San Diego Defense Lawyers
P.O. Box 124890
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The Update

Fall 2017

San Diego Defense Lawyers

ETHICAL PITFALLS FOR LAWYERS IN A SOCIAL MEDIA WORLD

By Richard Huver, Esq.
Mediator at WCRG

Social media is taking over the world. If you do not have a professional Facebook page, a LinkedIn account, do not communicate over a group Listserve, or use Twitter, Instagram, etc., to interact with colleagues, potential clients, or for marketing purposes, you may at a competitive disadvantage. Regardless of what social media platform you use in your practice now or will in the future, you need to know the ethical rules that apply, particularly ones you might be unknowingly violating. This article will touch on a few of the more prominent rules.

What Constitutes A "Communication"?

The first question you must answer is whether your post, tweet, or message is considered a "communication" under the Rules of Professional Conduct. Simply put, if you say something in any type of social media platform that is considered a "message or offer by or on" your behalf "concerning the availability for professional employment," then Rule 1-400, and others, are triggered. In addition, any post on social media, on a ListServe, or some other platform that is or is construed as an offer of your services is likewise governed by these ethical rules. Assuming your post is a "communication," these are some of the requirements:

1. "Communications" Must Include Words Like "Advertisement" or "Newsletter"

Anything deemed a "communication" must have words like "Advertisement" or "Newsletter" in 12-point font on the first page. This requirement is easy to comply with for written letters or your website. Social media postings are another thing entirely. The simplest way to comply is to avoid posting anything that could be construed as a "communication" under the Rules. There are many examples in the California State Bar's website of considered postings that are not "communications." The State Bar also recently addressed circumstances under which a Blog would or would not be considered a "communication." (See, Formal Opinion 2016-196.)

The Standing Committee on Professional Responsibility has already addressed complaints that compliance with these and other ethics rules in our social media world is "overly burdensome" and destroys the "conversational and impromptu nature of a social media status posting." The Committee's response - "change the form of advertisement [social media post] so that compliance is possible ... or comply!" (See, Formal Opinion 2012-186.)

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President's Message

By Bethsaida Obra-White, Esq.
HAIGHT BROWN & BONESTEEL LLP

Although we approach the end of summer, several important SDDL activities remain on the horizon. We have four additional Lunch and Learn programs and an evening seminar scheduled, one of which is to include competence issues (formerly substance abuse). We were also fortunate enough to offer our members four hours of programs on legal ethics and a one hour program covering Recognition and Elimination of Bias in the Legal Profession and Society – thereby covering all of The State Bar of California's special MCLE requirements in a single year. I encourage you to attend our remaining continuing legal education programs in order gain further insight into a topic affecting your practice, nourish yourself and mingle with fellow SDDL members. Alternatively, we are always looking for new speakers and interesting topics to address, so please do not hesitate to serve as a speaker or forward potential topics to our attention at sddlinfo@sddl.org.

By the time this issue of The Update is published, our annual golf tournament would have taken place on September 8, 2017 at the beautiful Coronado Golf Course. Please check the "Events" tab of our website periodically in order to view photos from the tournament and other SDDL events.

Our annual Mock Trial Competition will take place on October 19, 20 and 21, 2017. Several teams from various law schools throughout the country have registered for this competition that has only grown in size and stature over the years. The skill, dedication and confidence exhibited by the competitors is quite impressive and, in the end, you will surely find the whole experience rewarding. If you have not already signed up as a judge, please consider doing so. We could not put on this event without the support of attorneys, judges and mediators who generously volunteer their time.

Additionally, we will hold our annual Trivia Night in the fall so get your teams together and prepare to compete for our coveted Ein-Stein award. Similar to our previous happy hours at Nason's Beer Hall at the Pendry Hotel, joint events with ASCDC and CASD, as well as our annual Padres Game and pre-game tailgate at Mission Brewery, our upcoming Trivia Night is expected to be a great success!

Our 34th Annual Installation Dinner is scheduled to take place on Saturday, January 27, 2018 at the Omni San Diego Hotel. We hope that you and your firms will join us in honoring our Defense Lawyer of the Year as well as Bench and Bar Award recipient. We will present a check to the Juvenile Diabetes Research Foundation per tradition, and will also award new scholarships to three well-deserving law students.

Finally, an organization is only as strong as its membership base and its growth is largely dependent upon the participation of its members so, whenever possible, please renew your membership, encourage others to join, attend our events, run for a board position and/or volunteer. I appreciate your time and thoughts and look forward to seeing you at the next event! ■

MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are $125.00 for new members for the first year and $160.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org.

THE UPDATE

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SDDL Recognition of Law Firm Support

The 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 the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email evan.kalooky@dbtlaw.org so that corrections can be made for the next edition.

#1 - Tyson & Mendes - 35 members

#2 - Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson –18 members

#3 - Balestreri Potocki & Holmes – 15 members

#4 - Wilson Elser Moskowitz Edelman & Dicker LLP – 13 members

#5T - Farmer Case & Fedor – 12 members

#5T - Grimm Vranjes & Greer LLP – 12 members

#7T - Horton, Oberrecht, Kirkpatrick & Martha, APC – 10 members

#7T - Winet Patrick Gayer Creighton & Hanes – 10 members

#9T - Ryan Carvalho & White LLP – 8 members

#9T - Wingert, Grebing, Brubaker & Juskie, LLP – 8 members

#11 - Lincoln, Gustafson & Cercos – 7 members

#12T - Dunn DeSantis Walt & Kendrick, LLP – 6 members

#12T - Lorber Greenfield & Polito, LLP – 6 members

#12T - Lotz Doggett & Rawers LLP – 6 members

#15T - Carroll Kelly Trotter Franzen & McKenna – 5 members

#15T - Davis Grass Goldstein & Finlay – 5 members

#15T - Dummit Buchholz & Trapp – 5 members

#15T - Walsh McKean Furcolo LLP – 5 members

#19T - Hughes & Nunn, LLP – 4 members

#19T - Klinedinst PC – 4 members

#19T - Pettit Kohn Ingrassia Lutz & Dolin – 4 members

#19T - The Roth Law Firm – 4 members ■

SDDL Board of Directors (from left to right): Gabriel Benrubi, Vanessa Whirl, Evan Kalooky, Eric Deitz, Zachariah Rowland, Janice Walshok, Colin Harrison, Beth Obra-White, Dianna Bedri (Executive Director), Ben Cramer, Patrick Kearns and Laura Dolan

Special Thanks

SDDL wishes to thank all of these gracious sponsors for ensuring that the 2017 Installation Dinner was a memorable night which focused on the important charitable efforts that our group prides itself on. ■

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MCLE LUNCH AND LEARN

Negotiating ESI Protocols During the Meet and Confer Process

By Zach Rowland
DUNN DESANTIS WALT & KENDRICK

On May 30, 2017, SDDL presented an MCLE regarding the negotiation of ESI protocols during the discovery process presented by Women in EDiscovery and specifically Lee Bays, of counsel for Robbins Geller; Catherine Mirhady of Stradling Yocca; and Lauren Doucette of Klinedinst.

The presentation made clear that in California an attorney's duties of competency include handling e-discovery, including the production of ESI based on an ethics opinion issued by the State Bar. In negotiating ESI Protocols with the opposing party the following topics should typically be addressed: disclosure of custodial list; disclosure of ESI sources; preservation; collection methods; search terms; processing specifics; and production format.

Additionally, counsel should be sure to implement a litigation hold at the outset of a case that extends to the client's ESI, including any and all mobile devices or cloud storage. With respect to review of data, the trend is toward using analytic tools to conduct large scale ESI review. Such tools include predictive coding; categorization; clustering; concept searching; random sampling; stratified sampling; and key word expansion. These tools and others can greatly increase the efficiency and reduce the cost of analysis of large amounts of ESI. In terms of outsourcing, a number of professional consulting companies are available to assist counsel with handling ESI protocol negotiation and production. ■

2017 MCLE Events Hosted By SDDL

Bottom Line

Title: Abramian v. Davtyan, et al.

Case No.: Los Angeles Superior Court Case No. BC595502

Judge: Hon. Michael B. Harwin, Dept. M, Van Nuys

Type of Action: 3 car freeway rear-end auto

Type of Trial: Jury

Length of Trial: 5 days

Verdict: $10,000; however, since the defense prevailed on its Offer to Compromise (see below) and the parties had an undisclosed high/low agreement of $0/$150,000, the parties reached a post-verdict walkaway agreement

Plaintiff's Counsel: Martin J. Kanarek, Carpenter, Zuckerman & Rowley, Beverly Hills

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

Damages and/or injuries claimed: Neck sprain and claim of low back injury with diskectomy surgery; medical specials totaling approximately $156,334; with no loss of earnings claim

Plaintiff's Settlement Demand: $250,000 time limit policy demand

Plaintiff's Request at Trial: $300,000

Defendant's Settlement Offer: $15,000, CCP §998

Upcoming Events

September 16, 2017
33rd Annual Red Boudreau Trial Lawyers' Dinner at the U.S. Grant Hotel (co-hosted by SDDL)

October 19–21, 2017
27th Annual SDDL National Mock Trial Competition

November 3, 2017
"Solutions Summit: Eliminating Sexual Harassment, Sexism and Bullying in the Workplace" at Point Loma Nazarene University (co-sponsored by SDDL)

Which is Better, eDiscovery in the Cloud or eDiscovery in a Data Center?

By Adi Elliott
EPIQ SYSTEMS, INC.

This commonly asked question is actually a false dichotomy – in reality, neither the cloud nor a data center is better, because the cloud *is* a data center. "The cloud" is often used as a buzzword to give the impression of technological sophistication. Some companies that use cloud-based IT services promote themselves as being "in the cloud," implying that this makes their products and services somehow "high tech" and therefore high value. But the fact that a company operates in the cloud does not really tell us anything about the quality of its applications. And it does not, by itself, provide any net benefit to the end user.

The Cloud: Reality vs. Hype

Before "the cloud," businesses would have to make large, up-front investments in both hardware (computing, networking, data storage systems) and software (the applications that run on that hardware) simply to get basic parts of a business, such as customer relationship management (CRM), enterprise resource planning (ERP), email, etc., off the ground. The problems with this were twofold:

You had to pay the up-front costs whether or not you had underlying business to support these costs and;

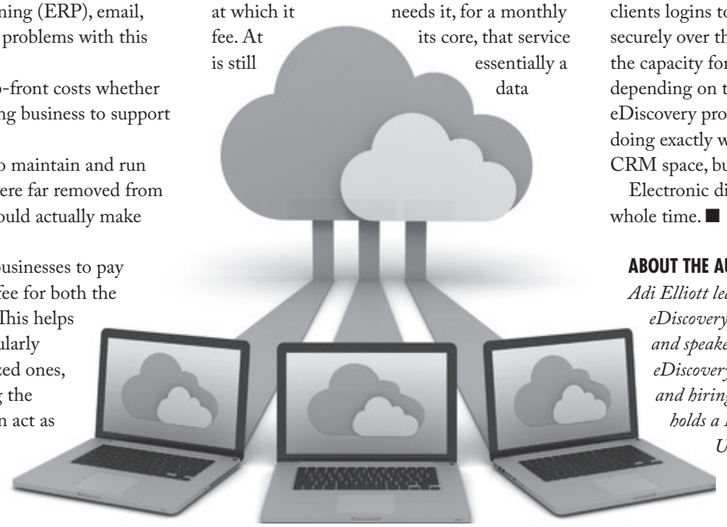
It forced companies to maintain and run large cost centers that were far removed from the way the company would actually make money.

"The cloud" enabled businesses to pay a usage-based monthly fee for both the hardware *and* software. This helps many companies, particularly small or highly-specialized ones, by significantly reducing the overhead costs that often act as barriers to market entry and expansion.

Today, the cloud has made it possible to affordably "pay as you go" for the immediate use of someone else's data center and software instead of incurring a large up-front infrastructure cost to be amortized over time and then separately procuring software to run on that hardware.

One of the first examples of this was Salesforce.com. Salesforce created a CRM application accessible via the internet that could be used and paid for on a monthly basis, starting at a single user and scaling up as necessary. It is important to note that Salesforce was a "cloud" to its clients, but not to itself.

Companies now have the option to subscribe to a service that provides all the functionality their company needs, at the scale at which it needs it, for a monthly fee. At its core, that service is still essentially a data center with software, "virtual" in the sense that the subscriber does not see or handle the underlying infrastructure, which is owned and managed by the cloud provider.



Beware Cloud-Based Marketing Hype

When someone touts that their technology is "cloud-based," it is important to understand who is getting the benefit of the cloud. The real benefit of the cloud is a business process benefit to the company using it; it does not necessarily provide direct benefit to the end users of that company's products or services. The cloud gives companies who do not have the interest, resources, or expertise to make large up-front investments in hardware and software to solve a discreet business problem that are not core to how the business makes its money.

What Does "The Cloud" Mean for eDiscovery?

If you think about it, the eDiscovery industry has always been "cloud"— before the term cloud was cool. By managing the hardware and software ourselves, giving our clients logins to access these applications securely over the internet, and providing the capacity for them to scale up or down depending on the demands of the project, eDiscovery providers—as a whole—were doing exactly what Salesforce was doing in the CRM space, but for our clients.

Electronic discovery has been "cloud" this whole time. ■

ABOUT THE AUTHOR

Adi Elliott leads the definition of Epiq's global eDiscovery strategy. He is a frequent author and speaker on the topics of the business of eDiscovery, technology-assisted review, and hiring and training top talent. He holds a Bachelor of Arts degree from the University of Illinois-Chicago.

Overcoming Implicit Bias in the Workplace

By Kate Besch
TYSON & MENDES

What is implicit bias?

Have you ever wondered why the demographics of CEOs and those in leadership positions remain largely homogenous regardless of a diverse workforce? Or why certain physical attributes, such as being tall, are associated with leaders? Unconscious associations, or implicit bias, may be part of the reason.

While many companies understand and take active measures to prevent explicit bias in the workplace, the danger of implicit bias often remains unaddressed. Bias can be defined as prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair. Implicit bias remains problematic, in part, because it is often difficult to observe. Implicit bias stems from the attitudes and beliefs we hold about a person or group on *subconscious level*. Unlike explicit bias, implicit bias occurs subconsciously. Thus, the decisions and actions resulting in bias may not even be known to the person who holds the bias.

Why should we care about implicit bias?

