeal affirmed the dismissals. The Court of Appeal reasoned restitution is only available where it would be unjust to allow the person receiving the benefit to retain it and where restitution would not frustrate public policy. The Court noted Hartford breached its duty to defend, forcing the insureds to retain their own

counsel and negotiate a fee arrangement. Hartford then reserved its right to contest coverage and was ordered to provide and compensate *Cumis* counsel. Under these circumstances, allowing Hartford to sue Squire Sanders directly for reimbursement would frustrate the policies underlying section 2860 and *Cumis*. The Court reasoned, when *Cumis* counsel is provided following an insurer’s breach of its duty to defend, “the insurer loses all right to control the defense.” Rather, counsel chosen by the insured answers solely to their clients.

The Supreme Court disagrees. The Supreme Court points out the theory of restitution does not require a contract. “Though this restitutionary obligation is often described as quasi-contractual, a privity of relationship between the parties is not necessarily required.” The Court then points out in *Buss v. Superior Court* (1997) 16 Cal.4th 35, 51, where an insurer has met its obligation to completely defend a “mixed” action against its insured, the insurer is entitled to restitution from the insured for those fees and costs solely attributable to defending claims clearly not covered by the policy. The insurer never bargained to bear the costs of defending those claims manifestly outside the policy’s coverage. Under those circumstances, it would be unjust for the insured to retain the benefit of the insurer paying for defense costs beyond the scope of the policy.

In the present case, however, Hartford alleged counsel is the unjust beneficiary of the insurer’s overpayment. The Court found, where counsel’s fees are excessive, unnecessary and not incurred for the benefit of the insured, it is counsel who should owe the restitution of the excess payments received. Although it appear this case opens the door to the argument, where *Cumis* counsel has incurred unreasonable and excessive fees, *Cumis* counsel is responsible for reimbursement to the carrier, the Court expressly made this ruling very narrow and applicable only to the exact circumstances of this case. ♦

### ABOUT THE AUTHORS

*Mrs. Ramirez is a graduate of Southwestern University School of Law. She specializes in the defense of contractors and materials suppliers in the areas of construction defect and construction related claims. Contact her at [pramirez@tysonmendes.com](mailto:pramirez@tysonmendes.com).*

*Elizabeth Terrill is an associate at Tyson & Mendes. Elizabeth specializes in the areas of construction defect and construction injury claims.*

# Bottom Line

**Case Title:** Joe Ferris v. Sarpes Beverages, LLC dba Dream Products, LLC

**Court & Case Number:** San Diego Superior Court case no. 37-2011-97625

**Judge:** Frederic Link

**Plaintiff’s Counsel:** Derrick Coleman of Coleman Frost LLP and Alex Tomasevic of Nicholas & Tomasevic LLP

**Defense Counsel:** Hugh McCabe and Joanna Ryan Shippee of Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson APLC

**Type of Case/Causes of Action:** Certified state-wide class action case (class of California consumers from 2010 through May 2015 when class notice was disseminated). Plaintiff, on behalf of the class, alleged Defendant’s labeling and website advertising of its product, Dream Water, was false and misleading in violation of Business and Professions Code section 17200, the Unfair Competition Law; BPC section 17500, the False Advertising Law; and Civil Code section 1750, the Consumer Legal Remedies Act.

**Plaintiff’s Settlement Demand:** At mediation, Plaintiff’s demand was in the millions.

**Defendant’s Settlement Offer:** At mediation, Defendant offered approximately 100-200K.

**Trial Type: Jury/Bench:** Bench trial in front of Judge Frederic Link.

(The case was filed in September 2011 and overseen by Judge Ronald Prager until he was recently replaced by Judge Pollack. The matter was then transferred to Judge Link for purposes of trial.)

**Trial Length:** Trial was bifurcated with respect to liability and damages. The liability phase of trial took place over the course of five (5) days from February 22-29, 2016. The equitable phase of trial did not take place given the defense verdict following the liability phase.

**Verdict:** Verdict for Defendant. Plaintiff failed to prove the challenged advertising was false and misleading. As such, he failed to establish his claims under the UCL, FAL, and CLRA which require that false or misleading statements be made. When rendering the verdict, the Court was not required, but nonetheless chose, to also address the ancillary issue of Plaintiff’s failure to prove the additional reliance and causation requirements of those statutes on behalf of himself or the class. ♦



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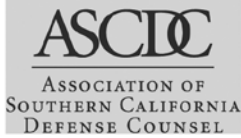
### Relationship with the Bench

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(Updated 3/30/16)



# Insurance Law Update

By Jim Roth

THE ROTH LAW FIRM

*WHEN AN OCCURRENCE IS CLEARLY NOT INCLUDED WITHIN THE COVERAGE AFFORDED BY AN INSURING CLAUSE, IT NEED NOT ALSO BE SPECIFICALLY EXCLUDED. [Filed February 3, 2016]*

In the case styled Haering v. Topa Insurance Company (2016) 244 Cal.App.4th 725, 198 Cal.Rptr.3d 291, the Court of Appeal, Second District, held that an insured's claim for underinsured motorist ("UIM") benefits was not within the coverage provision of an excess liability policy defining a covered "loss" as "the sum paid in settlement of losses for which the Insured is liable" because the UIM claim was not a third party liability claim.

