Ethical Pitfalls for Lawyers in a Social Media World

By Richard Hoffer, 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...
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though 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 o

serve as a speaker or forward potential topics

to address, so please do not hesitate to

contact us at sddlinfo@sddl.org.

Additionally, we will hold our annual Trivia

Night in the fall so get your teams together

and prepare to compete for our coveted

Evo-Stem 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 tailgates at Mission Brewery,

our upcoming Trivia Night is expected to be
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.

THE UPDATE

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The Update is published for the mutual

benefit of the SDDL membership, a

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views, opinions, statements and conclusions

expressed in this magazine are those of the

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the opinions or policies of the SDDL or

its leadership.

SDDL UPDATE

c/o Evan Kalooky

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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@dtlaw.org so that corrections can be made for the next edition.

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#2 - Neil, Dymott, Frank, McCaff, Teitel, McCabe & Hudson – 39 members

#3 - Balasteri Potocki & Holmes – 15 members

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

#5 - Farmar Case & Fedor – 12 members

#6 - Grimm Vanijes & Greer LLP – 12 members

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

#8 - Winet Patrick Guyer Creighton & Hanes – 10 members

#9 - Ryan Carvalho & White LLP – 8 members

#9T - Wingerter, Gerbing, Brubaker & Juskie, LLP – 8 members

#11 - Lincoln, Giustafson & Cerros – 7 members

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

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

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

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#19T - Hughes Nunn, LLP – 4 members

#19T - Klinedinst PC – 4 members

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

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

By Adi Elliott

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.

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.

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 applications that run on that hardware.

As you go” for the subscriber does not see or handle the large up-front investments in hardware and software itself.

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 on 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 Roach

What is implicit bias?

Have you ever wondered why the demographics of CEOs and those in leadership positions remain largely homogeneous 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 undervalued or unfavored stereotypes as examples, 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 subconsciously 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 we 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 our own’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 or negatively expected different stereotypes, 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 of 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 criticized for coming on too strong and their accomplishments being attributed to luck, 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 means such as stating commitment to building a diverse and inclusive culture, banning “culture fits” 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.

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


3 Project Implicit’s tests can be accessed at http://implicit.harvard.edu/implicit/celebtests.html.


Expert Testimony Required When Litigating Reasonable Value of Medical Bills

Leslie M. Price, Esp.
TYSON & MENDES

The landmark decision in Howell v. Howard Metz Group Publishers, 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, Upton v. Moline (2015) 241 Cal.App.4th 996, 194 Cal.Rptr.3d 364.)

In these cases, the battle is just beginning once plaintiffs sign a lien agreement for his or her treatment. (Howell, supra, at p. 555 instructed, “[t]he recoverable, a medical expense must be both incurred and reasonable.”)

The trite 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, Howell 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 pediatrician Dr. Sanjiv Goel. Goel provided emergency interventions and 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 appraised, 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 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 payers 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 Kathleen 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 Enterprises, as well as Sulfurine Inc., which operated the farm in 2007, and T.T. Miyasaka Inc., the half owner of Sulfurine. 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 defusing 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.
Successful. To resolve a dispute

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a mediator, arbitrator, and
career and welcome him to

him on his distinguished

career and statewide.

ALL TYPES OF PERSONAL INJURY

EMPLOYMENT

PROFESSIONAL MALPRACTICE

REAL ESTATE/IAA

MAIN AREAS OF EXPERTISE:

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
showed 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
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. 37-2016-00033221-CU-PN-CTL

Judge: Hon. Randa Tripp

Type of Action: Negligence Per Se (violation of
HIPAA/CMA); Medical Malpractice
(dismissed the first day of trial); Ununls
Civil Rights Violation; and Intentional
Inflation 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
treatment.

However, Plaintiff’s healthcare at
Sharp Memorial Hospital was racially
profiled the African-American plaintiff by
offering a taxi voucher. She further claimed
she was cleared for discharge while
bringing the instant lawsuit concerning
her alleged emotional distress. The nurse
stated, with one of the patient’s
caregivers, that she needed to stay due to lack of a ride
home. The patient 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 patient 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
surgery.

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

Verdict: Defense verdict on all claims - Per Se
11-1, Ununls 12-0, IED 12-0

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

“I see private dispute mediation as a
continuation of those aspects of my
judicial career which I found most
satisfying and in which I was most
successful. To resolve a dispute
without the emotional and monetary
cost of trial is a wonderful thing.”