Before addressing suggestions to overcome bias, an examination of the reasons you should care about bias, beyond complying with antidiscrimination laws, is in order. Research indicates gender disparity exists across many fields. For example, as of 2016, fewer than 5% of Fortune 500 CEOs were women, women accounted for only 17% of the highest positions in the top 200 law firms, and only 19% of congressional representatives and 12% of state governors were women.[1] Implicit bias hampers diversity, which often leads to increased productivity and profits. Studies show the benefits of diversity include innovation, business growth, increased problem solving, higher earnings and returns on equity, and increased creativity.[2]

How do you overcome implicit bias?

Since diversity benefits companies, employees, and clients, how can we best address implicit bias? On an individual level, the elimination of implicit bias begins with simply identifying one's biases. One resource for identifying biases is Project Implicit, which offers online tests to evaluate biases based on 14 different criteria ranging from weight to race to sexuality.[3]

The American Association of University Women (AAUW) offers the following strategies for individuals to overcome implicit bias: focus on concrete positive and negative factors rather than "gut" feelings, notice when your responses and decisions may have been caused by bias and stereotypes, think about people who positively defy expected stereotypes as examples, and make an effort to think about members of stereotyped groups as individuals.[4]

What can my company do to address implicit bias?

On an institutional level, a few intentional practices can remove the opportunity for bias and assist in eliminating implicit bias. One simple practice companies can implement is anonymous job screening of applicants. Redacting information revealing a candidate's name, address, and age, allows decision makers to evaluate the experience and skills candidates may bring to the job. Optimally, anonymous screening will reduce implicit bias and result in employees with a broad range of interests, backgrounds, and perspectives.

With respect to current employees, implementing a structured evaluation process reduces implicit bias by allowing employees to be reviewed in the same way. The Wall Street Journal reports implicit gender bias often manifests in performance reviews, with females being critiqued for coming on too strong and their accomplishments being attributed to team efforts, while males are commended for assertiveness, independence, and self-confidence.[5] The Clayman Institute for Gender Research finds women are often held to a higher standard in evaluations, both by themselves and the evaluators regardless of the evaluator's gender.[6] Using the same criteria to consistently evaluate employees is one tool to reduce the effects of implicit bias in performance reviews. Additional measures to reduce implicit bias are to implement mentorship programs, examine parental leave policies, and formalize gender equality initiatives.

Ensuring diversity and inclusion in decision making, planning, and leadership is another way to reduce the effects of implicit bias. Promoting diversity and inclusion in the workplace can be implemented by formal measures such as stating commitment to building a diverse and inclusive culture, banning "culture fit" as a reason to reject candidates, and offering workshops, as well as simple actions like checking the temperature in the office and pointing out interruptions in meetings.[7]

Google, Facebook, and Coca-Cola are among many companies who now offer implicit bias training. Other companies have developed innovative approaches to eliminate implicit bias such as creating small groups for employees to discuss issues arising in their daily work lives, offering easy access to employee relations personnel, or providing mentorship opportunities. ■

(Endnotes)

1 McGill, Alexis J. "How Gender Roles, Implicit Bias and Stereotypes Affect Women and Girls." Institute for New Economic Thinking 27 Oct. 2016.

2 Walter, Ekaterina. "Reaping the Benefits of Diversity for Modern Business Innovation." Forbes 14, Jan. 2014.

3 Project Implicit's tests can be accessed at https://implicit.harvard.edu/implicit/selectatest.html.

4 Miller, Kevin. "How to Fight Your Own Implicit Biases." AAUW Leadership 30 Mar. 2016.

5 Silverman, Rachel E. "Gender Bias at Work Turns Up in Feedback." The Wall Street Journal 30 Sept. 2015.

6 Silverman, Rachel E. "Gender Bias at Work Turns Up in Feedback." The Wall Street Journal 30 Sept. 2015.

7 Kim, Jennifer. "50+ Ideas for Cultivating Diversity and Inclusion in the Workplace." Linked in Talent Blog 14 Mar. 2017.

Expert Testimony Required When Litigating Reasonable Value of Medical Bills

Leslie M. Price, Esq.
TYSON & MENDES

The landmark decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 129 Cal.Rptr.3d 325, drastically reduced recoverable medical specials in personal injury cases where plaintiff's medical bills were covered by health insurance. One response from the plaintiffs' bar has been an increase in cases where plaintiffs have treated on a lien basis in situations where the plaintiff had healthcare coverage available and where plaintiff did not have coverage. Courts have recently held the full amount of the medical bills remains admissible in situations where an uninsured plaintiff receives lien-based treatment. (See, *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 194 Cal.Rptr.3d 364.)

In these cases, the battle is just beginning once plaintiff signs a lien agreement for his or her treatment. *Howell, supra*, at p. 555 instructed, "[t]o be recoverable, a medical expense must be both incurred and *reasonable*." The trier of fact, whether it be the court or a jury, will consider the evidence as to what is "reasonable." Consequently, expert opinion testimony as to the reasonableness of medical bills can be critical to reduce medical special damages as demonstrated in the very recent Court of Appeal decision from the Second District, *Goel v. Regal Medical Group, Inc.* (May 23, 2017) 2017 WL 2242981.

You Don't Always Get What You Want

The plaintiff Goel is the medical corporation for cardiologist Dr. Sanjiv Goel. Goel provided emergency intervention procedures to four patients at a local hospital. Previously, Goel terminated all insurance contracts he had with health care insurers. Regal Medical Group, Inc. ("Regal") covered the four patients under a medical plan. Goel billed Regal $275,383.16 total for services provided to the four patients and Regal only paid $9,660.86. Goel sued Regal for difference.

The sole issue in this decision was the "reasonable and customary value" of his services. Dr. Goel testified he set the amounts for the services billed based upon his training and practice, skill set, his opinion as to the value of his services, and personal risk for exposure to radiation performing the procedures. He also introduced evidence of what he was paid for his services when his charges were undisputed. Regal offered expert opinion testimony based on methodology determining the fair market value of the services provided by referencing a regional database and by comparing the amounts paid by Regal to Goel with amounts paid by Medicare.

The trial court found in favor of Regal, crediting the testimony of their expert. Goel appealed, contending the trial court erred in admitting the expert's testimony because Medicare rates were irrelevant, as were the rates other providers charged or were paid. Goel relied on the decision in *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 172 Cal.Rptr.3d 861. The Court of Appeal here determined Goel's interpretation of the decision in *Children's Hospital* was too narrow.

Evidence As To The Market Value Of Services Should Always Be Relevant

The Court of Appeal interpreted the decision in *Children's Hospital* to "…require consideration of a 'wide variety of evidence' bearing upon the reasonable value of those services." (*Goel v. Regal Medical Group, Inc.* (May 23, 2017) 2017 WL 2242981, at *5.) The trial court has great latitude in determining relevancy. The Court of Appeal declined to hold Medicare rates were irrelevant as a matter of law or that the trial court should have been limited to a consideration of the fees accepted by Goel in the determination of the reasonable value of the services.

The parties remain free to argue their contentions as to the probative value of the evidence. Those arguments, however, should not prevent relevant evidence from being admitted.

Conclusion

While the *Children's Hospital* and *Goel* decisions did not involve personal injury claims, they are nonetheless instructive in defending claims for medical specials. The Court of Appeal in *Children's Hospital* quoted *Howell* in support of the proposition that a provider's charges for services alone do not determine the market value of the services. "[A] medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value." (*Children's Hospital, supra* at p. 1275.)

Similarly, in personal injury claims, the defense must challenge the testimony of the medical provider who rubber stamps full lien amounts as the reasonable value of treatment. As in the *Goel* case, providers commonly treating plaintiffs on a lien basis and charge amounts far above the fair market value of those services. Many jurors are aware of the discrepancy between what medical providers charge and are paid, and are receptive to testimony consistent with their experience.

Where the medical bills have not been paid, plaintiffs will argue the full lien amounts are admissible at trial. However, the door remains open for the defense to rebut those amounts with expert witness testimony. Based on the *Goel* decision, the defense expert should continue to analyze Medicare reimbursement rates as an indicator of the reasonable value of medical treatment based on what providers accept as payment in full from a variety of payors for the specific treatment at issue in the case. ■

ABOUT THE AUTHOR

Leslie M. Price is an associate who specializes in personal injury and general liability litigation.

Tyson & Mendes Obtains Defense Verdict in $23 Million Toxic Tort Jury Trial

LOS ANGELES (July 2017) – In a carefully watched case, a Ventura County Superior Court jury rejected a $23 million demand following a contentious 10-week toxic tort trial, determining that three companies were not liable for a boy's birth defects after his mother claimed she was exposed to pesticides. Tyson & Mendes' Los Angeles partner Kevin Place and San Diego associate Kathryn Lee defended the trial, along with three other defendants, against a minor plaintiff – represented by Waters Kraus & Paul – who alleged in-utero exposure to toxic chemicals had resulted in permanent disabilities.

The plaintiff's claims totaled $23 million and included future medical bills, a life care plan, future loss of income and past and future pain and suffering. The jury returned a defense verdict in favor of Tyson & Mendes' client Ramco Enterprise, as well as Soilfume Inc. which operated the farm in 2007, and T.T. Miyasaka Inc., the half owner of Soilfume.

Ultimately, the jurors determined the three companies were not liable for the serious craniofacial birth defects sustained by plaintiff, now nine years old. The lawsuit filed on behalf of the child claimed he was damaged during a critical period of fetal development because his mother, an employee of Ramco Enterprises, was sprayed with dangerous pesticides while working in Ventura County berry fields.

According to Place, his team prevailed by illustrating the implausibility of the plaintiff's mother's story, as well as the lack of a causal connection between exposure to the pesticide and plaintiff's birth defect. "While we felt tremendous compassion for plaintiff, ultimately, there was no evidence supporting his claims – effectively diffusing potential juror emotion in the face of plaintiff's significant disabilities," Place said. The defense team succeeded by employing core techniques of accepting responsibility, giving a defense number, and personalizing the corporate defendant. ■

Plaintiff determined the car had not been towed and made an insurance claim with his insurer, Defendant Wawanesa, for the theft of his Camaro.

Wawanesa began its investigation of the claim and determined that certain factors, namely the existence of the transponder key, making the car very difficult to steal, warranted transferring the claim to the Special Investigations Unit ("SIU"). Wawanesa took recorded statements of Plaintiff and his family members, and Wawanesa found inconsistencies in the recorded statements that required further investigation and document production from Plaintiff. The parties then hired attorneys, which slowed down the pace of the investigation. Wawanesa also felt that an Examination Under Oath ("EUO") of Plaintiff was warranted, which was not scheduled until November of 2013. Plaintiff received the EUO transcript in December of 2013, and returned it to Wawanesa in February of 2014.

In the meantime, Plaintiff filed his lawsuit against Wawanesa in January of 2014. Pursuant to the terms of Plaintiff's insurance policy, he was to sign the EUO under penalty of perjury before Wawanesa was obligated to pay the claim. After Wawanesa received Plaintiff's signed EUO transcript back, Wawanesa paid Plaintiff's claim in full to US Bank, the leaseholder and owner of the Camaro.

Plaintiff's Contentions: Plaintiff contended that Wawanesa breached the insurance contract and acted in bad faith by taking too long to investigate the insurance claim, asking for unnecessary information and documents from Plaintiff, and having Plaintiff submit to an EUO after he had already undergone two recorded statements. Additionally, Plaintiff contended that he was forced to bring the instant lawsuit in order for Plaintiff's claim to get paid. Further, Plaintiff contended that Wawanesa caused him severe emotional distress because he felt abused by the claims investigation.

Defendant's Contentions: Defendant contended that it did not breach the insurance contract nor commit insurance bad faith as it paid Plaintiff's claim after a reasonably necessary investigation. Any alleged delays in the investigation of Plaintiff's insurance claim were caused by Plaintiff and/or his attorney. Wawanesa also contended that Plaintiff's preexisting psychological disorders were the source of his emotional distress, rather than Wawanesa's behavior.

Verdict: 11-1 defense verdict, the jury found no breach of contract and therefore no insurance bad faith

998 Offers: Defense offered $15,001 and Plaintiff demanded $299,995 ■

Title: Sharon Denise Julien v Sharp Memorial Hospital, et al.

Case No.: San Diego Superior Court Case No. 37-2016-00003221-CU-PN-CTL

Judge: Hon. Randa Trapp

Type of Action: Negligence Per Se (violation of HIPAA/CMIA); Medical Malpractice (dismissed the first day of trial); Unruh Civil Rights Violation; and Intentional Infliction of Emotional Distress

Type of Trial: Jury

Length of Trial: 5 days and 30 minutes of deliberations

Plaintiff's Counsel: Doc Anthony Anderson, III, Esq. of Law Offices of Doc Anthony Anderson, III, San Diego

Defense Counsel: Stephen T. Sigler, Esq. of NEIL DYMOTT

Plaintiff's Expert Witnesses: None designated

Defense Expert Witnesses: Davina Leary, RN

Factual Background: On September 4, 2015, Plaintiff went to Sharp Memorial Hospital for chest pain and severe anemia due to prior heavy bleeding. She had an extensive history of menorrhagia with prior periodic transfusions. Post-transfusion, she was admitted for monitoring and further transfusions. Claims of premature discharge leading to an "emergency" were dropped the first day of trial.

Plaintiff claims a charge nurse forced her out of Sharp Memorial Hospital and racially profiled the African-American plaintiff by offering a taxi voucher. She further claimed the nurse stated, with one of the patient's friends present, that there was nothing they could do for the patient as she had "Stage IV uterine cancer." Plaintiff claimed to have never heard of this diagnosis previously and that it violated privacy rights and caused her to suffer severe emotional distress.

Argument and testimony showed plaintiff asserted uncertainty of actually having a cancer diagnosis, despite alleging emotional distress. Multiple prior physicians testified to discussions with plaintiff about cancer concerns and the actual confirmed diagnosis. This included the need for specific treatment for bleeding issues and cancer several years prior. A prior OB/GYN confirmed positive pathologic diagnosis of cancer and discussion and counselling of plaintiff. A physician also identified discussion of the cancer diagnosis during the subject stay and the need for plaintiff to follow up for post-stay treatment.

Although plaintiff was cleared for discharge the night prior, she was allowed to stay overnight. Plaintiff admitted the morning discharge discussion included her stating she would leave if medically cleared, but that she needed to stay due to lack of a ride home. The nurse only offered the voucher after plaintiff identified her dilemma. Further, testimony from the defense expert, nurses, and hospital staff identified the voucher system is used routinely, regardless of ethnicity, for patients identifying an inability to get home.