Larry Haering was an insured under a primary insurance policy issued by State National Insurance Company ("**State National**") and concurrently an insured under an excess liability policy issued by Topa Insurance Company ("**Topa**"). The Topa policy designated the State National policy as the underlying primary policy. The Topa policy excluded coverage for "any liability or obligation imposed on the Insured under ... any uninsured motorists, underinsured motorists or automobile no-fault or first party personal injury law." Haering was injured in a motor vehicle accident caused by a negligent third party driver who was an insured under a policy with a \$25,000 liability limit. Haering settled his claim against the negligent driver by accepting the \$25,000 limit under the driver's policy and then submitted a claim to State National and eventually recovered the policy limit under the \$1 million UIM endorsement to the State National policy. Haering then submitted a claim to Topa for \$1 million in excess coverage, arguing that the Topa policy "followed form" to the State National policy and incorporated the \$1 million UIM endorsement. Topa denied coverage for the claim on two principal grounds: (1) the policy's insuring agreement limited coverage to third party (not first party) liability claims, and (2) a policy exclusion barred coverage for liability imposed under any UIM law.

In the ensuing coverage bad faith litigation, the parties stipulated to judgment in favor of Topa after Haering unsuccessfully moved for summary judgment. In undertaking its review, the appellate court noted that the requirement in Insurance Code § 11580.2(a)(1) that auto

policies contain UIM coverage does not apply to excess policies. Consequently, Haering's right to UIM coverage from Topa depended entirely on whether the Topa policy provided such coverage.

In teeing up its findings, the court distinguished first and third party coverages, and stressed that UIM coverage is a form of first party coverage, explaining that: "[A] first party insurance policy provides coverage for loss or damage sustained directly by the insured .... A third party liability policy, in contrast, provides coverage for liability of the insured to a 'third party' .... In the usual first party policy, the insurer promises to pay money to the insured upon the happening of an event, the risk of which has been insured against. In the typical third party liability policy, the carrier assumes a contractual duty to pay judgments the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by the insured." In finding that UIM coverage is "strictly" first party' coverages, the court focused on the fact that "the insurer's duty is to compensate its own insured for his or her losses, rather than to indemnify against liability claims from others."

In discussing "following form" excess insurance and how courts resolve inconsistencies between the language of the primary and the excess policy, the court clarified that a "following form" excess policy incorporates by reference the terms and conditions of the underlying primary policy and generally will contain the same basic provisions as the underlying policy, with the exception of those provisions that are inconsistent with the excess policy. Any inconsistency or conflict between the provisions of a following form excess policy and the provisions of an underlying primary policy is resolved by applying the provisions of the excess policy. "It is well settled that the obligations of following form excess insurers are defined by the language of the underlying policies, except to the extent that there is a conflict between the two policies, in which case, absent excess policy language to the contrary, the wording of the excess policy will control." Applying the provisions of the Topa policy, the court found that the Topa policy did not incorporate the UIM provisions in State National's policy. Since the Topa policy covered only "the sum paid in settlement of losses for which the Insured

is liable," it covered only liability claims against the insured. Moreover, the Topa policy language incorporating the provisions of the primary policy was subject to an exception for "any other provisions therein which are inconsistent with the provisions of this policy," and the "following form" provision of the Topa policy stated that it would follow the form of the primary policy "subject to the terms, conditions and limitations of all other provisions of this policy." Additionally, the Topa policy did not include a "broad as primary" endorsement, which expressly includes coverage for losses within the scope of the underlying primary policy, even though the loss would otherwise have been excluded under the terms of the excess policy.

**CALIFORNIA PUBLIC POLICY PRECLUDES ENFORCEMENT OF AN "OTHER INSURANCE" CLAUSE TO PRECLUDE AN INSURER'S EFFORTS TO ESCAPE ITS DUTY TO DEFEND.**  
[Filed March 11, 2016]

In the case styled Certain Underwriters at Lloyds, London v. Arch Specialty Insurance Co. (2016) 246 Cal.App.4th 418, 200 Cal. Rptr.3d 786, the Court of Appeal, Third District, held that California public policy precluded an insurer that provided primary liability coverage for a later period from enforcing "other insurance" language limiting the duty to defend to situations where no other primary insurer afforded a defense, and thus the "other insurance" language did not bar an earlier primary insurer's claim for equitable contribution, since the language amounted to an improper "escape clause," even though the later insurer included the "other insurance" language in both the "coverage" section of the policy and the "limitations" section.

Underwriters at Lloyds, London ("**Underwriters**"), and Arch Specialty Insurance Company ("**Arch**"), issued successive commercial general liability ("**CGL**") policies to Framecon, a carpentry and framing subcontractor. Underwriters' policies covered the period from October 28, 2000 to October 28, 2002. Arch's policy covered October 28, 2002, to October 28, 2003. Both insurers' policies named KB Homes, a residential developer with which Framecon contracted to provide carpentry and framing services, as an additional insured.