DOWNTOWN LOS ANGELES | SACRAMENTO | SAN DIEGO | SAN FRANCISCO | SANTA ANA | WEST LOS ANGELES
The case initially arose out of a personal injury claim brought against the defendants. The injured employee fell through an unsecured barricade at the construction site. The Court of Appeals 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.

Both defendants disputed liability and 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 other contractors working in the area prior to the accident beyond the two defendants, such that res ipsa loquitur was inapplicable because the defendants were in control of the instrumentation that caused the injury and should burden the proof of who removed the barricade. Both defendants opposed the insurer’s motion, arguing the accident occurred on an active construction site and who had control of the site was indeterminate.

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 site 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 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: Bosco Grayfer v. Wawanesa General Insurance Company
Case No.: Los Angeles Superior Court Case No. BC 337972
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: Arnon Shaghoz, Shaghoz & Shaghoz Law Firm, and Ara Anoushtamian, Anoushtamian & Associates, Glendale, CA
Defense Counsel: Kenneth N. Greenfield and Kate A. Greenfield, Law Offices of Kenneth N. Greenfield

Factual Background: In late July 2015, Plaintiff lost his leased 2015 Chevrolet Camaro parked on the street in Los Angeles, and went to Palm Springs for the weekend. He gave the spare tire to a mechanic and had it taken to a tire store 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 neighbor had the key back to Plaintiff noting that the car should be on the street where Plaintiff had left it.

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 precipitant and expert witnesses. Ultimately, the court found 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.
How Will Autonomous Cars Steer Insurance Issues
Beth I. Golub, Esq.
TYSON & MENDES

The insurance industry is 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 taping into their think tanks 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 would 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 that tech companies are spending on their development. "If I had to take the over and that tech companies are spending on their development, 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 31% 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 programmed 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 dominate mistakes while driving, liability and premiums will 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. The costs of settling, traditional or 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 safe, there’s less in the way of insurance costs and that brings down premium 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 General v. Rail [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 Risks

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 corrosive 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 of the court’s consideration. The court must 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 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 firms 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 Legal site (Law360) could become a major threat to insurance companies seems inevitable. Warren Buffet 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, Evidence, are triggered. Mr. Huver also discussed that the 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.”

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 social media on non-settling defendants who act 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.
The Specter Of Sliding Settlements In Multi-Party Litigation: Strategies For Protecting The Non-Settling Defendant

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In formulating California’s approach to evaluating the good faith of peace-meal settlements, the California Supreme Court famously stated: “When profit is involved, the ingenuity of man spans limitless varieties of unfairness.” (Tech-Bilt, Inc. v. Woodard-Glyde & Associates (1995) 38 Cal.3d 488, 494-495 quoting River Garden Farm, Inc. v. Superior Court (1972) 26 Cal.App.3d 986, 993.) As set forth below, a sliding scale settlement certainly falls within this unfairness 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 plaintiff ultimately obtains from the non-settling defendant with the statutory goal of equitable apportionment amongst tortfeasors when the necessary evidence affects an improper share of each defendant’s share of liability onto 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 set at the time of settlement because the issue of credit is part of the contingency of the plaintiff’s liability. (In Re: Defects in the Tech-Biltấu Good faith standard applies to controversial sliding scale settlements. (Abbot-Ford, Inc. v. Superior Court (1987) 43 Cal.3d 858, 875-876.) The difficult issue confronting the Abbot-Ford Court was how to reconcile an agreement wherein a plaintiff’s recovery is contingent on the amount plaintiffs ultimately obtains from the non-settling defendant with the statutory goal of equitable apportionment amongst tortfeasors when the necessary effect of any agreement is to improperly shift the settling defendants’ share of liability onto the non-settling defendant. (Id.)

2. Disclosures
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 Abbot-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. (Abbot-Ford, 43 Cal.3d at 878-879.) Accordingly, to achieve the statutory objective of fair apportionment of fault, the Abbot-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 set at the time of settlement because the issue of credit is part of the contingency of the plaintiff’s liability. (In Re: Defects in 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 require a good faith hearing as an adequate 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 to 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 to the complexity of 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 Bauske 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 creatively already in the process of evaluating these issues and collaborate. Gather and logically synthesize all existing data for complete understanding of the laws 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 among multiple party settlements and premiums. Consider retention of political consultants who may be needed to address how the technology is incorporated into the 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
Both Glob 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

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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 employee-defined workweek not on a rolling basis, and an employer is not prohibited from allowing a full-time employee to forsake 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 guaranteed day of rest applies only if the employee had at least one shift of six (6) hours or less during the period, and Nordstrom did not “cause” the employee to work more than 6 consecutive days because it did not force or coerc[e] any employee to do so.