The nurse's discharge discussion occurred in the plaintiff's private room with plaintiff and her friend present. The friend had stayed overnight in the room, had been present through medical care and treatment that stay, and was present and noted as involved in the plaintiff's healthcare at the time of the discharge discussions. The nurse identified that she responded to a question(s) from plaintiff, with the friend present, about the cause of her bleeding and concerns over discharge. In response, the nurse made statements about bleeding possibly being related to the untreated uterine cancer and concerns about the need for treatment/follow up regarding potential spread.

Plaintiff's Demand at Trial: Over $3 million for past and future damages

Verdict: Defense verdict on all claims - Per Se 11-1, Unruh 12-0, IIED 12-0

998 Offers: Defense offered a waiver of costs and Plaintiff demanded $77,000 ■

Bottom Lines

Title: Chartis Specialty Insurance Co. v. Turner Construction, et al.

Case No.: San Diego Superior Court Case No. 37-2014-00011708-CU-PO-CTL

Judge: Hon. Timothy Taylor

Type of Action: Equitable Indemnity and Contribution

Type of Trial: Bench

Length of Trial: 3 days

Cross-Complainant's Counsel: Mark Bonino and Matthew Bisbee of Hayes, Scott, Bonino, Ellingson & McLay, Redwood City

Cross-Defendant's Counsel: Ted Cercos and Amanda Bremseth of Lincoln, Gustafson & Cercos, for Brady Company/San Diego, Inc. ("Brady")

Case Summary: This case initially arose out of a personal injury claim brought by a sprinkler subcontractor's employee who was injured when he fell through an unbarricaded opening while working at a construction project. The employee sued the general contractor of the project for negligence and premises liability, and the general contractor in turn cross-complained against the demolition subcontractor responsible for creating and barricading the opening through which the employee fell. The demolition subcontractor's insurer then intervened on behalf of its insured, which had gone out of business after the project was completed. The insurer brought claims for equitable indemnity and contribution against Brady, a door subcontractor, as well as another subcontractor responsible for the project's drywall.

The injured employee ultimately settled his claims with the demolition subcontractor's insurer, and the general contractor prevailed on summary judgment, leaving only the intervening insurer's claims against Brady and the drywall subcontractor. The intervening insurer sought full reimbursement from the two defendants for the amount of the settlement with the injured employee on the theory that they had negligently caused the barricade to the opening to be removed, thereby causing the employee's accident.

Both defendants disputed liability and the case proceeded to trial, in which the primary issues involved whether either defendant negligently removed the barricade to the opening, or whether either defendant had a duty to install a new barricade in the absence of the original barricade.

One key issue prior to the start of trial was whether the doctrine of *res ipsa loquitur* should be applied to shift the burden of proof from the claimant to defendants. The intervening insurer claimed *res ipsa loquitur* was applicable and thus defendants, not the claimant, should be responsible for proving who removed the barricade prior to the accident. Specifically, the insurer claimed there was no evidence of any other contractors working in the area prior to the accident beyond the two defendants, such that *res ipsa loquitur* was invoked because the defendants were in control of the instrumentality that caused the injury and should bear the burden of proof. Both defendants opposed the insurer's motion, arguing the accident occurred on an active construction site and who had control of the site was undetermined.

The court agreed with the defendants that *res ipsa loquitur* did not apply. The court found there was insufficient evidence to allow the burden of proof to shift from the claimant to defendants because the issue of who had control of the construction area at the time of the accident was an open question and an issue for the trier of fact. Thus, the case proceeded with the insurer bearing the burden of proving who had removed the barricade prior to the accident.

Another key issue prior to trial was whether the intervening insurer was entitled to a jury trial in light of the causes of action for equitable indemnity and contribution. The claimant argued the "gist" of the action was legal in nature, which gave rise to a right to a jury trial.

Counsel for Brady argued that the claims for equitable indemnity and contribution were equitable in nature because there was no contract between the parties. Moreover, counsel argued that the precedent of *A.C. Company v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462 was controlling, in which the Court of Appeals found that a plaintiff who asserted equitable claims against the defendants was not entitled to a jury trial because equitable issues are for the trial judge to decide, not a jury. The trial court agreed with Brady's position and the case proceeded as a bench trial.

The parties presented their evidence, including numerous percipient and expert witnesses. Ultimately, the court ruled that the intervening insurer failed to prove that any actions or omissions by Brady or the other subcontractor were a substantial factor in causing the accident. The court found Brady's standard of care expert David Little to be the most persuasive in showing that the original barricade location chosen by the demolition contractor was unreasonable in light of the active construction work going on in the area. In addition, the court found that the claimant failed to show that either defendant had any duty to install a new barricade, or that either defendant had breached any such duty. As a result, the court ruled that neither defendant had any obligation to contribute to the settlement paid by the insurer and found entirely in favor of the defendants. ■

Title: Boris Grayfer v. Wawanesa General Insurance Company

Case No.: Los Angeles Superior Court Case No. BC 533792

Judge: Hon. Holly E. Kendig, Department 42

Type of Action: Insurance Bad Faith

Type of Trial: Jury

Length of Trial: 9 days

Plaintiff's Counsel: Armen Shaghzo, Shaghzo & Shaghzo Law Firm, and Ara Aroustamian, Aroustamian & Associates, Glendale, CA

Defense Counsel: Kenneth N. Greenfield and Kate A. Greenfield, Law Offices of Kenneth N. Greenfield

Factual Background: In late July 2013, Plaintiff left his leased 2013 Chevrolet Camaro parked on the street in Los Angeles, and went to Palm Springs for the weekend. He gave the spare transponder key to his nephew to move the car while he was gone in order to avoid ticketing during street cleaning days. When Plaintiff returned from Palm Springs his Camaro was gone. Plaintiff's nephew had given the key back to Plaintiff noting that the car should be on the street where Plaintiff had left it.

A New Expedited Appeals Process Regarding Petitions to Compel Arbitration in Elder Abuses Cases Went Into Effect on July 1, 2017

By Lann G. McIntyre, Esq.
LEWIS BRISBOIS BISGAARD & SMITH

The California Legislature has created a new class of highly expedited time frames for appeals from an order denying a petition to compel arbitration in cases involving a claim under the Elder and Dependent Adult Civil Protection Act (Welf. & Inst. Code §§ 15600, et seq.). (See Code Civ. Proc. § 1294.4.) The new rules went into effect July 1, 2017.

The expedited appeal process applies to appeals from an order denying or dismissing a petition to compel arbitration made appealable by Code of Civil Procedure, §1294(a). (California Rules of Court, Rule 8.710(a).) The process applies only to those orders in cases raising an elder abuse claim and only where a party has been granted a preference pursuant to Code of Civil Procedure section 36. (Code Civ. Proc., §1294.4(a).)

The expedited appellate process dramatically shortens the usual civil appeal time frames throughout the appellate process and imposes new requirements for the expedited appellate process. The implementing rules are contained in California Rules of Court, Rules 8.710 through 8.717, and below are some of the highlights. Please note that there are additional changes to the usual appellate procedures contained within these rules, such that the rules should be studied carefully for those details.

Notice of Appeal and Record Designation

- The notice of appeal must be filed within 20 days of service of a notice of entry of order, instead of the usual 60 days. (Rule 8.712(b).)
- Only a joint appendix or separate appellant's and respondent's appendices may be used; not clerk's transcripts. (Rule 8.713(a).)
- The record must be designated at the same time the notice of appeal is filed, instead of within 10 days. (Rule 8.713(b)(1).)
- Court reporters must prepare the reporter's transcript within 10 days after notification by the superior court. (Rule 8.713 (b)(2).)
- The time frame to cure certain defaults is reduced to two court days. (Rule 8.713 (b)(3).)

Briefing Schedule

- The appellant's opening brief is due 10 days after the notice of appeal is served and filed. (Rule 8.715(a)(1).)
- The respondent's brief is due within 25 days after the appellant's opening brief is filed. (Rule 8.715(a)(2).)
- The reply brief is due within 15 days after the respondent's brief is filed. (Rule 8.715(a)(3).)
- Stipulations for extensions may be made only upon agreement that the extension

will "promote the interests of justice." The extension will extend the time deadline for the Court of Appeal to file its decision by the same amount of time. (Rule 8.715(c).) Absent a stipulation, the parties may still apply for an extension of time from the court, which will only be granted upon a showing of good cause and if the extension will promote the interests of justice. (Rule 8.717.)

Oral Argument and Decision

- The court must give 10 days notice of oral argument, but the notice period may be shortened by the court for good cause. (Rule 8.716.)
- The Court of Appeal must issue its decision within 100 days after the notice of appeal is filed. (Code Civ. Proc. § 1294.4(a).)

From a defense point of view, since the opening brief must be filed so soon after the notice of appeal is filed, counsel should be aware that plaintiff's counsel wishing to move the case along will likely promptly obtain a trial preference order and serve and file a notice of entry of the order after the hearing on the petition to compel arbitration. Because the opening brief will be due as soon as 30 days from the hearing date, a draft of the appellant's opening brief and appendix should be well under way by the time you file a notice of appeal in these cases. ■

How Will Autonomous Cars Steer Insurance Issues

Beth I. Golub, Esq.
TYSON & MENDES

The insurance industry is likely bracing itself for monumental changes that will come about as self-driving cars become more prevalent, or even dominate our market. To survive or thrive during this evolution, insurance companies should be tapping into their thinktanks and experts to remain viable. Considerations about shifting of risk, responsibility, and philosophy are paramount.

Experts vary as to when the changeover to self-driving cars will occur. A transport scholar at the University of Minnesota believes that by 2030, every car on the road will be driverless. (Insurance Information Institute, July 2016). The Insurance Institute for Highway Safety has estimated there will be 3.5 million self-driving vehicles by 2025 and 4.5 million by 2030. In an interview on CNBC on February 27, 2017, Billionaire Investor Warren Buffet has discussed that disrupting an entire industry takes time and the market will embrace self-driving cars slowly, despite the immense amount of capital that tech companies are spending on their development. "If I had to take the over and under bet 10 years from now on whether 10 percent of the cars on the road would be self-driving, I would take the under, but I could very easily be wrong."

Current studies reveal self-driving cars are significantly safer, and reduce injuries and deaths. The number of accidents is expected to drop significantly as more crash avoidance features are incorporated into vehicles. Most accidents are caused by human error. If control of the moving vehicle is taken away from the driver, the accident rate should plummet. The National Highway Traffic Administration found that crash rates for Tesla vehicles dropped 40% since its Autopilot was first installed in 2015. Similarly, The Insurance Institute for Highway Safety found improvements in design and safety technology have led to a lower fatality rate in accidents involving 2011 or later model cars. In February 2014, vehicle to vehicle (V2V) communication systems were approved by federal agencies. These systems enable vehicles to communicate with each other to make crash-avoidance decisions based upon blind spots or fast moving vehicles. The Department of Transportation estimates this communication system will be able to prevent 76 percent of crashes on the roadway. The general consensus among those in the industry is if self-driving cars reduce the number of collisions, there should be a reduction in the risk premium.

Although there will be a need for liability coverage, there are many considerations for self -driving cars. A 2014 RAND study on autonomous vehicles suggests manufacturers, suppliers and municipalities will be called upon to take responsibility for what went wrong. The burden is no longer entirely on the driver to properly control the vehicle. Assessing liability and risk will likely come down to how the computer was programed and how the vehicle was instructed to operate. A precedent has already been set for automakers to take full responsibility. Volvo said in 2015 it would accept full liability in the event its self-driving car gets into a crash. ("Who's at Fault" NBC, February 27, 2017). The RAND study advocates product liability laws may incorporate the concept of cost benefit analysis to mitigate the cost of claims brought against manufacturers. Liability laws might evolve to ensure self-driving technology advances are not brought to a halt.

Although human error may eliminate mistakes while driving, liability and premiums would likely hinge on issues pertaining to owners following recommended maintenance and not making alterations to the vehicles. How vehicles are stored may be factored when assessing premiums. Also unknown is whether there may be an override option available to bring human decision making back into play. The issues become more complicated when factoring in the level of autonomy, known in the industry as Level 2 or 3 autonomy, when a driver still has control or charge of the vehicle. The Tesla fatal crash in May 2016 was operating at Level 2 in Autopilot and failed to brake when a truck was making a left in front of it. Tesla blogged the Autopilot system did not detect the white side of the tractor trailer against a brightly lit sky and so the brake was not applied. The National Highway Traffic Safety Administration conducted a six-month investigation and determined Tesla Autopilot was not at fault because the driver had enough time to brake (7 seconds). This incident shows how a driver can still be liable for a crash in a Level 2 autonomous system, even if the car is actually driving at the time of the accident.

Coverage for physical damage due to a crash caused by wind, floods, natural elements, or theft will likely not change. However, it is predicted there will be higher costs to repair or replace damaged vehicles because of the complexity of the components, but this cost will be offset by the lower accident frequency rate. In underwriting, traditional criteria such as the accident history of an applicant will likely be replaced by the make, model, and style of car. Jurisdictional factors might include whether there are dedicated lanes for automated driving in the locale of the applicant.

Despite the continued need for automobile insurance, the likely negative impact upon insurance companies seems inevitable. Warren Buffet opined the self-driving car business could become a major threat to insurance companies when the technology hits the market. "If autonomous vehicles prove to be safer than regular cars, the insurance costs will plummet, and by the time roads are filled with self-driving cars, insurers like Geico will have taken a serious hit. If they're safer, there's less in the way of insurance costs and that brings down premium buy significantly." Because billions of dollars and brains are involved in autonomous cars, Mr. Buffet believes it could come sooner than he predicts and will

to economic and non-economic damages because the settlement agreement likely does not do so. This is so, because there is case law holding the right to settlement credit may be waived entirely. (See *Conrad v. Ball* (1994) 24 Cal. App. 4th 439 [Court refused to make an allocation in place of the jury and non-settling defendant lost the opportunity for offset].)

4. Use The Settlement Agreement At Trial to Show Bias

In addition to disclosure and full settlement credit, another protection afforded the non-settling defendant is use of the settlement agreement at trial to show bias. California Civil Jury Instruction No. 222 allows the settlement agreement to be shown to the jury so they may properly evaluate the potential bias and credibility of witnesses against the non-settling defendant. At trial, the settlement agreement may be disclosed to the jury for the purpose of evaluating the potential bias of settling defendant witnesses: "The court must give this instruction on the motion of any party unless it finds that disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

5. Conclusion

While it is a challenging position to be a non-settling defendant, the defense should avail itself of all statutory and legal protections so as to mitigate the inherent prejudice which results in this situation. The first step is to be persistent in finding out the terms of the settlement to which you are not a party. Be on the alert for a sliding scale settlement and scrutinize the settlement terms and conditions when opposing the inevitable motion for determination of good faith.