Purchasers of homes from KB Homes sued KB Homes for construction defects, some of which were attributable to Framecon's work. KB Homes filed a cross-complaint against Framecon and both Framecon and KB Homes sought a defense from both Underwriters and Arch under the Framecon policies. Although



both insurers acknowledged their obligations to indemnify against liability in the lawsuits, only Underwriters agreed to provide a defense. Arch took the position that its policy excused it from defending when another insurer is providing a defense. Arch relied on language in its policy's "Insuring Agreement" limiting Arch's duty to defend to lawsuits in which "no other insurance affording a defense against such a suit is available to you." Arch further relied on language in its policy's "Conditions" section stating that Arch would have no duty to defend "any claim or suit that any other insurer has a duty to defend."

After the construction defect lawsuits were settled, with Underwriters and Arch contributing a pro rata share based on "time on the risk," Underwriters sued Arch for declaratory relief and equitable contribution to defense costs. On cross-motions for summary judgment, the trial court ruled in favor of Arch. The trial court accepted Arch's position that the so-called "exclusive defense" provisions in its policy relieved it of a duty to defend if another insurance carrier has a duty to defend. The trial court reasoned that placing the "other insurance" clause in the "Insuring Agreement" portion of the insurance policy defining coverage, as opposed to merely placing it in the conditions/limitations portion of the contract, created an enforceable exception to coverage, rather than a disfavored escape clause in violation of public policy.

The appellate court reversed and remanded, reminding the trial court that equitable principles designed to accomplish ultimate justice, not the language of the relevant insurance contracts, governs contribution actions between insurers. The court equated the language in Arch's Insuring Agreement with an "escape" clause, which relieves a primary insurer of any obligation to provide coverage if another insurer provides primary coverage. In the court's view, the fact that Arch's escape language appeared in the Insuring Agreement, rather than the conditions section of the policy, did not justify excusing Arch from paying a share of Framecon's and KB Homes's defense costs. The court found nothing in the case law suggesting that the location of the other insurance clause matters. Indeed, the court criticized undue reliance upon the location of the other insurance language, as "tend[ing] to encourage insurers to jockey for best position in choosing where to locate other insurance language, needlessly complicating the drafting of policies, inducing wasteful litigation among insurers, and delaying settlements—all ultimately to the detriment of the insurance-buying public."

DESPITE A CGL CARRIER PROSECUTING IN THE NAME OF ITS INSURED DEVELOPER AN INDEMNITY ACTION AGAINST A SUBCONTRACTOR FOR THE REIMBURSEMENT OF DEFENSE FEES AND COST, THE DEVELOPER'S CARRIER WAS THE REAL PARTY IN INTEREST AND COULD NOT AVOID LIABILITY FOR THE SUBCONTRACTOR'S CONTRACTUAL ATTORNEY'S FEES WHEN THE SUBCONTRACTOR DEFEATED THE REIMBURSEMENT CLAIM. [Filed May 2, 2016]

In the case styled Hearn Pacific Corporation v. Second Generation Roofing, Inc. (2016) --- Cal.App.4th ---, --- Cal. Rptr.3d ---, 16 Cal. Daily Op. Serv. 4637, 2016 WL 1757290, the Court of Appeal, First District, held that a claim for equitable contribution may be asserted by multiple insurers of the same insured and the same risk, each of which has an independent standing to assert a right for equitable contribution when it has undertaken the defense or indemnification of their common insured though this right is not the equivalent of standing in the shoes of the insured.

Hearn Pacific Corporation ("**Hearn**") was a general contractor on a project in Sonoma County for the construction of a mixed-use building. In 2007, the project's owner brought suit for design and construction defects against multiple parties, including Hearn and Second Generation Roofing, Inc. ("**Second Generation**"). Hearn cross-complained against Second Generation and other subcontractors, alleging causes of action for breach of contract, professional negligence, express indemnity, implied indemnity, equitable indemnity, breach of warranties, comparative negligence and contribution.

Two years later Hearn executed an agreement assigning its rights and interests under its subcontracts to two insurers, including North American Specialty Insurance Company ("**North American**"). Thereafter, Hearn settled with the plaintiff and all but two subcontractors, one of which was Second Generation. Later in the case, one of Hearn's attorneys filed a declaration in support of a motion for summary adjudication stating that, "Hearn's defending insurers are suing in Hearn's name as transferees of Hearn's contractual indemnity rights, including the right to obtain equitable contribution for defense costs incurred herein from co-indemnitors such as Second Generation Roofing, Inc."

Eventually the litigation terminated successfully in Second Generation's favor, with dismissal of the cross-complaint against it on procedural grounds. In the same order, the trial court awarded it \$30,256.79 in costs and granted a motion for attorney fees pursuant to a prevailing party attorney fee clause contained in the subcontract. The trial court entered a later order awarding attorney fees in the amount of \$179,119. Second Generation then moved under both Code of Civil Procedure §§ 187 and 368.5, and pursuant to the trial court's inherent powers, to amend both orders to name one of Hearn's two insurers, North American, as a judgment debtor owing the amounts awarded against Hearn.