The Ninth Circuit filed an order requesting the California Supreme Court to 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 the employee works 6 hours or less on at least one day of the applicable week, or does it apply only when an employee works 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 week,” 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 that exceed 6 consecutive days is not “per se prohibited,” indicating the Legislature did not intend to prevent workers 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.

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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 parent of K-12 students. The trial court had denied tenancy 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 stricken 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 2589915. 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 the Court of Appeal’s dismissal of an appeal from a motion to strike a complaint filed by a parent of K-12 students. The trial court affirmed the decision of the Court of Appeal denying petitioner’s writseeking 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. (July 19, 2017.)

Employment (Whistleblower Protection)

Show v. Superior Court (2017) _ Cal.5th _, 2017 WL 1335681. 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. 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. However, Health and Safety Code section 1278.5(b) preserves a plaintiff’s right to a jury trial for wrongful termination in violation of claims for gross negligence, recklessness and strict liability. The Court of Appeal also affirmed plaintiff’s motion for summary judgment in costs 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 $5,962.50 in costs. (C.A. 4th, filed June 22, 2017, published July 17, 2017.)

Taylor v. Trimboli (2017) _ Cal.App.5th _, 2017 WL 3187391. The Supreme 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 son in defendant’s pool. Regarding the claim for negligence supervision, where the homeowner initially assumed responsibility for supervision of defendant, 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. 4th, 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 trial immunity under Government Code section 831.4. The Court of Appeal ruled that trial 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 trial 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.)

San Diego Defense Lawyers will proudly present its 27th Annual National Mock Trial Competition on Thursday, 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 year.

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Two of 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 us inspire law students in this year’s Mock Trial Competition.

Save the Date! 2017 SAN DIEGO DEFENSE LAWYERS NATIONAL MOCK TRIAL COMPETITION

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2. Disclaimers, Declarations, 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 (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 LastServe 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. Learning 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 LinkedIn, you must post it on a backup or 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 what 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 alter articulate some of the guidelines discussed herein. Be sure to check out the new Rules when they are finally approved.
viable cause of action for promissory estoppel. The Court of Appeal held that, although the ordinance was non-retroactive, the parties did not agree 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 1422353: The Court affirmed the trial court’s denial of a writ petition seeking to invalidate a county ordinance that excluded public comment during the environmental review process. The Court determined the ex parte nature of the public comment process in the Sierra Club’s petition. The Court further ruled that the trial court’s order denying the petition did not alter the Planning Commission’s ex parte decision, but rather, it modified the decision to include public comment. The Court affirmed the trial court’s denial of the petition for failing to raise a triable issue of fact. (C.A. 6th, May 12, 2017.)

Torts
Alvarez v. Saddle 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 499 (Privette). Plaintiff sued for personal injuries suffered when his van was hit by a deer while at work. Plaintiff’s employer, Pacific Crane Maintenance Company, had been hired by Everett 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 3141990: The Court affirmed the trial court’s order denying defendant’s motion to suppress evidence. 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.)

Swager v. Bruno (2017) _ Cal.App.5th _, 2017 WL 2436676: 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 he had dismounted at a required check point during an organized endurance horseback riding event. The primary assumption of risk doctrine barred the claim because plaintiff was not a invitee. The Court found that the accident site was growing in an improved area by virtue of the artificial physical changes in its immediate vicinity. (C.A. 1st, July 25, 2017.)

Cavus v. Contra Costa County (2017) _ Cal.App.5th _, 2017 WL 1567913: 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 rehabilitative care. Plaintiff’s complaint alleged that the defendant breached the duty of care by refusing to order an amniocentesis. The Court 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. 111-144 (March 23, 2010) 124 Stat. 119) would be available to mitigate plaintiff’s future medical costs. The Court ruled that the trial court’s summary judgment that excluded evidence of past collateral source medical benefits, but the Court of Appeal ruled that section 3333.3 allows evidence of past and future collateral source medical benefits. (C.A. 1st, April 27, 2017.)