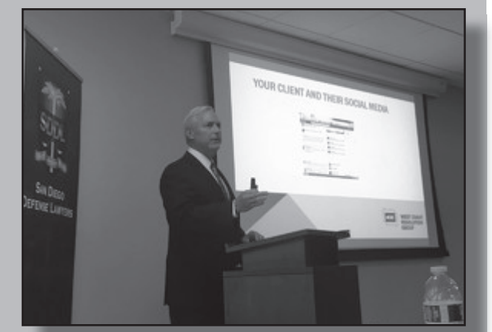
In opposing the settlement, alert the court to the collusive nature of the settlement including non-disclosure, particularly if the recovery amount paid by the settling defendant is disproportionately low. If on the other hand, the settlement amount is reasonable, ask the court to give the non-settling defendant full settlement credit at the good faith stage. If the court refuses to do so and punts the issue, file a motion in limine again asking for full settlement credit. If the court denies the in limine motion, then be sure to ask for a special jury verdict allocating the settlement between economic and non-economic damages so as to not lose out on receiving credit altogether. A motion in limine should also be filed asking the court to allow the settlement agreement to be shown to the jury for the purposes of evaluating bias and the credibility of settling defendant witnesses. The corresponding jury instruction should also be submitted to the court. Implementation of these defense strategies will go a long way to mitigating the prejudicial impact of sliding scale settlements on non-settling defendants who acting in good faith refuse to be compelled to settle. ■

ABOUT THE AUTHOR

David Kahn specializes in civil litigation in the areas of personal injury, professional liability, general liability, and employment litigation.

MCLE LUNCH AND LEARN

The Ethics of Lawyering in a Social Media World



As we all know, social media is taking over the world. There was a time when a website - the old "electronic firm brochure" - was enough. Those days are gone. In order to keep members updated on the challenges posed by rapidly evolving technology, Richard A. Huver, Esq. presented on July 11, 2017 at the San Diego Defense Lawyer's Lunch & Learn on the topic "The Ethics of Lawyering in a Social Media World."

Mr. Huver, a mediator with the West Coast Resolution Group, explained how different emails, posts, tweets, or questions on a Listserve constitute a "communication." Mr. Huver cautioned the attendees that, if an attorney says something in any type of social media platform that is considered a "message or offer by or on" your behalf "concerning the availability for professional employment," then Rule 1-400, and others, are triggered. Mr. Huver provided many examples from various social media outlets and some of the potential pitfalls for attorneys to avoid.

This was a very well attended CLE which provided SDDL members with extremely useful information and the elusive 1.0 hour of legal ethics credit. SDDL thanks Peterson Reporting for graciously hosting the event and providing a delicious pizza lunch for the attendees. Mr. Huver also kindly allowed SDDL to reprint the cover article providing further information on this topic. ■

The Specter Of Sliding Scale Settlements In Multi-Party Litigation: Strategies For Protecting The Non-Settling Defendant

David J. Kahn, Esq.
TYSON & MENDES

In formulating California's approach to evaluating the good faith of piece-meal settlements, the California Supreme Court famously stated: "When profit is involved, the ingenuity of man spawns limitless varieties of unfairness." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 494-495 quoting *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 993.) As set forth below, a sliding scale settlement certainly falls within this paradigm. Although California allows such settlements, there are statutory protections and defense strategies which should be implemented to mitigate the prejudice inherent in such settlements.

1. Recognition of the Sliding Scale Settlement

Your insured is a defendant in complex multi-party litigation. The plaintiff settles around your insured, leaving your insured as the sole defendant at trial and potentially obligated to pay the full judgment without any right of comparative indemnity or contribution from the settling defendant. If you find yourself in this scenario, it is important to recognize the possibility of a sliding scale settlement. There are countless variables of such a settlement arrangement, but the key defining feature is the settling defendant's ultimate liability to the plaintiff is contingent upon the amount recovered from the non-settling defendant at trial. These types of settlements are commonly known as "Mary Carter" agreements after the Florida District Court of Appeal Case *Booth v. Mary Carter Paint Co.*, (1967) 202 So. 2d 8.

Other jurisdictions such as Nevada, have outlawed such settlements as violating public policy and the canons of professional conduct. (*See Lum v. Stinett* (1971) 87 Nev. 42.) In California, courts have struggled to reconcile such settlement arrangements with the twin policy goals of encouraging settlements and fair allocation of fault. In *Abott-Ford v. Superior Court*, the California Supreme Court addressed how the *Tech-Bilt* good faith standard applies to controversial sliding scale settlements. (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal. 3d 858, 875-876.) The difficult issue confronting the *Abott-Ford* Court was how to reconcile an agreement wherein a plaintiff's recovery is contingent on the amount plaintiff ultimately recovers from the non-settling defendant with the statutory goal of equitable apportionment amongst tortfeasors when the necessary effect of such an agreement is to improperly shift the settling defendants' share of liability onto the non-settling defendant. (*Ibid.*).

2. Disclosure

Because sliding scale settlement arrangements are typically negotiated under a shroud of secrecy, the legislature enacted Code of Civil Procedure Section 877.5. The statute requires the parties to such an agreement to promptly notify the court of the existence of the agreement and its terms. (877.5 (a)(1).) In addition, no sliding scale settlement is effective, unless a notice of intent to enter into such an agreement is served on the non-settling defendant at least 72 hours before the agreement is entered into. (877.5(c).) If the agreement is not properly disclosed, raise the issue at the good faith stage as evidence of collusion and grounds for denying good faith.

3. Settlement Credit

In *Abott Ford*, the court identified the principal difficulty with sliding scale settlements is arriving at an accurate price or consideration paid by the settling defendant(s) to be applied as an equitable offset or credit in favor of the non-settling defendant against the ultimate judgment. (*Abott-Ford,* 43 Cal. 3d at 878-879.) Accordingly, to achieve the statutory objective of fair apportionment of fault, the *Abott-Ford* Court held the non-settling defendant is entitled a credit in the amount of the **full consideration paid by the settling defendant**. (*Id*. at 886). However, California courts and judges are divided as to when settlement credit should be set.

At least one appellate court has held the credit or offset afforded to a non-settling defendant should be fixed at the time of settlement because the issue of credit is part of the overall good faith determination. (*Regan Roofing Co. v. Superior Court*, 21 Cal. App. 4th at 1703.) If the settlement consideration or the amount of the recovery guaranteed to the plaintiff is within the *Tech-Bilt* ballpark, meaning it is reasonable in relation to the settling defendant's proportional share of liability, then the non-settling defendant should ask the trial court to set the settlement credit at the time of the good faith hearing. Some judges are not well versed in the policies informing the good faith and credit statutes and simply view a good faith hearing as an adequacy hearing to determine if the amount of the settlement is fair to the *plaintiff,* even though the intended policy is to protect the interests of the *non-settling defendant*. Even so, the issue of settlement credit should be raised at the good faith stage anyway to educate the court regarding the issue in advance of subsequent pre-trial motions.

If the court defers settlement credit at the good faith stage, a motion in limine should be filed again asking the court to grant the non-settling defendant full settlement credit. If the court refuses to set the settlement credit pre-trial, it is critical for the non-settling defendant to request a special jury verdict asking the jury to allocate damages

be negative for auto insurers. Auto insurance accounts for 42% of property and casualty insurance, which is a $200 billion market in the United States alone, according to a report by KPMG. Insurers are and should be preparing for the almost certain impacts to occur.

Despite the enhanced safety and reduction in accidents autonomous cars will provide, it is inevitable they will still cause damage, injuries, and take lives. Insurers will be required to be innovative to make up for the shortfall in total coverage by creating solutions needed to assess machine drivers. To add even more complexity to the analysis is considering where to place the financial risk of potential hacking to autonomous vehicle's computer systems. Data will need to be collected and actuarial models will need to be entirely rebuilt. "Insurance is a data-based effort to really predict the future based on the past, and you have dramatically different technologies and new applications for automated driving, it makes predicting the future much harder because you don't have those reliable data about the past and present." ("What do Self-Driving Cars Mean for Auto Liability Insurance?" by Mike Baukes of UpGuard.)

As with anything, research, preparation, and creativity are paramount. Those insurance companies proactively working to accept the inevitable changes before them, the shifting long-standing paradigms and structures, should stand a better chance in successfully adapting to the technology. Explore companies already in the process of evaluating these issues and collaborate. Gather and logically synthesize all existing data for complete understanding of the risks and history to date. Use the information to try and forecast and predict. Tap into or hire in-house experts to create logical proposals to address ways of assigning risk and designating premiums. Consider retention of political consultants who may be needed to address how the technology is incorporated into infrastructure on a federal or state-wide basis. These consultants may also be needed for legislation that may need to be developed and/or lobbied. Automobile insurers need to keep control and steer their industry through the ever-changing technology.

ABOUT THE AUTHOR

Beth Golub specializes in civil litigation in the areas of personal injury, professional liability, general liability, and employment litigation. ■

California Supreme Court Clarifies "Day of Rest" Statute

Regina Silva, Esq.
TYSON & MENDES

In *Mendoza v. Nordstrom, Inc.* (Case No. S224611, May 2017), the California Supreme Court held "one day's rest in seven" can be based upon the employer-defined workweek not on a rolling basis, and an employer is not prohibited from allowing a fully-informed employee to forgo their day of rest.

In *Mendoza*, plaintiffs worked for Nordstrom at different locations in different positions. One of the plaintiffs was asked by a supervisor or a co-worker to fill in for another employee, which resulted in him working more than 6 consecutive days, but in shifts which lasted 6 hours or less. The other plaintiff worked more than 6 consecutive days, but most of the shifts lasted 6 hours or less.

Both plaintiffs filed separate complaints, which were later combined. Plaintiffs claimed violations of the Labor Code for failure to be provided with a guaranteed day of rest, and for Private Attorney General Act ("PAGA") penalties.

The district court granted summary judgment on most of the claims other than the day of rest cause of action. After a bench trial, the district judge concluded Labor Code section 551 guaranteed a day of rest on a rolling basis, for any seven (7) consecutive days. Per Labor Code section 556, however, the guarantee did not apply so long as an employee had at least one shift of six (6) hours or less during the period, and Nordstrom did not "cause" the employees to work more than 6 consecutive days because it did not force or coerce any employee to do so.

The Ninth Circuit filed an order requesting the California Supreme Court resolve the following unsettled questions concerning California law's day of rest statutes:

(1) Is the day of rest required by Labor Code sections 551 and 552 calculated by the workweek, or does it apply on a rolling basis to any seven-consecutive day period?

(2) Does Labor Code section 556's exemption for workers employed 6 hours or less per day apply so long as an employee works 6 hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than 6 hours on each and every day of the week?

(3) What does it mean for an employer to "cause" an employee to go without a day of rest (force, coerce, pressure, schedule, encourage, reward, permit, or something else)?

In response to the first question, the Supreme Court found a "day of rest is guaranteed for each work week," as opposed to a 7-day rolling basis. Hence, the day of rest is measured by the workweek set by the employer. The Court also stated periods of work over more than 6 consecutive days is not "per se prohibited," indicating the Legislature did not intend to prevent employees from working more than 6 consecutive calendar days.

In response to the second question, the Court found the Labor Code section 556 exemption, which states section 551 and 552 do not apply when the total hours of employment do not exceed 30 hours in any week or 6 hours in a day, must be given effect to the 7th day rest protection.

CONTINUED ON PAGE 17

California Case Summaries

By Monty McIntyre
ADR SERVICES, INC.

CALIFORNIA SUPREME COURT

Civil Procedure

Park v. Board of Trustees of the California State University (2017) _ Cal.5th _ : The Supreme Court reversed the Court of Appeal's decision that had reversed the trial court's denial of an anti-SLAPP motion to strike a complaint filed by a person of Korean origin who had been denied tenure that alleged violations of the California Fair Employment and Housing Act (Government Code § 12900 et seq.) for national origin discrimination and failure to receive a discrimination-free workplace. The Supreme Court ruled that a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. A claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. (May 4, 2017.)

Ryan v. Rosenfeld (2017) _ Cal.5th _ , 2017 WL 2589515: The Supreme Court vacated the Court of Appeal's dismissal of an appeal from a motion to vacate a judgment under Code of Civil Procedure section 663. An order denying a motion under section 663 is appealable even if it raises issues that could have been litigated via an appeal of the judgment. The rule announced in *Bond v. United Railroads* (1911) 159 Cal. 270, 273 is still valid. (June 15, 2017.)

Weatherford v. City of San Rafael (2017) _ Cal.5th _ , 2017 WL 2417763: Reversal of the trial court's judgment of dismissal of plaintiff's action under Code of Civil Procedure section 526a because plaintiff had not paid property tax. The California Supreme Court ruled that, for a person to have standing to sue the government for wasteful or illegal expenditures under section 526a, it is sufficient for a plaintiff to allege she or he has paid, or is liable to pay, to the defendant locality a tax assessed on the plaintiff by the defendant locality. (June 5, 2017.)

Constitution

Lewis v. Superior Court (2017) _ Cal.5th _ , 2017 WL 3014285: The Supreme Court affirmed the decision of the Court of Appeal denying petitioner's writ petition seeking to overturn the trial court's denial of petitioner's writ of administrative mandamus that sought to overturn the decision of the Medical Board of California (Board) to revoke petitioner's license and stay revocation while placing him on probation for three years. Petitioner claimed that the Board's actions in obtaining patient prescription records from the Controlled Substance Utilization Review and Evaluation System (CURES) without first obtaining patient authorization or issuing any subpoenas violated his patient's privacy rights. The Supreme Court ruled that the balance tipped in favor of the Board's interests in protecting the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians. Because any potential invasion of privacy caused by the Board's actions was justified by countervailing interests, the Board did not violate article I, section 1 of the California Constitution when it obtained patient prescription records from CURES without first obtaining patient authorization or issuing any subpoenas. (July 19, 2017.)

Employment (Whistleblower Protection)

Shaw v. Superior Court (2017) _ Cal.5th _ , 2017 WL 1315681: The Supreme Court affirmed in part and reversed in part the ruling of the Court of Appeal in an action for wrongful termination and violation of Health and Safety Code section 1278.5(g). The Court ruled that a trial court ruling denying a request for a jury trial in a civil action is reviewable before trial by a petition for an extraordinary writ, and that there is no statutory right to a jury trial for retaliatory termination under section 1278.5(g). However, Health and Safety Code section 1278.5(m) preserves a plaintiff's right to a jury trial for wrongful termination in violation

Save the Date!

2017 SAN DIEGO DEFENSE LAWYERS NATIONAL MOCK TRIAL COMPETITION

San Diego Defense Lawyers will proudly present the 27th Annual National Mock Trial Competition on October 19, 20 and 21, 2017.