The appellate court found that Second Generation had a liquidated right — adjudicated by the trial court's order — to collect its attorney fees and costs as a prevailing party. It is, reasoned the court, an abuse of discretion to refuse Second Generation's request to add the name of the real party in interest, Hearn's assignee, who pressed claims in the name of the party nominally adjudged liable by those orders. That relief is consistent with the law governing contractual attorney fees. Had Hearn's insurer exercised its right to formally substitute in as the real party in interest, rather than remain on the sidelines and sue in Hearn's name, it could have been held directly liable for Second Generation's prevailing party attorney fees under the subcontract, as an assignee. That is because an assignee's acceptance of the benefits of a contract containing an attorney fees clause, by bringing suit, constitutes an implied assumption of the attorney fee obligations, unless there is evidence the parties did not intend to transfer those fee obligations. And that is true even if, like here, there is only a partial assignment of contractual rights. Indeed, even outside the attorney fee context, an assignee's voluntary acceptance of the benefits of a contract may obligate the assignee to assume its obligations as a matter of law, even if the assignment agreement expressly excludes the obligations. Hearn's insurer — North American — cannot evade responsibility for paying Second Generation's costs and legal fees solely because of its tactical choice to keep Hearn's name, not its own, on the case caption. Concluded the appellate court, "We do not think the discretion afforded a trial court to continue an action in the transferor's name under [CCP] section 368.5 was meant as a get-out-of-jail-free card, to insulate the real party in interest from exposure to liability for costs and fees when the litigation they pursue concludes unfavorably. ♦"

# California Legislative Updates 2016

By Regina Silva, Esq.  
TYSON & MENDES

## Increase to California Minimum Wage

Effective January 1, 2016, the minimum wage increased from \$9/hour to \$10/hour. This wage increase also affects the salary requirement for Exempt employees, which requires (in part) that in order for an employee to meet the salary exemption the employee must be paid at least two times the minimum wage for full-time employment.

## Assembly Bill 1506 (amendments to Private Attorney General Act ("PAGA"))

Effective October 2, 2015, this legislation changes Labor Code section 2699 (PAGA law). Under the old law, if there was a defect in an Employee's wage statement, Plaintiff's counsel could pursue a cause of action for inaccurate paystubs under PAGA, without the employer being provided the opportunity to correct its deficient paystubs in order to avoid a claim for PAGA penalties for failure to provide an accurate wage statement. Under PAGA, an employee can recover penalties for himself and former/current employees for wage/hour violations. For the Labor Code provisions that do not set forth a penalty for that violation, PAGA has a catchall provision that allows each aggrieved employee to recover \$100 per pay period for an initial violation, and \$200 per pay period for each subsequent violation. Although PAGA penalties can only go back one year, the resulting penalties an employer could face for PAGA penalties could be detrimental to an employer. PAGA also allows for the recovery of attorneys' fees and costs.

The old law provided that before an employee could pursue a PAGA claim, that he/she needed to submit a notification letter to the Labor Workforce Development Agency ("LWDA") detailing the alleged wage/hour violations that the Employer had committed. The old law also provided the Employer (upon receipt of this notification letter to the LWDA) had 33 days to cure the alleged wage/hour violation. However, under the old law, the cure provisions did NOT apply to wage statement violations. Hence, an employer when notified that its paystubs were inaccurate (for example, because the paystub did not provide the ending date of the payroll week, or did not contain the employer's address), even if they corrected their paystubs within the 33 days of the LWDA notice, could not prevent a PAGA claim for

inaccurate paystubs from being lodged against it. Furthermore, due to changes to Labor code section 226, which took effect in 2013, employees no longer had the burden to show any actual injury as a result of a violation of Labor Code section 226, whether technical or not. Due to this change in the law, more employee attorneys have pursued a cause of action for failure to provide accurate wage statements, and have tacked on a claim for PAGA penalties due to the inability to cure a paystub violation.

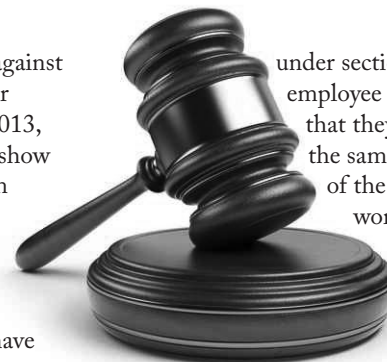
Under the new law, an employer who is notified that its wage statements are inaccurate due to a technical violation of Labor Code section 226(a)(6) or (8) has the right to "cure" the defects, and upon proper notification to the LWDA, can avoid a PAGA claim for inaccurate wage statements for these technical violations. A technical violation of this section is where the employer does not provide in a paystub the dates of the period for which the employee is paid, or the name and address of the employer.