Domina 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 negligence 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 plaintiff’s 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.)

Garcia v. Perez (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 equally barred from opposing the arbitration agreement. (C.A. 4th, filed April 24, 2017, published May 16, 2017.)

Hinode v. Shoji (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 1281.1, subdivision 2(a) remand. The 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 respond to the 998 request to the arbitrator during the arbitration hearing because the request 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 rejected defendant’s request for arbitration under Code of Civil Procedure section 1281.1(b), because an order denying a renewed motion or application under section 1008(b) is not appealable. (C.A. 2nd, May 26, 2017.)

Arbitration
Andreadis v. Superior Court (2017) _ Cal.App.5th _, 2017 WL 1702718: In this case, 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 defense failed to meet its burden of showing that the arbitrator was, 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.)

Jackson v. City of Los Angeles (2017) _ Cal.App.5th _, 2017 WL 2946300: The Court affirmed the trial court’s order denying a motion 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 the L.A. County Board of Supervisors were equitably estopped to 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 compelled arbitration under the 2010 RPA was not appealable. (C.A. 1st, filed May 23, 2017, published June 9, 2017.)

L.A. Unified School District v. Safety National Casualty Corporation (2017) _ Cal.App.5th _, 2017 WL 2946300: 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 carriers for failing to provide coverage for third party litigation alleging sexual abuse of elementary school students. Where an arbitration agreement is part of a dominant contract, 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 there, the FAA’s procedural provisions govern the arbitration, California procedure applies. The trial court properly denied the motion to compel arbitration under California 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.)

Levay v. J. Rodicki, Inc. (2017) _ Cal.App.5th _, 2017 WL 2242945: 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 motions to compel arbitration against several real estate brokers (broker defendants) and a group of title companies and other service providers (service provider defendants) in connection with the sale of 17 homes, brought motions to compel arbitration upon the trial court’s 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 defense failed to meet its burden of showing that the arbitrator was, 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.)

Attorney Fees (CCP § 1021.5)
County of Los Angeles Board of Supervisors v. Superior Court (2017) _ Cal.App.5th _, 2017 WL 2692842: The Court considered this case regarding the confidentiality of attorney invoices after it was remanded from the California Supreme Court decision in Los Angeles County v. County of Los Angeles Board of Supervisors (2016) 2 Cal.5th 282 (Los Angeles County). Applying Los Angeles County, the Court of Appeal held that the superior court erred when it ordered California Public Records Act (PRA) disclosure of invoices related to pending matters. Invoices related to pending matters are attorney fees that are attorney fees that are not generated by a lawsuit and are not subject to PRA disclosure. The Court of Appeal ruled that the matter should be retrained to the trial court for a hearing as to whether for totals related to concluded

CONTINUED ON PAGE 12
ATTORNEYS

Roderick T. W. Chen

Attorney Management

Counsel vs. Superior Court (2017) _ Cal.App.5th _, 2017 WL 2833001: 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 the item of damages. (C.A. 2nd, June 21, 2017.)

In Beat headphones, could have its motion for attorney fees (under Civil Code section 1717) for the item of damages. (C.A. 2nd, June 21, 2017.)

Right. Defendant did not pursue a motion for attorney fees (under Civil Code section 1717) for the item of damages. (C.A. 2nd, June 21, 2017.)

The trial court erred in failing to apply a more specific line of cases that governs an attorney’s successor representation of clients in a derivative lawsuit by holding that the fees are part of the relief sought, they must instead elected to seek its fees as damages on the course of a nonjudicial foreclosure are slander of title.

The trial court’s order sustaining a demurrer to reverse its summary judgment granted in favor of Attorney who formerly employed by Tucker Ellis. The issue involved the proper holder of the attorney work product privilege as between the firm and the former partner. 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

Section 25834: 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.)

McDermott Will & Emery vs. Superior Court (2017) _ Cal.App.5th _, 2017 WL 1382152: 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, in his discovery disqualification, the law firm’s sovereign immunity for the use and tenancy questions in an insurance contract are slander of title.