The Mock Trial Competition is a showcase event for San Diego Defense Lawyers and the San Diego legal community. It gives you the opportunity to judge teams from various law schools coming in from different parts of the country. This is a very popular event that has been well received by the bench, bar and participating law schools throughout the years.

The first two rounds will take place at the San Diego Superior Court on Thursday and Friday evening, October 19 and 20, 2017. The semi-final and final rounds will take place at USD on Saturday morning and afternoon, October 21, 2017.

There will be an estimated 20 teams participating and trying their cases before three-member panels. We need your help and participation as a judge/panel member judging the competition. So please save the date now and help these aspiring law students compete in this year's Mock Trial Competition. ■

claims for gross negligence, recklessness and strict liability. The Court of Appeal also affirmed plaintiff's motion to tax $1,962.50 in costs claimed by defendant. Because defendant did not include a complete copy of the order on appeal, he failed to meet his burden of establishing error. Defendant also failed to meet his burden of establishing that the trial court abused its discretion in taxing $1,962.50 in costs. (C.A. 4th, filed June 22, 2017, published July 17, 2017).

Taylor v. Trimble (2017) _ Cal.App.5th _ , 2017 WL 3187388: The Court affirmed the trial court's order granting defendant's motion for summary judgment in a wrongful death case arising from the drowning of plaintiff's five-year-old son in defendants' pool. Regarding the claim for negligent supervision, where the homeowner initially assumed responsibility for supervision of the child, but then turned over such responsibility to an adult close relative (the grandfather) who accepted it and did not thereafter relinquish it, the homeowner owed no duty of care to protect the child. As to the claim for premises liability, plaintiff failed to raise a triable issue of fact as to causation. (C.A. 2nd, July 27, 2017.)

Toeppe v. City of San Diego (2017) _ Cal. App.5th _ , 2017 WL 3187391: Reversal of the trial court's order granting defendant's motion for summary judgment on the basis of trail immunity under Government Code section 831.4. The Court of Appeal ruled that trail immunity did not apply because plaintiff's dangerous condition claim was based on a negligently maintained eucalyptus tree, not the condition of the trail passing through the park. Moreover, even if the trail immunity did apply, there was a disputed issue of material fact as to where plaintiff was located when the branch struck her. (C.A. 4th, July 27, 2017.) ■

Monty A. McIntyre, Esq. is a full-time mediator, arbitrator and referee at ADR Services, Inc., who has been practicing law in California since 1980. Mr. McIntyre has extensive trial experience representing both plaintiffs and defendants in a wide variety of business, insurance, real property and tort cases. Mr. McIntyre is a frequent contributor to the SDDL Update and also offers a service providing bi-weekly summaries of every new published California civil case in his publication called California Case Summaries Civil™.

COVER STORY CONTINUED FROM PAGE 1

2. Disclaimers, Disclaimers, Disclaimers

The Rules prohibit any "false, misleading, or deceptive" message, communication or advertisement. Fine you say, everything I post is true so I need not worry. Being truthful is only part of the analysis. If you post something that includes an offer of your services, for example; "Just got a great verdict. So happy for my client. *Does anyone out there need a good attorney?*" - this is a restricted "communication." Truthful or not, there must be a disclaimer to the effect that "prior results do not guarantee a similar outcome." Without such a warning, your post may be considered misleading or deceptive and in violation of the Rules. There are other circumstances where a disclaimer is needed to bring the statement into compliance, including situations involving prospective clients, so as to defeat any reasonable belief that an attorney-client relationship has been created.

3. Unwittingly Creating An Attorney/Client Relationship

One scary situation to avoid is where a potential client believes you are going to represent them. There are a number of factors that go into determining whether or not you need a disclaimer. Usually, an unsolicited inquiry via social media does not establish a relationship. But if you respond with, "I'll be happy to look into this for you," or something similar, you need to protect yourself. Always document in writing any contact with a potential client clarifying your role. Disclaimers are clunky in social media postings, but may be necessary.

4. Properly Handling Confidential Information From Prospective Clients

If someone discloses something to you via a public social media platform, there is probably not a reasonable expectation the information will remain private. However, there are many examples of ListServe posting with what looks like private information about a potential client. If something is provided to you by a potential client in a confidential setting, disclosing that information without their informed consent is a violation of Rule 3-100. Leaving out their identifying information may or may not solve the problem. Also, having a general disclaimer that "an attorney client relationship is not formed" may not be enough to defeat a reasonable expectation that information will be kept confidential.

5. Maintaining Copies Of "Communications" For 2 Years

Now that we have identified some examples of what is or is not considered a "communication" for purposes of ethical rules, there is another catchy item. Did you know that Rule 4-100(F) requires you to keep a copy of any "communication" you create, disseminate or post for 2 years? This means if you update your website then you must keep copies of the old pages. The Rule specifically includes any electronic communication so, if you post a "communication" on Facebook or LindkedIn, you must print it out and keep a copy. Advertisements? Solicitation letters? A record of all of these must be kept for 2 years.

6. Conclusion

We are in an ever-evolving social media world. New sites pop up every day and present tremendous business and branding opportunities. Knowing whether your post, tweet or question on a Listserve is a "communication" is essential. Study all the ethical rules to make sure you are in compliance! Please note that the Rules of Professional Responsibility are being revised, and the approved revisions may amplify or further articulate some of the guidelines discussed herein. Be sure to check out the new Rules when they are finally approved. ■

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 15:

viable cause of action for promissory estoppel. The Civil Code section 2923.6 claim was not viable because subdivision (g) excludes loan modification applications undertaken before January 2, 2013, and defendant considered and rejected a loan modification before that date. Civil Code section 2923.7 requires a borrower to expressly request a single point of contact with the loan servicer, and plaintiffs' complaint did not allege that they requested a single point of contact. The trial court properly dismissed the unfair competition law claim because it was merely derivative of other causes of action that were properly dismissed. (C.A. 3rd, July 28, 2017.)

Cummings v. Dessel (2017) _ Cal.App.5th _ , 2017 WL 3048706: The Court affirmed the trial court's judgment ordering partition of real property by the appraisal method. Although the Court of Appeal ruled that the trial court erred when it ordered partition of the property by appraisal because the parties had not agreed to that method, as required by statute, it affirmed the judgment because defendants failed to show that the error was prejudicial. (C.A. 1st, July 19, 2017.)

Sierra Club v. County of Sonoma (2017) _ Cal.App.5th Supp. _ , 2017 WL 1422533: The Court affirmed the trial court's denial of a writ petition seeking to challenge a permit issued by respondent that allowed property owners to establish a vineyard on property they had been using for grazing. Petitioners challenged the determination that issuing the permit was a ministerial act and therefore exempt from the California Environmental Quality Act, Public Resources Code section 21000 et seq. The Court held that, although the ordinance might allow the Agricultural Commissioner of Sonoma County (Commissioner) to exercise discretion when issuing erosion-control permits in some circumstances, petitioners failed to show that the Commissioner improperly determined that issuing the permit in question was ministerial. (C.A. 1st, April 21, 2017.)

Settlements

Krechuniak v. Noorzoy (2017) _ Cal. App.5th _ , 2017 WL 1967796: The Court affirmed the trial court's order entering a stipulated judgement for $850,000 pursuant to a memorandum of settlement. The settlement called for payments totaling $600,000, and included a stipulated judgment for $850,000 in the event of a breach. In his appeal, defendant contended that the stipulated judgment amount included a liquidated damages penalty of $250,000 that was unenforceable under Civil Code section 1671, but he did not make this argument in the trial court. As such, the Court of Appeal ruled that defendant had forfeited his contention. The determination of whether a contract provision is an illegal penalty or an enforceable liquidated damage clause is a question to be determined by the trial court and, on review, appellate deference to the trial court's factual findings is required unless the facts are undisputed and susceptible of only one reasonable conclusion. (C.A. 6th, May 12, 2017.)

Torts

Alvarez v. Seaside Transportation (2017) _ Cal.App.5th _ , 2017 WL 3083926: The Court affirmed the trial court's summary judgment for defendants based upon *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*). Plaintiff sued for personal injuries suffered when his van hit a shipping container while at work. Plaintiff's employer, Pacific Crane Maintenance Company, had been hired by Evergreen Container Terminal to perform maintenance work at a marine container terminal. The trial court properly granted summary judgment to defendants based on the *Privette* doctrine because defendants provided sufficient evidence to trigger the *Privette* presumption and plaintiff did not raise a triable issue of fact. (C.A. 2nd, July 20, 2017.)

County of San Mateo v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 3141190: The Court affirmed the trial court's order denying petitioner's writ petition seeking to overturn the trial court's denial of a motion for summary judgment on the basis of Government Code section 831.2, in a case where a massive tree fell on a child's tent inflicting catastrophic injuries. The Court of Appeal affirmed because it found there were triable issues of fact as to whether the property was "unimproved." There were triable issues of fact as to whether the tree was growing in the same general location as the accident site or was growing in an improved area by virtue of the artificial physical changes in its immediate vicinity. (C.A. 1st, July 25, 2017.)

Cuevas v. Contra Costa County (2017) _ Cal. App.5th _ , 2017 WL 1507913: In a medical malpractice trial for injuries sustained at birth, the jury awarded plaintiff $9,577,000 as the present cash value of his future medical and rehabilitation care expenses. The Court of Appeal reversed the trial court's ruling that had excluded evidence that health insurance benefits under the Patient Protection and Affordable Care Act (ACA) (Public Law No. 111-148 (March 23, 2010) 124 Stat. 119) would be available to mitigate plaintiff's future medical costs. The trial court ruled that Civil Code section 3333.1 allowed only evidence of past collateral source medical benefits, but the Court of Appeal ruled that section 3333.1 allows evidence of both past and future collateral source medical benefits. (C.A. 1st, April 27, 2017.)

Demara v. The Raymond Corporation (2017) _ Cal.App.5th _ , 2017 WL 3038160: Reversal of the trial court's summary judgment in favor of defendants in an action for strict liability and negligence based on injuries plaintiff suffered allegedly caused by design defects in a forklift. The trial court erred in granting summary judgment for the following reasons: First, because plaintiffs' showing as to causation was more than negligible or theoretical, it was sufficient to defeat summary judgment. Second, defendants did not meet their burden of establishing as a matter of law that the consumer expectation test did not apply to plaintiffs' claims. Third, in applying the risk-benefit test, defendants failed to present sufficient evidence to shift the burden to plaintiffs to show a triable issue of material fact. (C.A. 4th, filed June 21, 2017, published July 18, 2017).

Swigart v. Bruno (2017) _ Cal.App.5th _ , 2017 WL 3016756: The Court affirmed the trial court's summary judgment for defendant based upon the primary assumption of risk doctrine. Plaintiff was injured by defendant's horse after she had dismounted at a required checkpoint during an organized endurance horseback riding event. The primary assumption of risk doctrine barred the negligence claim, and plaintiff failed to establish a material issue of fact as to her

of public policy as authorized under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. (April 10, 2017.)

CALIFORNIA COURTS OF APPEAL

Appeals

Chango Coffee, Inc. v. Applied Underwriters, Inc. (2017) _ Cal.App.5th _ , 2017 WL 2302170: The Court dismissed defendant's purported appeal from the trial court's order denying its renewed petition to compel arbitration under Code of Civil Procedure section 1008(b), because an order denying a renewed motion or application under section 1008(b) is not appealable. (C.A. 2nd, May 26, 2017.)

Arbitration

Aanderud v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 3185218: The Court treated an appeal as a writ petition, granted the writ petition, and ordered the trial court to partially modify its order granting a motion to compel arbitration, ordering plaintiffs to submit their individual claim to arbitration and dismissing the class claims without prejudice. The Court of Appeal ruled that the delegation clause was enforceable and that it was the arbitrator, not the court, who was to determine the enforceability of the arbitration provision and whether it covers class claims. The Court of Appeal also vacated the order dismissing the class claims. (C.A. 5th, July 26, 2017.)

Garcia v. Pexco (2017) _ Cal.App.5th _ , 2017 WL 1435788: The Court affirmed the trial court's order granting defendant's motion to compel arbitration. Plaintiff signed an arbitration agreement with a temporary staffing company, who assigned plaintiff to work with defendant Pexco. Although defendant Pexco was not a signatory to the arbitration agreement, the Court of Appeal held that plaintiff was equitably estopped from denying Pexco's right to arbitrate and the agency exception applied. (C.A. 4th, filed April 24, 2017, published May 16, 2017.)

Heimlich v. Shivji (2017) _ Cal.App.5th _ , 2017 WL 2351269: Reversal of the trial court's order confirming an arbitration award but denying defendant's request for Code of Civil Procedure section 998 costs. The trial court had determined that defendant had failed to make a timely section 998 claim to the arbitrator, but the Court of Appeal disagreed. It held that defendant was not required to present his section 998 cost request to the arbitrator during the arbitration hearing because an offer which is not accepted "cannot be given in evidence upon the trial or arbitration." (Section 998(b)(2).) In the request to confirm the arbitration award, defendant established that the arbitrator had refused to hear any evidence of plaintiff's rejection of defendant's section 998 offer. The Court concluded that defendant had timely presented his 998 claim to the arbitrator, the arbitrator should have reached the merits of that claim, and the arbitrator's refusal to hear evidence of the 998 offer warranted partially vacating the arbitration award. (C.A. 6th, May 31, 2017.)

Hutcheson v. Eskaton Fountainwood Lodge (2017) _ Cal.App.5th _ , 2017 WL 2570672: The Court affirmed the trial court's order denying a motion to compel arbitration. The Court ruled that admission of decedent to a residential care center for the elderly was a health care decision, and the attorney-in-fact who admitted her, acting under the Power of Attorney Law (Prob. Code, section 4000 et seq. (PAL)), was not authorized to make health care decisions on behalf of the principal. Because the attorney-in-fact acting under the PAL did not have authority to admit the principal to the residential care facility for the elderly, her execution of the admission agreement and its arbitration clause were void. (C.A. 3rd, June 14, 2017.)

LA Unified School District v. Safety National Casualty Corporation (2017) _ Cal.App.5th _ , 2017 WL 2963003: The Court affirmed the trial court's order denying a motion to compel arbitration by one carrier in a bad faith case where plaintiff was suing 27 insurance companies for failing to provide coverage for third party litigation alleging sexual abuse of elementary school students. Where an arbitration agreement is governed by the Federal Arbitration Act (FAA, 9 U.S.C. section 1 et seq.) because it involves interstate commerce, but the agreement has no choice-of-law provision, and no provision stating the FAA's procedural provisions govern the arbitration, California procedure applies. The trial court properly denied the motion to compel arbitration under Code of Civil Procedure section 1281.2(c) based on the possibility of conflicting rulings in pending litigation with third parties. (C.A. 2nd, July 12, 2017.)