What are the cure/notice requirements for an employer who has violated Labor Code section 226(a)(6) or (8)? What the new PAGA provision states is that within 33 calendar days of the LWDA notification of the inaccurate paystubs, the employer needs to show that it has provided a fully compliant itemized paystub to each affected employee for each pay period for the three-year period prior to the date of the written notification letter sent to the LWDA. It is unclear why this new law requires the employer to go back and fix three years worth of employee paystubs when PAGA claims can only go back one year.

It is important to note that this new law only affects an employer's exposure to PAGA penalties. This new law does not prohibit an employee from pursuing a claim (or class action) for failure to provide accurate paystubs under Labor Code section 226(a), regardless of whether or not the violation is technical. The statutory penalties for this violation are set forth in Labor Code section 226(e).

## Senate Bill 358- California Fair Pay Act

SB 358 amends California Labor Code section 1197.5 which currently sets forth the law on equal pay. What the new law does, however, is lessen the burden of proof required for employees who complain that they are not paid the same as their opposite gender. Specifically, before this new amendment,



under section 1197.5, an employee had to demonstrate that they were not paid the same rate as a member of the opposite sex who worked in the "same establishment" "for equal work on jobs the performance of which

requires equal skill, effort, and responsibility...." Per the amendment, "same establishment" has been deleted, and the employee only needs to show that he/she is not being paid at the same rate for "substantially similar work." "Substantially similar work" is to be viewed as a "composite of skill, effort, and responsibility, and performed under similar working conditions...."

The new amendment also now requires that the employer affirmatively demonstrate that the wage difference is based upon one of more of the following factors:

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. A bona fide factor other than sex, such as education, training, or experience.

While the above four factors are set forth in the prior law, this new law sets forth the requirements as an affirmative burden. In addition, the new law also added a caveat to the fourth factor, which diminishes its application. Specifically, in order to meet this four factor, the employer has to demonstrate that it is not derived from a sex-based differential in compensation, is related to the position in question, and there is an overriding "business necessity" justifying the wage difference. Moreover, the business necessity defense shall not apply if the employee demonstrates that an alternative business practice exists which would serve the same business purpose without producing the wage differential.

Under the new law, the employer must further demonstrate that its reliance on any of the factors is applied reasonably, and that one or more of the factors relied upon accounts for the entire wage differential.

The new law also added in a prohibition from discharging, discriminating or retaliating against an employee who invokes their own rights under this statute, or assists others in invoking their rights under the statute.

In addition, the new law added in a provision which prohibits an employer from restricting employees from disclosing their wages, discussing the wages of other, inquiring about other employee's wages, or aiding or encouraging other employees to exercise their rights under the statute.

Finally, the new law also amended the provision that requires employers to maintain records containing employee's wages, wage rates, job classifications, and other terms and condition of their employment from two years to three years.

This law took effect January 1, 2016.

#### **Senate Bill 432: Removal of "Alien" from the California Labor Code**

This new law removes the definition of the term "Alien" from the California Labor Code. This term was defined as any person who is not a born or fully naturalized citizen of the United States. This bill repeals a section of the Labor Code which set forth a prescribed order for the issuance of employment under public works contracts in the limited instance of extraordinary employment. That section provided a preference first to California residents, then to other states' residents living in California, and finally to those defined as "Aliens."

This law took effect January 1, 2016.

#### **Senate Bill 501: Modification to Wage Garnishment Restrictions**

This bill repeals the law relating to wage garnishments, and adds Section 706.050 to the Code of Civil Procedure. This new law reduces the prohibited amount of an individual judgment debtor's weekly disposable earnings which are subject to levy under an earnings withholding order from exceeding the lesser of 25% of the individual's weekly disposable earnings or 50% of the amount by which the individuals' disposable earnings for the week exceed 40 times the state minimum hourly wage (or local minimum wage if higher) in effect at the time the earnings are payable.

This law is effective July 1, 2016.

#### **Assembly Bill 304: Clarification to Sick Leave Law**

This bill clarifies the accrual and limitations set forth in California's sick leave law (Healthy Workplaces, Healthy Families Act of 2014), which was operative on January 1, 2015. This bill amends the Act in several respects. One, it clarifies that an employee

must work 30 days for the same employer in California in order to be eligible for sick leave. Second, this bill provides for two additional accrual methods to accrue sick leave- (1) the employee will earn 24 hours of paid sick leave by the date the employee's has worked 120 calendar days, or (2) where the employer has a PTO policy, the employee will accrue 8 hours of leave within 3 months, and can earn at least 24 hours of leave within nine months. Third, if the employer has an unlimited PTO policy, the written notification requirement can be satisfied by setting forth "unlimited" on the employer's notice of the new law to employees, or the employee's wage statement. Fourth, it clarifies that employers can pay out sick leave to hourly employees at either the regular rate of pay for the workweek in which the sick leave is used, or by dividing the employee's total wages by their total hours worked during the entire pay periods of the prior 90 days of employment. Fifth, it clarifies that that an employer need not reinstate accrued sick leave previously paid out to an employee upon their termination of employment, when the employee is reinstated. Sixth, it clarifies that no accrual or carryover is required if the employer provides the full amount of leave at either the beginning of each calendar year, at the year of employment, or on a 12-month basis.

The amendments to the Sick Leave law went into effect on July 13, 2015.

#### **Assembly Bill 1509: Anti-Retaliation Provision against Family Members of Employee Whistleblowers; Joint Liability Exclusion**

This bill amends Labor Code sections 98.6, 1102.5, and 6310, and prohibits employers from retaliating against an employee for being a family member of an employee who has or is perceived to have engaged in protected conduct or made a complaint which is protected.

This bill also clarifies that household good carriers are subject to the same exemption from joint liability as provided to motor carriers with respect to labor contractors who fail to pay wages (amendment to Labor Code section 2810.3).

This law became effective January 1, 2016.

#### **Assembly Bill 1513: Piece Rate Compensation Relief**

This bill created California Labor Code section 226.2 which follows recent case authority regarding the compensation of piece rate employees for non-productive time. Specifically, this new law states that piece rate employees are to be compensated for rest and recovery periods at a regular hourly rate of pay that is no less than the higher of (1) an

average hourly rate determined by dividing the total compensation for the workweek (exclusive of compensation for rest and recovery periods and overtime) by the total hours worked during the work week except for rest/recovery periods; or (2) the applicable minimum wage in effect which is the highest (i.e., federal, state, or local).

An employer who commits a good faith error in calculating the amount of non-productive time can avoid liability for civil penalties or liquidated damages, however must still pay the amount of non-productive time owed.

This bill also creates an affirmative defense for an employer who is accused of failing to pay rest and recovery periods and other non-productive time for time periods up to December 31, 2015, if the employer compensates its employees for the rest/recovery periods or non-productive time owed for the time period from July 1, 2012 to December 31, 2015, and provides notice to the Department of Industrial Relations by July 1, 2016 of its intent to compensate employees for this time.

This law became effective January 1, 2016.

#### **Assembly Bill 970-Expansion of Labor Commissioner's Powers**

This law amended several provisions of the California Labor Code. Labor Code section 558 is amended to now give the Department of Labor Standards Enforcement Labor Commissioner's power to issue citations for violations of local overtime laws, in addition to issuing citations for Labor Code and Industrial Welfare Commission Order violations. Labor Code section 1197 and 1197.1 are also amended to allow the Labor Commissioner to issue citations for violations of any state or local minimum wage laws, in addition to investigating violations of the Industrial Welfare Commission set minimum wage. Labor Code section 2802 is also amended to allow the Labor Commissioner to issue citations against employers who do not properly indemnify employees for incurred expenses. These amendments prohibit simultaneous issuance of citations by both the Labor Commissioner and a local agency for the same violations.

This law became effective January 1, 2016.

#### **Senate Bill 588-Enforcement of Judgments by Labor Commissioner**

This bill expands the authority of the Labor Commissioner to enforce judgments, and amends Labor Code section 98 in addition to adding a handful of Labor Code sections.

*continued on page 24*



## CALIFORNIA LEGISLATIVE UPDATES 2016 CONTINUED FROM PAGE 24

The Labor Commissioner now has the power to issue a lien on employer's property for amounts owed to employees, such as for unpaid wages, penalties, other compensation, and even interest. This bill also allows for liens against an employer's real or personal property, or levy against the employer's credit, money, or related property after a judgment has been entered against the employer. This law allows the Labor Commissioner, acting on behalf of the employees, to obtain the lien or levy against the employer. If an employer fails to satisfy a judgment within 20 days of receiving notice of a levy, this bill requires the employer to cease its business operations in California, or obtain a surety bond of up to \$150,000 (depending on how much of the judgment is unsatisfied). In addition, this law also holds businesses that contract with certain "property services" jointly and severally liable for wage violations of the service contractors (assuming the business is named in the underlying complaint).

Under this new law, wage liability is also extended to individuals who act "on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated" specific sections of the Labor Code including those relating to wages, overtime, willful failure to pay wages, and paystubs. Individuals who can be liable are those persons who are owners, directors, officers, or managing agents of the Employer.

This law was effective January 1, 2016.

### **Assembly Bill 622- E-Verify Misuse**

This bill adds Labor Code section 2814, and prohibits employers from conducting an E-Verify check of employment applicants who have not been extended an offer of employment, or those existing employees of the employer (unless doing so is required by federal law, or as a condition of receiving federal funds). E-Verify is an internet based system that allows employers to check the employment authorization status of individuals. Employers can now only check the employment status of those individuals for whom it has extended a job offer. Further, an employer is required to notify the potential employee immediately if the E-Verify system does not confirm that the individual is authorized to work in the United States. A violation of this statute will result in a \$10,000 penalty for the employer.

This law was effective January 1, 2016.

### **Assembly Bill 987: Accommodation Request=Protected Activity**

This Bill amended the California Fair Employment & Housing Act (FEHA) to now provide that employees who request accommodations for religion or disability constitutes legal activity and protected activity. Hence, an employer cannot retaliate against an employee who requests an accommodation for religious or disability reasons. This new amendment overturns the Court's decision in *Rope v. Auto-Chlor System of Washington, Inc*(2013) 220 Cal.App.4th 635.