Laymon v. J. Rockcliff, Inc. (2017) _ Cal. App.5th _ , 2017 WL 2242954: Reversal of the trial court's order denying arbitration under two arbitration agreements and compelling arbitration under one arbitration agreement. Two sets of plaintiffs filed two materially identical class action lawsuits against several real estate brokers (broker defendants) and a group of title companies and other service providers (service provider defendants) alleging improper conduct by the broker defendants in getting unreported payments from the service provider defendants. Each of the broker defendants represented one or more of the plaintiffs in connection with the sale of his or her home. Defendants brought motions to compel arbitration based upon three arbitration agreements: a Residential Listing Agreement (RLA), the 2007 version of a form Residential Purchase Agreement (2007 RPA), and the 2010 version of a Residential Purchase Agreement (2010 RPA). The Court of Appeal ruled that the plaintiffs who executed the RLA were required to arbitrate their claims and, because every plaintiff initialed an arbitration clause either in the RLA or the 2007 RPA, they were required to arbitrate. The Court of Appeal also ruled that the trial court's order compelling arbitration under the 2010 RPA was not appealable. (C.A. 1st, filed May 23, 2017, published June 9, 2017.)

Attorney Fees (CCP § 1021.5)

County of Los Angeles Board of Supervisors v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 2692842: The Court reconsidered this case regarding the confidentiality of attorney invoices after it was remanded from the California Supreme Court decision in *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282 (*Los Angeles County*). Applying *Los Angeles County*, the Court of Appeal ruled that the superior court erred when it ordered California Public Records Act (PRA) disclosure of invoices related to pending matters. Invoices related to pending or ongoing litigation are privileged and are not subject to PRA disclosure. The Court of Appeal ruled that the matter should be remanded to the trial court for a hearing as to whether fee totals related to concluded

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matters must be disclosed. The conclusion in *Los Angeles County* that information in billing invoices is sometimes subject to PRA disclosure appears to be limited to fee totals. Billing entries or portions of invoices that provide any insight into litigation strategy or legal consultation, reveal the substance of legal consultation, or reveal clues about legal strategy, are privileged. The trial court erred in ordering portions of invoices other than fee totals disclosed. (C.A. 2nd, filed June 5, 2017, published June 22, 2017.)

Monster v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 2665193: The Court granted a writ petition ordering the trial court to reverse its order providing that defendant, who had won a summary judgment against plaintiff's fraud claims regarding its interest in Beat headphones, could have its motion for attorney fees (under Civil Code section 1717) for its contract cross-complaint claims determined by the court by a motion and not by a jury trial. The Court ruled that plaintiff had a right to have a jury determine the amount of attorney's fees resulting from its alleged breach of the two relevant agreements and nothing in section 1717 withdrew that right. Defendant did not pursue a motion for fees under section 1717 (or Code of Civil Procedure section 1033.5 c)(5)(A)) as the prevailing party on plaintiff's fraud claims, but instead elected to seek its fees as damages on its cross-claims for breach of contract. Because the fees are part of the relief sought, they must be pleaded and proved at trial, as any other item of damages. (C.A. 2nd, June 21, 2017.)

Save Our Heritage Organisation v. City of San Diego (2017) _ Cal.App.5th _ , 2017 WL 1505923: The Court of Appeal affirmed the trial court's order denying a motion for attorney fees by project proponent Plaza de Panama Committee. The Court ruled that a project proponent may obtain a section 1021.5 attorney fees award if the project proponent satisfies the award's requirements, but petitioner Save Our Heritage Organisation (SOHO) was not the type of party against whom the court could impose an award of attorney fees because SOHO did nothing to compromise public rights. (C.A. 4th, April 27, 2017.)

Attorneys

Beachcomber Management Crystal Cove v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 2823001: The Court granted a writ petition and ordered the trial court to vacate its order disqualifying defendant's counsel in a derivative action brought by plaintiffs against the defendants who were the sole managing member of the limited liability company. The trial court erred in failing to apply a more specific line of cases that governs an attorney's successive representation of clients in a derivative lawsuit brought on a small or closely held company's behalf against the insiders who run the company. Under these cases, an attorney may represent the insiders in a derivative lawsuit by the company despite the attorney's previous representation of the company regarding issues raised in the suit. Unlike the ordinary successive representation case, these cases recognize the attorney's representation of the insiders does not threaten the attorney's duty of confidentiality to the company because the insiders already are privy to all of the company's confidential information. The trial court was directed to determine whether the reasoning in the cases discussed by the Court of Appeal permits defendants' counsel to continue representing defendants in the lawsuit, determine whether the additional grounds plaintiffs raised in their motion support disqualification, and enter a new order on plaintiffs' disqualification motion. (C.A. 4th, filed June 28, 2017, published July 28, 2017.)

McDermott Will & Emery v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 1382132: The Court denied a writ petition seeking to overturn the trial court's ruling that a client did not waive the attorney-client privilege in disclosing an attorney-client communication to his sister-in-law, and its order disqualifying the law firm Gibson, Dunn & Crutcher LLP (Gibson Dunn) from representing defendants/petitioners McDermott Will & Emery LLP and Jonathan C. Lurie because Gibson Dunn's attorneys failed to notify the client or the client's attorney that counsel had obtained a copy of the communication, reviewed and analyzed the communication, and used it in the lawsuit. The trial court properly found the client did not waive the attorney-client privilege by forwarding a confidential e-mail he received from his personal attorney to his sister-in-law because he inadvertently and unknowingly forwarded the e-mail from his iPhone and lacked the necessary intent to waive the privilege. The trial court also properly ruled that Gibson Dunn had an ethical obligation to return the privileged material and refrain from using it under *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App.4th 644. (C.A. 4th, April 18, 2017.)

Tucker Ellis v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 2665188: The Court granted a writ petition ordering the trial court to reverse its summary judgment granted in favor of an attorney who was formerly employed by Tucker Ellis. The issue involved the proper holder of the attorney work product privilege as between the firm and the former employee. The Court of Appeal ruled that the law firm was the holder of the privilege. As a result, the law firm had no legal duty to obtain the attorney's permission before it disclosed to others documents he created during and in the scope of his employment. (C.A. 1st, June 21, 2017.)

Civil Code

Schep v. Capital One (2017) _ Cal.App.5th _ , 2017 WL 2729834: The Court affirmed the trial court's order sustaining a demurrer without leave to amend in an action alleging slander of title. The trial court properly sustained the demurrer because a trustee's acts in recording a notice of default, a notice of sale, and a trustee's deed upon sale in the course of a nonjudicial foreclosure are privileged under Civil Code section 47. (C.A. 2nd, June 26, 2017.)

Civil Procedure

Bonni v. St. Joseph Health System (2017) _ Cal.App.5th _ , 2017 WL 3167351: Reversal of the trial court's order granting defendant's anti-SLAPP motion to strike in a case where plaintiff physician sued defendants for retaliation under Health and Safety Code, section 1278.5 (the whistleblower statute), alleging that defendants retaliated against him for his whistleblower complaints by summarily suspending his medical staff privileges and conducting hospital peer review proceedings. The Court of Appeal held that plaintiff's retaliation claim arose from defendants' alleged acts of retaliation against plaintiff because he complained about the robotic surgery facilities at the hospitals, and not from any written or oral statements made during the peer review process or otherwise.

In the decision styled Duarte v. Pacific Specialty Insurance Company (filed June 12, 2017; as modified June 29, 2017) 13 Cal.App.5th 45, the Court of Appeal, First District, Division 2, found that an insurer has a right to know all that the applicant for insurance knows regarding the risks sought to be insured against; and that material misrepresentation or concealment of such facts are grounds for rescission of the policy, even though an actual intent to deceive need not be shown. Not long after Victor Duarte bought an insurance policy from Pacific Specialty Insurance Company ("Pacific") to cover a rental property he owned, he was sued by his tenants. When Pacific refused to defend him against the tenants' claims, Duarte sued Pacific, seeking, among other things, a declaration that Pacific was required to defend him in the tenants' suit.

The trial court granted Pacific's motion for summary judgment, ruling that Pacific was entitled to rescind the policy because Duarte "made material misrepresentations and/or concealed material facts" when he applied for the policy and that rescission rendered the policy unenforceable from the outset, and therefore Duarte never had any coverage and was not entitled to any benefits from the policy. The appellate court began its evaluation by noting that the California Supreme Court has explained that the law of rescission applies to insurance contracts in the following way: "It is generally held that an insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. [Citations.] Material misrepresentation or concealment of such facts are grounds for rescission of the policy, and an actual intent to deceive need not be shown. [Citations.] ... Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. [Citations.] The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law. [Citations.]"

Turning to the facts at hand, the appellate court then noted that this general principle applies as well to first party property claims and claims on liability insurance policies. The insurer is not required to show a causal relationship between the material misrepresentation or concealment of material fact and the nature of the claim. Nor must the misrepresentation be intentional: an insurer is entitled to rescind a policy "based on an insured's negligent or unintentional concealment or misrepresentation of a material fact." This is because the focus of the inquiry is not on the state of mind of the insured or applicant, but on "the probable and reasonable effect which truthful answers would have had upon the insurer." Thus, concluded the appellate court, false representation or concealment in connection with an application for insurance provide grounds for rescission of an insurance contract from the outset.

CGL POLICIES ARE LIMITED TO PROVIDING COVERAGE FOR ACCIDENTAL OCCURRENCES, AND DO NOT PROVIDE COVERAGE FOR PROFESSIONAL NEGLIGENCE CLAIMS

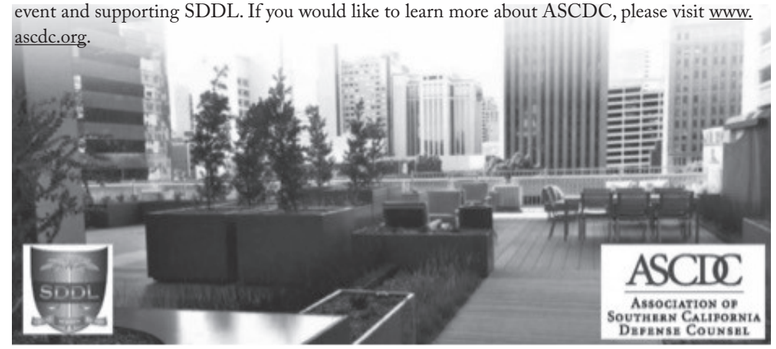
In the unpublished decision Energy Insurance Mutual Limited v. ACE American Insurance Company (filed July 11, 2017) 2017 WL 2953677, the Court of Appeal, First District, Division 4, found that CGL policies are limited to providing coverage for accidental occurrences, and do not provide coverage for professional negligence claims. This insurance coverage dispute arises from a massive explosion that occurred when an unmarked petroleum pipeline was struck by an excavator. Numerous lawsuits were filed against a range of defendants, including the pipeline owner and the staffing agency providing personnel to the pipeline.

After settling the lawsuits against the pipeline owner, an excess insurer for the pipeline sought to recover defense costs and settlement payments from the staffing agency's insurer. The staffing agency's excess insurance policy excluded damages arising from professional services. In affirming summary judgment in favor of the staffing agency's insurer, the appellate court found that the policy excluded the claims in the underlying lawsuits. The appellate court concluded that courts have applied the professional services exclusion broadly to bar coverage for damages resulting from a wide range of professional services that extend beyond those traditionally considered "professions," such as medicine, law, or engineering. ■

SDDL May & June Mixers

On May 25, 2017, SDDL co-hosted the annual Joint Mixer with the Consumer Attorneys of San Diego (CASD) at Bar Basic in San Diego. This event was graciously sponsored by Millennium Settlement Consulting, and Brinig Taylor Zimmer, Inc. As is always the case for this annual event, we had a huge turnout from both sides of the bar. Good times were had by all and it proved to be a great opportunity to share in civility and libations with our colleagues from the "dark side."

SDDL and the Association of Southern Defense Counsel jointly hosted a Mix & Mingle event on June 29, 2017 at Peterson Reporting's "Sky Terrace" at 530 B Street in San Diego. This after-work event was a chance for members of both organizations to socialize and take in the lovely views of downtown, while enjoying a variety of food and beverages. As always, the Mixer proved to be an excellent opportunity to decompress after a long day and meet with colleagues from the defense bar. We would like to thank Peterson Reporting for graciously sponsoring the event and supporting SDDL. If you would like to learn more about ASCDC, please visit www.ascdc.org.



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umbrella insurer did not breach its insurance policies with its insured when the insurer paid full policy limits to settle one of multiple existing claims. This breach of contract and "bad faith" action arose from a train accident on a film set that took the life of a camera operator ("Jones") and injured several other people.

New York Marine and General Insurance Company was Film Allman's insurer against claims arising from the making of the film, among other areas of coverage. Among the insurance policies at issue were a commercial general liability policy and a commercial liability umbrella policy, both issued by N.Y. Marine and General Insurance Company ("NYM"). After Film Allman provided notice of the train accident, NYM retained counsel in order to defend Film Allman and its principals against any litigation that arose. Predictably, litigation did follow, the most significant case being one brought by Jones's parents. The other injured parties also sued.

Because payment of the Jones settlement exhausted both the NYM CGL and Umbrella policies, NYM advised Film Allman that NYM's duty to defend in connection with the train accident had ended. This left Film Allman to shoulder the cost of defending those actions without insurance. As such, Film Allman demanded that NYM continue to defend it in the underlying suits. When it refused, Film Allman filed the instant suit alleging causes of action including "extra-contractual" liability.