This law was effective January 1, 2016.

### **Senate Bill 579: Time Off for School Activities**

This Bill amends California Labor Code section 230.8 and 233. Under existing section 230.8, which applies to Employers with 25 or more employees, an employer is prohibited from discriminating against or terminating an employee (who is parent, guardian, or grandparent) who takes up to 40 hours of unpaid time to participate in school activities for a child in a licensed "child day care facility," in kindergarten, or grades 1 to 12. The amendment changes "child day care facility" to "child care provider," allows time off to address a school emergency, and defines parent to include parent, guardian, stepparent, foster parent, grandparent, or person who stands in "loco parentis" to a child.

Under section 233, which applies to all Employers, an employer is required to allow an employee to use one-half of their accrued sick leave to care for a "family member" per the Healthy Workplaces, Healthy Families Act ("Act") of 2014. Under the Act, a family member includes a child of any age, parent, parent-in-law, siblings, etc. . .

This law was effective January 1, 2016.

### **Assembly Bill 583: Employment Protections for National Guard Members**

This bill amends state law relating to employment protections provided to National Guard Members who are called into state service by the California Governor, or federal service by the President of the United States due to an emergency, or reservists called to active duty. This bill extends the protections to members of the National Guard of other states, who work for a private employer in California, and are called to military service by their respective Governor of the other state, or by the President of the U.S.

This law was effective January 1, 2016.

### **Changes to California Family Rights Act ("CFRA")**

The California Fair Employment and Housing Council's made updates to the CFRA, which went into effect on July 1, 2015. Some of the updates include the following:

Definition of "covered employer" has been changed to now include successors in interest and joint employers. While a joint employer relationship is to be viewed on the "economic realities of the situation," the revised regulations provide various factors that need to be analyzed to determine if a joint employer relationship exists.

The definition of worksite is expanded to include "either a single location or a group of contiguous locations." Moreover, the definition of fixed worksite was also defined to be (1) the worksite to which employees are assigned as their home base; (2) the worksite which their work is assigned; or (3) the worksite to which they report.

An employee not eligible for leave because they have not met the requisite 12 months of employment, may become eligible for CFRA leave while on leave because leave to which an employee is otherwise entitled counts towards their length of service for coverage purposes.

The definition of "spouse" now includes registered domestic partners and same-sex partners in marriage.

The amendment adds additional detailed requirements that an employer must meet in order to defend a refusal to reinstate on the basis that an employee is a "key employee."

An employer now has an express defense that an employee who fraudulently obtains or uses CFRA leave is not protected by CFRA's job restoration or maintenance of health benefits provisions.

An employer must designate the measuring period in which the computation of time is made for purposes of determining whether the employee is eligible, and if the employer changes its measuring period, it must provide 60 days notice.

If an employee's work schedule varies from week to week, a weekly average of the hours scheduled over the 12-month period prior to the commencement of the CFRA leave is used to calculate the employee's 12-week entitlement.

If it is physically impossible for an employee to use intermittent leave, or work a reduced schedule, then the entire period that the employee is absent must be designated as CFRA leave and count against the CFRA entitlement. However, if the employee is able to perform other aspects of his/her work, those duties must shorten the time designated

## LUNCH AND LEARN

# FORENSIC ACCOUNTING: What it is and How the Defense Can Use It

By Patrick Kearns  
WILSON ELSER

as CFRA leave.

The employer's required response date to any CFRA leave request is changed from 10 calendar days to 5 business days after receiving the request.

An employer may not contact a health care provider for any reason other than to authenticate a medical certification. An employer must have a "good faith, objection reason" to doubt the validity of a medical certification, and request a second opinion.

The regulations expand the use of accrued vacation time or other paid accrued time off for an otherwise unpaid portion of CFRA leave.

Covered employers are required to post a notice of the CFRA's new provisions and information concerning the procedures for filing complaints of violations of the CFRA in conspicuous places where it can readily be seen. ♦

**ABOUT THE AUTHOR:** *Ms. Silva is a graduate of University of the Pacific. She is Director of Employment Practices in the firm's Employment Practices Group. She is a former prosecutor and has considerable trial experience. Contact her at [rsilva@tysonmendes.com](mailto:rsilva@tysonmendes.com)*

## LUNCH AND LEARN JUDGE

MICHAEL CUTRI ON

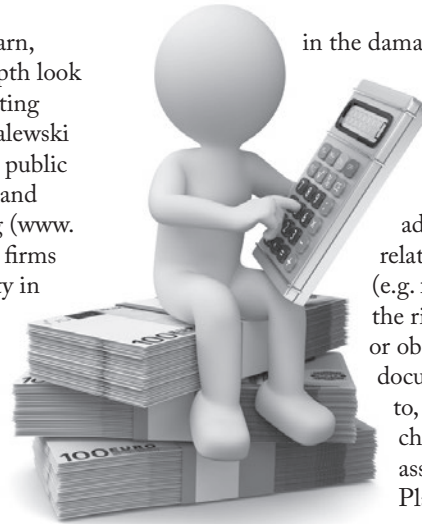
ADMINISTRATIVE LAW CONTINUED  
FROM PAGE 3

or outside litigation. And most importantly, he provided some basic informational background and shortcuts to clarify and simplify appearances and procedures in what may otherwise be an unfamiliar legal settings. Key take away: practitioners should familiarize themselves with the very different rules governing administrative proceedings, and consider contacting an unfamiliar agency for basic ground rules before appearing. ♦

At the SDDL's April Lunch & Learn, attendees were provided an in depth look into the world of forensic accounting and its use in defense cases. Kate Kowalewski is an accomplished attorney, a certified public accountant, a certified fraud examiner, and the founder of Kowalewski Consulting ([www.klcsd.com](http://www.klcsd.com)); a firm that works with law firms in both a consulting and expert capacity in matters of financial accounting. Ms. Kowalewski provided insight into issues of forensic accounting and how they factor into lawsuits more often than we would think.

Ms. Kowalewski discussed the basics of "what" forensic accounting means and the various roles a forensic accountant can take in the defense of a lawsuit. More than just serving as an expert to testify in a matter, a forensic accountant can consult during all phases of case, performing financial tracing and audits of financial records or damages-related evidence; performing damage calculations for personal injury or wrongful termination matters; assessing business disputes and valuations, and even examining family-law cases where property or financial ownership interests are in dispute.

Ms. Kowalewski drew on her long experience as both an attorney and an accountant, and discussed how to identify and avoid common mistakes made by Defendants



in the damages portion of their cases, including failing to consider or perform adequate damages-related discovery (e.g. failing to "ask the right questions" or obtain the correct documents); failing to, or insufficient challenges to the assumptions by the Plaintiffs or their experts applied to damages (e.g. faulty lost

earnings projections that do not accurately consider past and future accounting principles); and failing to conduct the appropriate industry specific research. Ms. Kowalewski stressed that a lawsuit does not need to be a financial or account-based case to benefit from the use of a forensic accountant.

As always, attendance at the Lunch & Learn presentations are FREE for SDDL members, a catered lunch is provided, and the presentations qualify for MCLE credit. ♦

# San Diego Defense Lawyers



## 2016 Juvenile Diabetes Research Foundation Golf Benefit



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# SAVE THE DATE!

## Friday, September 9, 2016 at 1:00 p.m.

**Mark your calendars! On Friday, September 9, 2016 at 1:00 p.m., the San Diego Defense Lawyers will descend upon Coronado Golf Course to show off our finely-tuned golf skills and enjoy an afternoon Filled with friends, colleagues, and mulligans. A portion of the proceeds will benefit the Juvenile Diabetes Research Foundation.**

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# SDDL Recognition of Law Firm Support

**T**he *Update* traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the *Update* will no longer include a list of current members. We have observed over the course of the last year or so an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the *Update* is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the *Update*.

In place of the membership list, the SDDL Board will instead recognize some of the outstanding law firms that contribute to SDDL's success. Each edition will feature two categories for recognition: 1) The 100% Club – this recognizes law firms with two or more attorneys where all attorneys in the firm are members of SDDL; and 2) The 10 Firms with the Most SDDL Members – this recognizes firms who have the most amount of attorneys as members of SDDL. If there are any errors in the information provided, please email [rmardian@hcesq.com](mailto:rmardian@hcesq.com), so that corrections can be made for the next edition.

## The 100% Club

- Belsky & Associates
- Butz Dunn & DeSantis
- Gentes & Associates
- Grimm Vranjes & Greer LLP
- Hughes & Nunn, LLP
- Law Offices of Kenneth N. Greenfield
- Letofsky McClain
- The Roth Law Firm
- White Oliver & Amundson APC

## The 10 law firms with the highest SDDL membership

- #1 Lorber, Greenfield & Polito, LLP  
– 30 members
- #2 Tyson & Mendes LLP – 23 members
- #3T Neil, Dymott, Frank, McFall & Trexler, APLC – 16 members
- #4T Grimm Vranjes & Greer LLP  
– 16 members



*SDDL Board of Directors (from left to right): Ben Cramer, Gabriel Benrubi, Eric Deitz, Janice Walshok, Beth Obra-White, Stephen Sigler, Dianna Bedri (Executive Director), Patrick Kearns, Ken Purviance, Vanessa Whirl, Robert Mardian and Colin Harrison*

#5T Balestreri Potocki & Holmes  
– 12 members

#5T Wilson Elser Moskowitz Edelman & Dicker LLP – 12 members

#7 Butz Dunn & DeSantis – 11 members

#8T Farmer Case & Fedor – 9 members

#8T Dummit, Buchholz & Trapp  
– 9 members

#10 The Law Offices of Lincoln, Gustafson & Cercos, LLP – 8 members ♦

## SDDL's 5th Annual Tailgate Party August 19, 2016



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