In noting that NYM had the right under the CGL policy to settle the Jones suit for policy limits, the District Court recognized that NYM had the right to protect against the possibility that the Jones suit plaintiffs would prevail and expose it to much larger liability. NYM was therefore not obligated to continue defending Film Allman. The District Court concluded that NYM correctly assessed that its coverage had expired with the settlement of the Jones action. Therefore, NYM did not act objectively unreasonably. *An appeal to the Ninth Circuit Court of Appeal was filed on June 12, 2017.*

HOME DAMAGED BY A FIRE SUFFERED A "PARTIAL LOSS TO THE STRUCTURE" FOR PURPOSES OF THE STATUTE MEASURING AN INSURER'S INDEMNITY OBLIGATION UNDER AN OPEN ACTUAL CASH VALUE INSURANCE POLICY, EVEN IF THE LOSS REQUIRED REPAIRS WHICH EXCEEDED THE HOME'S FAIR MARKET VALUE

In the case styled California Fair Plan Association v. Garnes (filed May 26, 2017) 11 Cal.App.5th 1276, the Court of Appeal, First District, Division 2, held in a *case of first impression*, that a home damaged by a fire suffered a "partial loss to the structure" for purposes of the statute measuring an insurer's indemnity obligation under an open actual cash value insurance policy, even if the loss required repairs which exceeded the home's fair market value. In 2011, Marlene Garnes' family home was seriously damaged by a kitchen fire. She had purchased a fire insurance policy for the property, with a policy limit of $425,000. The dispute in this case and the issue on appeal is how much coverage Garnes is entitled to under the policy. She claimed that she should receive the amount it will cost her to repair the house, less an amount for depreciation, the net amount of which the parties agree would be $320,549. The insurer contended the policy, and the Insurance Code, allow it to pay her the lesser of that amount or the fair market value of the house, which at the time of the fire was $75,000.

The answer to this question, the appellate court stated, depends on the interpretation of sections 2051, 2070 and 2071 of the Insurance Code, including the phrases "total loss to the structure," "partial loss to the structure" and "actual cash value" in section 2051, and whether sections 2070 and 2071 permit insurers to provide less favorable coverage than that prescribed by section 2051. Applying its independent judgment to these questions of statutory interpretation, the appellate court concluded that Garnes was correct. Section 2051 of the Insurance Code provides that under an open fire insurance policy that pays "actual cash value," as does the policy here, the "measure of the actual cash value recovery ... shall be determined" in one of two ways, depending on whether there has been a "total loss to the structure" or a "partial loss to the structure." For a "partial loss to the structure," the measure prescribed is "the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation" or "the policy limit, whichever is less." (§ 2051(b)(2).) Construed in accord with its plain meaning, this provision, coupled with sections 2070 and 2071, sets a minimum standard of coverage that requires the insurer to indemnify Garnes for the actual cost of the repair to her home, minus depreciation, even if this amount exceeds the fair market value of her home.

Further, the legislative history and the Insurance Commissioner's interpretation of this statute also support this interpretation. The insurer's arguments were based on interpretations of these sections that cannot be squared with their plain language, and the contention that requiring recovery of repair costs less depreciation where they exceed fair market value is "bad policy." The latter argument, noted the appellate court, is for the Legislature, not this court. As such, the law supported Garnes' interpretation.

EQUITABLE CONTRIBUTION CLAIM AMONG TWO INSURERS REQUIRES TWO OR MORE VALID CONTRACTS OF INSURANCE COVERING THE PARTICULAR RISK OF LOSS AND THE PARTICULAR CASUALTY IN QUESTION

In an unpublished opinion styled Seneca Ins. Co. v. Allied Ins. Co. (filed June 7, 2017) 2017 WL 2465025, the United States Court of Appeals, Ninth Circuit, relying upon the California appellate decision Fireman's Fund Ins. Co. v. Md. Cas. Co., (1998) 65 Cal.App.4th 1279, summarily held that an equitable contribution claim requires two or more valid contracts of insurance covering the particular risk of loss and the particular casualty in question. Seneca Insurance Company's ("Seneca") first amended complaint alleged that Seneca rescinded its insurance policy retroactive to a date prior to the fires causing the insurance coverage claims. Accordingly, Seneca's equitable contribution claim is not viable because there were not two valid contracts of insurance covering the insureds' loss at the time of the fires.

INSURER HAS A RIGHT TO KNOW ALL THAT THE APPLICANT FOR INSURANCE KNOWS REGARDING THE RISKS SOUGHT TO BE INSURED AGAINST; MATERIAL MISREPRESENTATION OR CONCEALMENT OF SUCH FACTS ARE GROUNDS FOR RESCISSION OF THE POLICY, EVEN THOUGH AN ACTUAL INTENT TO DECEIVE NEED NOT BE SHOWN.

Therefore, defendants failed to satisfy the first prong of the anti-SLAPP statute's two-part test by failing to show plaintiff's claim arose from protected activity. (C.A. 4th, July 26, 2017.)

Casiopea Bovet, LLC v. Chiang (2017) _ Cal.App.5th _ , 2017 WL 2131421: The Court affirmed the trial court's order granting a motion for judgment on the pleadings. The trial court properly ruled that plaintiff could not claim escheated property under the Unclaimed Property Law (Code of Civil Procedure section 1500 et seq.) as an assignee of Financial Title Company because it was a suspended corporation (Revenue & Tax. Code, section 23301), which lacked legal capacity to prosecute an action. (C.A. 4th, filed May 17, 2017, published June 7, 2017.)

Crossroads Investors v. Federal National Mortgage Association (2017) _ Cal.App.5th _ , 2017 WL 3166914: After the California Supreme Court granted a writ petition by defendant, depublished the original Court of Appeal opinion, and remanded the matter to reconsider the appeal in light of *Baral v. Schnitt* (2016) 1 Cal.5th 376, the Court of Appeal reversed the trial court's order denying defendant's anti-SLAPP motion to strike. Plaintiff sued for wrongful foreclosure, breach of contract, fraud, and other tort and contract causes of action after defendant sold real property in a nonjudicial foreclosure sale after plaintiff failed to get confirmation of a bankruptcy reorganization plan. The Court of Appeal ruled that, except for claims based on one of defendant's actions, all of plaintiff's claims arose from defendant's constitutionally protected actions that were taken as part of, or related to, the bankruptcy action. Moreover, plaintiff did not establish a prima facie case in support of those claims, as all of its tort claims based on protected activity attacked statements privileged under Civil Code section 47, and the contract claims arising from protected activity were barred as a matter of law. (C.A. 3rd, July 26, 2017.)

CRST, Inc. v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 2302215: The Court granted a writ petition challenging the trial court's order denying the defendant employers' motion for summary adjudication as to punitive damages. Plaintiffs were seriously injured in a truck-vehicle accident and sued for damages including punitive damages. The employers admitted vicarious liability for the act of the defendant employee. The trial court granted the employee's motion regarding punitive damages, but it denied the employers' motion. The Court of Appeal ruled that the admission of vicarious liability did not bar punitive damages, but it found there were no triable issues of fact which could subject the employers to punitive damages because there was no evidence that one employee of defendants, who might have had knowledge of the driver employee's unfitness, was a managing agent under Civil Code section 3294(b). (C.A. 2nd, May 26, 2017.)

FilmOn.com v. DoubleVerify, Inc. (2017) _ Cal.App.5th _ , 2017 WL 2807911: Affirmation of the trial court's order granting an anti-SLAPP motion to strike in an action where plaintiff alleged trade libel, slander, tortious interference with contract, and other business-related torts against defendant. The Court of Appeal ruled that defendant's statement that plaintiff hosted adult content and copyright infringing material on its website concerned issues of public interest. (C.A. 2nd, filed June 29, 2017, published July 25, 2017.)

Fox Factory, Inc. v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 1507929: The Court granted a writ petition and reversed the trial court's order denying defendant's motion to dismiss on the ground of forum non conveniens under Code of Civil Procedure section 410.30(a)(3) and section 418.10(a)(2) in an action where the plaintiff had been seriously injured while mountain biking in British Columbia. Because plaintiff was not a resident of California (nor a citizen of the United States), the Court of Appeal ruled that the trial court had erred and applied the wrong legal standard by imposing a burden on petitioner to show that California was a seriously inconvenient forum in order to obtain a dismissal or stay under the forum non conveniens doctrine. (C.A. 6th, April 27, 2017.)

Hilliard v. Harbour (2017) _ Cal.App.5th _ , 2017 WL 2376338: The Court affirmed the trial court's order sustaining a demurrer without leave to amend because the elder abuse plaintiff lacked standing to sue. The fraudulent misrepresentations of defendants alleged in the complaint were not designed to induce plaintiff to create a corporate entity, but to induce conduct on the part of the James Crystal Companies (the Companies), a limited liability company he controlled that already existed and whose assets consisted of corporations and limited liability companies that also already existed. Plaintiff lacked standing because his claim was derivative of that of the Companies. (C.A. 1st, filed June 1, 2017, published June 16, 2017.)

Hupp v. Solera Oak Valley Greens Association (2017) _ Cal.App.5th _ , 2017 WL 2705626: The Court of Appeal affirmed the trial court's ex parte order dismissing the first amended complaint under Code of Civil Procedure section 391.7 as to all claims brought by or for the benefit of plaintiff's son Paul, on the ground he had been declared a vexatious litigant. However, because plaintiff had not been declared a vexatious litigant, the judgment of dismissal was reversed as to all claims solely personal to her. (C.A. 4th, June 23, 2017.)

Jackson v. Mayweather (2017) _ Cal.App.5th _ , 2017 WL 1131869: The Court reversed, in part, the trial court's denial of former boxing champion defendant's anti-SLAPP motion to strike plaintiff's complaint alleging invasion of privacy (both public disclosure of private facts and false light portrayal), defamation and intentional and negligent infliction of emotional distress. The Court of Appeal reversed with respect to plaintiff's claims for defamation, false light portrayal, and public disclosure of private facts based on defendant's comments about plaintiff's cosmetic surgery because plaintiff failed to demonstrate a probability of prevailing on those claims. (C.A. 2nd, filed March 27, 2017, published April 19, 2017.)

San Diegans for Open Government v. San Diego State (2017) _ Cal.App.5th _ , 2017 WL 1684295: The Court affirmed the trial court's order granting an anti-SLAPP motion to strike. Plaintiff's complaint alleged that contracts between KPBS and inewsource violated statutory prohibitions on self-dealing involving public funds. The Court ruled the trial court properly granted the anti-SLAPP motion, in that reporting news is protected speech and therefore providing office space and related newsgathering facilities in exchange for investigative news stories

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CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 13:

furthers protected speech. In determining whether the anti-SLAPP statute applies, the appropriate focus is on the alleged injury-producing conduct (here, the KPBS-inewsource contracts), and not the defendant's alleged wrongful motive for engaging in that conduct like self-dealing. The public interest exemption to the anti-SLAPP statute in section 425.17(b) does not apply to actions against news media engaged in newsgathering conduct. (C.A. 4th, May 3, 2017.)

The Rossdale Group v. Walton (2017) _ Cal. App.5th _ , 2017 WL 2590692: The Court reversed the trial court's order granting defendant's motion to dismiss a complaint for malicious prosecution under Code of Civil Procedure section 367 on the basis that plaintiff lacked capacity to sue because it was merely a fictitious business name. The Court of Appeal observed that a motion under section 367 is a plea in abatement that must be raised at the first opportunity, by a demurrer on in the answer. If an event causing lack of capacity occurs after the time to demurrer or answer, the defendant needs to file a motion to amend its answer (which they did not do). The Court ruled that section 367 does not provide a federal-style standing requirement, the suspension of a corporate entity's status does not implicate standing (as opposed to capacity), and neither section 367 nor the concept of standing prohibited plaintiff from pursuing its case under a fictitious name. (C.A. 6th, June 15, 2017.)

ZL Technologies, Inc. v. Does 1-7 (2017) _ Cal.App.5th _ , 2017 WL 3048761: Reversal of the trial court's order denying a motion to compel compliance with a subpoena seeking the identity of Doe defendants that plaintiff contended had anonymously defamed it on Glassdoor, Inc.'s website for job seekers, and also reversed the trial court's order later dismissing the action for failing to serve the Doe defendants. The trial court erred in deeming the comments to be entirely protected opinion, as the six reviews included factual assertions providing a legally sufficient basis for plaintiff's defamation cause of action. The Court of Appeal also ruled that constitutional protections weigh in favor of requiring a plaintiff to make a prima facie evidentiary showing of the elements of defamation, including falsity, before disclosure of a defendant's identity can be compelled. (C.A. 1st, July 19, 2017.)

Class Actions

Bartoni v. American Medical Response West (2017) _ Cal.App.5th _ , 2017 WL 1476182: In a wage and hour class action case, that also alleged violations under the Private Attorneys General Act of 2004 (PAGA), plaintiffs appealed the trial court's denial of the motion for class certification. The Court of Appeal denied defendant's motion to dismiss the appeal because the PAGA claims remained and it deemed plaintiffs' appeal to be a petition for writ of mandate. The Court concluded the trial court's denial of class certification rested in part on an incorrect legal assumption about the nature of rest periods, and therefore granted the writ and ordered the trial court to vacate the portion of its order denying class certification for claims regarding the failure to provide off-duty rest periods. (C.A. 1st, filed April 25, 2017,

Bottom Line

Title: Kendall Joseph Marsh, Joshua David Green and Rachel Green v. BJ Rentals Inc. and Abraham Aguilar Barraga

Case No.: San Diego Superior Court Case No. 37-2015-00012644-CU-PO-CTL

Judge: Hon. Eddie C. Sturgeon

Type of Action: Negligence/Personal Injury and Loss of Consortium

Type of Trial: Jury

Length of Trial: 7 days and 3 hours of deliberations

Plaintiff's Counsel: Paul R. Kiesel and Mariana Aroditis of Kiesel Law LLP, Beverly Hills

Defense Counsel: Wyeth E. Burrows and Steven D. Stutsman of Wood Smith Henning & Berman LLP

Plaintiff's Expert Witnesses: Timothy A. Peppers, M.D., orthopedic surgery; Mark Remas, M.A., C.R.C., A.B.V.E., vocational rehabilitation; Gregory A. Kaseno, C.P.A., economics

Defense Expert Witnesses: Larry D. Dodge, M.D., orthopedic surgery; Nancy F. Michalski, R.N., medical coding & billing; Behnush B. Mortimer, Ph.D., vocational rehabilitation; Heather H. Xitco, C.P.A., L.E.C.G., economics

Factual Background: On April 17, 2014, plaintiff Kendall Marsh, 34, was driving a pickup truck belonging to his employer, Joshua Green, 43, the owner of a local plumbing company, with Mr. Green riding as a passenger in the front seat. The truck was waiting at a stop light to enter the I-5 south in North County San Diego. Subsequently, their vehicle was rear-ended by a Chevrolet Silverado (towing a scissor lift), operated by Abraham Barragan.

Marsh claimed injuries to his neck and back, while Green claimed injuries to his back. Green's wife also claimed loss of consortium. They sued Barragan as well as his employer BJ Rentals Inc., the owner of the Chevrolet Silverado, based on the allegations that Barragan was negligent in the operation of his vehicle and that BJ Rentals was vicariously liable.

Defendants stipulated that they were negligent in the operation of the truck, and Green's spouse dismissed her claim for loss of consortium on the first day of trial.

Injuries/Damages and Trial: Plaintiffs had immediate onset of back and neck pain and were treated for multiple strain/sprain injuries at a local emergency room on the day of the collision. Plaintiffs claimed their symptoms worsened over the weeks following the collision and they were referred to neurosurgery and orthopedic specialists. Over the course of the next year and a half, both plaintiffs underwent conservative care, including physical therapy and multiple epidural injections. Eventually, plaintiffs underwent surgeries to address their worsening complaints of pain, including radiculopathy into their arms and legs.

Plaintiff Marsh alleged aggravation of cervical and lumbar issues which allegedly necessitated two separate surgeries and follow up care after conservative treatment allegedly failed. Specifically, Marsh underwent a multi-level anterior approach cervical discectomy, disc replacement and fusion at C3-4, C4-5 and C5-6 in May of 2015. Separately, in September of 2015, Marsh underwent an anterior approach L5-S1 total disc replacement. His treating orthopedist, Dr. Timothy Peppers, attributed the need for the surgeries to the collision. Marsh incurred approximately $600,000 in claimed medical bills over a 24 month course of care.

The parties stipulated that Marsh was disabled as a result of the surgeries and unable to resume his career as a plumber. Plaintiff presented evidence that Marsh faced significant obstacles to future employment beyond sedentary jobs due to the disabilities, and claimed past and future lost wages of $1.3 million.

Plaintiff Green alleged aggravation of lumbar issues which allegedly necessitated a fusion surgery and follow up care after conservative treatment allegedly failed. Specifically, Green underwent an anterior approach L5-S1 lumbar fusion and disc replacement in September of 2015. The same treating orthopedist, Dr. Peppers, attributed the need for surgery to the collision. Green incurred $385,000 in past medical bills and sought an additional $245,000 for a future surgery due to adjacent level deterioration at L4-L5. He also sought $700,000 in lost earning due to limits on his ability to continue working as the owner of his plumbing company in San Diego.

The parties stipulated that the collision occurred at a speed of 11 mph, and that the defendants' vehicle weighed twice as much as plaintiffs' vehicle. The defense argued that the need for surgery, to the extent there was any need, was not causally related to the collision. Defendants argued that x-rays, MRIs and CT scans taken over the course of the 18 months after the collision showed degenerative changes in both plaintiffs' spines, as opposed to acute changes attributable to the collision. Defendants further argued that the medical billings were not reasonable.

Plaintiff's Demand at Trial: $11.8 million for both plaintiffs

Verdict: The jury awarded Marsh $89,949 and Green $53,774, for a total of $143,723

998 Offers: Defense offered $600,000 to Marsh and $400,000 to Green, but plaintiffs allowed these offers to lapse without further negotiation. During trial the parties discussed the use of high/low offers as follows, but no agreement could be reached: Plaintiffs' Demand high/low of $6,000,000 / $1,900,000 and Defendants' Offer high/low of $2,000,000 / $450,000. ■

Insurance Law Update

By Jim Roth
THE ROTH LAW FIRM

The second quarter of 2017 has seen a variety of both state and federal insurance decisions, two of which are cases of first impression and which are discussed below.

WORKERS' COMPENSATION POLICY CAN BE RESCINDED FOR MATERIAL MISREPRESENTATIONS IN THE APPLICATION, EVEN AFTER A WORKERS' COMPENSATION CLAIM IS BROUGHT

In the case styled Southern Ins. Co. v. WCAB (filed May 10, 2017) 11 Cal. App.5th 961, the Court of Appeal, Second District, Division 2, ruled upon a *case of first impression*, finding that a workers' compensation policy can be rescinded for material misrepresentations in the application, even after a workers' compensation claim is brought. Southern Insurance Company ("Southern") issued a workers' compensation insurance policy based on the express representation that the employer's employees did not travel out of state. After an employee was injured in another state, Southern notified the employer that it was rescinding the policy because of the misrepresentation, and returned the premium.

The issue of insurance coverage went to mandatory arbitration within the workers' compensation arena, wherein the arbitrator concluded that, as a matter of law, the insurer could not rescind the policy, and the Workers' Compensation Appeals Board ("WCAB") affirmed the arbitrator's decision. The arbitrator had cited three reasons for finding there could be no "retroactive rescission" of a workers' compensation policy. First, Insurance Code section 676.8 (governing cancellation of workers' compensation insurance) says nothing about rescission. Second, there was no authorization from a judge or the WCAB. Third, a claim was pending and the employee would be left without coverage. The appeals court disagreed: "Contrary to the arbitrator's ruling, a workers' compensation insurance policy may be rescinded. (Ins. Code, § 650.) A rescission is enforced by a civil action for relief based on rescission (Civ. Code, § 1692) or by asserting rescission as a defense. Because the arbitrator and the appeals board did not address and determine whether rescission was a meritorious defense to the employee's claim, we annul the appeals board's decision and remand the case with directions to hear and determine whether the insurer was entitled to rescind, and did rescind, the policy."

To reach this decision, the appellate court first held that the WCAB has jurisdiction to decide rescission, because rescission is in effect a coverage question and the appeals board (WCAB) has specific statutory authorization to decide coverage disputes (Lab. Code, § 5275(a)(1)): "[I]f Southern disputes workers' compensation insurance coverage because it claims there is no contract, it must submit to the jurisdiction of the appeals board on the issue of coverage even if that entails a ruling on whether the insurance contract is (or was) in effect." The appellate court went on to conclude that the Insurance Code's rescission sections apply to workers' compensation insurance, like any other insurance. The court pointed out that, in contrast to the Insurance Code sections governing cancellation of policies (Ins. Code, § 676.8), the rescission sections are silent on workers' compensation (Ins. Code, §§ 650, 651). The appellate court found no indication in any of the applicable statutes of an intent to limit the right to rescind workers' compensation insurance.

The appellate court then explained the Insurance Code's "somewhat peculiar" limitation of rescission to the period prior to the filing of an "action on the policy," saying: "[T]he former equitable suit for rescission, now abolished, could not be brought if there was an adequate remedy at law. The adequate remedy at law was an action on the insurance contract. That is, if the policy holder brought an action on the contract, the carrier could assert rescission as a defense in that action. [Citations.] Thus, section 650 is an echo of the past reality that an equitable suit for rescission could not be brought in the face of a pending action at law.... [S]ection 650 does not affect the current state of the law which is that rescission can always be asserted as a defense to the action on the contract." In any case, the appellate court found that a workers' compensation claim is not the functional equivalent of an "action on the policy" and thus does not preclude rescission despite the existence of a pending claim.

The appellate court also rejected the arbitrator's criticism of "unilateral" action by the insurer, saying "rescission is routinely a unilateral act." The appellate court did send the insurer a warning that merely announcing a rescission and returning the premium did not, in and of itself, discharge the insurer's obligations, finding a distinction between "effecting" rescission and "enforcing" it. The appellate court pointed out that, under the general rescission of contracts sections of the Civil Code, a contracting party who rescinds is provided a variety of options for relief, such as an action for declaratory relief. (Civ. Code, § 1692.) Likewise, the insurer can raise rescission as a defense in the workers' compensation proceeding. But in any case, the insurer is not discharged until there is a ruling on the rescission. Having concluded that rescission was available to the insurer, the appeals court found numerous fact questions and remanded the matter to the WCAB for a determination on the merits.

A GENERAL LIABILITY AND UMBRELLA INSURER DID NOT BREACH ITS INSURANCE POLICIES WITH ITS INSURED WHEN THE INSURER PAID FULL POLICY LIMITS TO SETTLE ONE OF MULTIPLE EXISTING CLAIMS

In the decision styled Film Allman, LLC v. N.Y. Marine and General Ins. (filed May 23, 2017) 2017 WL 2259671, the United States District Court, Central District of California, found that that a general liability and

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published May 24, 2017.)

Kizer v. Tristar Risk Management (2017) _ Cal.App.5th _ , 2017 WL 2729841: The Court affirmed the trial court's order denying class certification in a wage and hour class action for failure to play claims examiners overtime compensation. The trial court properly denied the motion because plaintiffs failed to show that whether the putative class members worked any overtime at all was subject to common proof. To satisfy the commonality requirement for class certification, plaintiffs were required to show their liability theory could be established on a classwide basis through common proof. Typically, in overtime claims, plaintiffs show this by presenting evidence of an employer policy or practice that generally required the class members to work overtime. Plaintiffs, however, presented no evidence of any such policy or practice. A plaintiff seeking class certification on an unfair competition claim law (Business and Professions section 17200 et seq.) must establish that common issues of law or fact predominate, the representative's claim is typical of the class, and all other elements required for class certification. Substantial evidence supported the court's decision that plaintiffs failed to make that showing. (C.A. 4th, filed June 26, 2017, published July 26, 2017.)

Elder Abuse

Brenner v. Universal Health etc. (2017) _ Cal.App.5th _ , 2017 WL 2464959: The Court affirmed the trial court's order granting summary judgment in an action for wrongful death based on medical negligence, retaliation in violation of Health and Safety Code section 1278.5, and elder abuse in violation of Welfare and Institutions Code sections 15610, et seq. The trial court properly granted summary adjudication of the claims for wrongful death based on medical negligence because there was no triable issue of fact regarding the element of causation. The Court of Appeal ruled that section 1278.5 does not create a claim against individual doctors. Specifically, section 1278.5(b) does not permit an individual who is not a patient and not an employee, member of the medical staff, or other health care worker at the facility, but who has complained on behalf of a patient, to bring a claim for discrimination or retaliation. Moreover, the statute does not protect a patient from alleged "retaliation" resulting from complaints made by persons other than those identified in the statute. Finally, plaintiff's expert declaration was insufficient to create a triable issue of fact with respect to the elder abuse cause of action. (C.A. 4th, June 7, 2017.)

Mahan v. Charles W. Chan Insurance Agency (2017) _ Cal.App.5th _ , 2017 WL 2391817: Reversal of the trial court's order sustaining demurrers in an action alleging elder abuse. The trial court was persuaded that no elder abuse claim had been stated primarily because the elderly plaintiffs had transferred their property into a revocable trust and the trust property was allegedly the subject of elder abuse by defendants who sold costly insurance products and were charging expensive commissions. The Court of Appeal agreed with plaintiffs and held they had stated a cause of action for elder abuse by alleging they had suffered damage to their estate plan, loss of the money they felt compelled to transfer to the trust to pay for the insurance coverage, and loss of the money they felt compelled to transfer to the trust to pay defendants' commissions. (C.A. 1st, June 2, 2017.)

Employment

Featherstone v. Southern California Permanente Medical Group (2017) _ Cal. App.5th _ , 2017 WL 1399709: The Court affirmed the trial court's summary judgment for defendant in an action alleging that defendant violated the Fair Employment and Housing Act (FEHA; Government Code section 12940 et seq.) and public policy when it declined to rescind her resignation that she claimed had occurred when she was under a "temporary" disability as a result of a relatively uncommon side effect of medication she was taking. The Court of Appeal affirmed because defendant's refusal to allow plaintiff to rescind her resignation was not an adverse employment action under the FEHA, and plaintiff failed to raise a triable issue of fact as to whether defendant's employees who accepted and promptly processed her resignation knew of her alleged temporary disability at the time they took those actions. (C.A. 2nd, April 19, 2017.)

Minnick v. Automotive Creations, Inc. (2017) _ Cal.App.5th _ , 2017 WL 3203265: The Court affirmed the trial court's order sustaining a demurrer without leave to amend to a complaint alleging that defendant's vacation policy violated state law because it required employees who worked for less than one year to forfeit vested vacation pay. Defendant's vacation policy lawfully provided that employees did not begin to earn vacation time until after their first year. Because plaintiff's employment ended during his first year, he did not have any vested or accrued vacation pay and was not owed any vacation wages. (C.A. 4th, July 28, 2017.)

Santa Ana Police Officers Association v. City of Santa Ana (2017) _ Cal.App.5th _ , 2017 WL 2879796: Reversal in part of the trial court's order sustaining a demurrer without leave to amend. The trial court properly sustained the demurrer without leave to amend as to the cause of action alleging a violation of the California Invasion of Privacy Act (Penal Code section 630 et seq.) because the two police officers had no reasonable expectation as a matter of law that their communications during the raid of the marijuana dispensary were not being overheard, watched, or recorded. However, the trial court erred in sustaining the demurrer to the second cause of action for violation of the Public Safety Officers Bill of Rights Act because, under Government Code section 3303(g), defendants were required to produce the tape recordings of the initial interrogations, transcribed stenographer notes, and reports and complaints made by the investigators or other persons, before the two plaintiff police officers were interrogated a second time. (C.A. 4th, filed June 13, 2017, published July 6, 2017.)

Real Property

Conroy v. Wells Fargo Bank (2017) _ Cal. App.5th _ , 2017 WL 3205559: The Court affirmed the trial court's order sustaining defendant Wells Fargo's demurrer without leave to amend in an action filed by plaintiffs seeking to stop a foreclosure after they stopped paying their mortgage. The operative complaint did not state valid causes of action for intentional or negligent misrepresentation because it did not properly plead actual reliance or damages proximately caused by defendant. Plaintiffs could not assert a tort claim for negligence arising out of a contract with defendant. Due to the lack of detrimental reliance on any of defendant's alleged promises, plaintiffs also did state a

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6th Annual SDDL Tailgate and Padres Evening

On August 18, 2017, SDDL hosted a pre-game tailgate at the Mission Brewery and then members and their families watched the Padres take on the Washington Nationals at Petco Park. The tailgating was highlighted by a delicious taco bar and a bevy of craft beers. The sixth iteration of this well-attended annual event was another rousing success, despite the Padres not getting a W, and allowed members to socialize and enjoy a lovely night out downtown. We would like to thank U.S. Legal Support for graciously sponsoring the event and supporting SDDL.

CALIFORNIA SUPREME COURT CLARIFIES "DAY OF REST" STATUTE CONTINUED FROM PAGE 9

In response to the third question, the Court held the word "cause" implies certain affirmative behavior in "motivating or inducing action." Permitting or allowing an employee to work on the 7th day is allowed if the employee is notified of their right to a day of rest and independently chooses not to take a day of rest. The Court further stated an employer is to maintain "absolute neutrality" as to whether or not an employee exercises their right to a day of rest.

What does this mean for employers?

This decision is favorable for employers who schedule employees to work for more than 6 consecutive days. However, employers must have written practices in place to notify employees of their right to a day of rest, including a voluntary waiver of that right, when allowing for employees to work seven days in an employer-defined workweek. This will help avoid any claim the employee was induced to work the 7th day by their employer. ■

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.