The trial court’s order granting defendant’s anti-SLAPP motion to strike in a case where the insurer knows in good faith that a pipeline owner and the state are required to settle claims against the pipeline owner and the state and avoid settlement the insurer is entitled to rescind a policy “based on fraud.” However, the jury found that Paci should be made a party defendant for the purposes of the trial court’s order granting defendant’s anti-SLAPP motion to strike in a case where the insurer the Court of Appeal held that plaintiff’s claims asserted against defendants’ alleged acts of retaliation against plaintiff because he complained about the malpractice problems at the hospitals where he received his education were barred by attorney-client privilege.

In the decision styled Duarte v. Pacific Specialty Insurance Company (filed July 12, 2017), as amended July 29, 2017) 13 Cal.App.5th 45, the Court of Appeal, First Division, Division 2, found that an insurer has a right to know all that the applicant for insurance knows or should have known about the risk sought to be insured against, and that material misrepresentation or concealment of such facts is 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, the insurer found that Duarte was employed by a property owner he owned, which was sold by its tenants. When Pacific refused to defend him against the tenants’ claims, Duarte sued Pacific, seeking the insurer’s 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 rescison 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 or should have known about the state of his health and medical history. [Citations.] Material misrepresentation or concealment of such facts is 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 done nothing to secure the answers to the questions on an application for insurance is in itself usually sufficient to establish materiality as a matter of law. [Citations.]”

SDDL May’s June Mixers

On May 25, 2017, SDDL, co-hosted the annual Joint Mixer with the Consumer Attorneys of San Diego (CASD) at Bar Basil in San Diego. This event was graciously sponsored by Millennium Financial Strategies Consulting and Bring It! Talent United. Once again for this annual event, we had a huge turnout from both sides of the bar. Good times 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 Mix & Mingle was 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.
INSURER’S INDIVIDUAL OBLIGATION UNDER AN OPEN ACTUAL CASH VALUE INSURANCE POLICY; WHEN EVEN IF THE LOSS REQUIRED REPAIRS WHICH EXCEEDED THE HOME’S FAIR MARKET VALUE.

In the case of Bond California Fair Plan Association v. Magnus (filed May 26, 2017) 11 Cal.App.5th 1276, the Court of Appeal, First District, Division 1, reversed the lower court’s 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 2016, Marlene Magnus’s family home was seriously damaged by a kitchen fire. She 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 Magnus is entitled to under the policy. She claimed that she received the amount it will cost her to repair the house, less any amount for depreciation, the net amount of which the parties agree would be $320,049. The insurer, however, under the policy limits, paid her the lesser of that amount or the fair market value of the house, which at the time of the fire was $375,000.

The answer to this question, the appellate court said, depends on the interpretations of sections 2051, 2070 and 2071 of the Insurance Code, including the definition of "partial 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, the appellate court concluded that Magnus was correct. Section 2051 of the Insurance Code provides that under an open actual cash value 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 which would be allowed in a residential real property insurance policy, even if the loss required repairs which exceeded the fair and reasonable deduction for physical depreciation” or “the policy limit, whichever is less.” (§ 2051(b)(2).) Constructed 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 Magnus for the actual cost of the repair to her home, minus depreciation, even if the repair exceeds the fair market value of her home.

Further, the legislative history and the Insurers’ annual report makes clear that the purpose of this statute also support this interpretation. The insurer’s arguments were based on interpretations of three sections that cannot be read with plain language, and the contention that requiring recovery of repair costs less depreciation where they exceed fair market value is “bad policy.” The latter arguments are not what the Legislature intended, even the Appellate, not this court. As such, the law supported Magnus’ interpretation.

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

In the case of Central Western Insurance Co. v. Allied Ins. Co. (filed May 23, 2017) 2017 WL 2465025, the United States Court of Appeals, Ninth Circuit, relying upon the California appellate decision Korland Fund Inc. v. Mid-City Co. (1998) 65 Cal.App.4th 1279, summarily held that an equitable contribution claim requires two or more valid contracts of insurance covering the same particular risk of loss and the particular causation 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 insured’s 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 THE UNDERLYING BASIS FOR DENIAL OR REINSURANCE RISK, EVEN IF THE INSURER ENDORSED 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—failing to show plaintiff’s claim arose from protected activity. (C.A. 4th, July 26, 2017.)

Cenacino Brees, LLC v. Chung (2017) 10 Cal.App.5th 2017, 2131241: 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 expropriated property under the Unclaimed Property Code (Civil Code of Public Resources § 15610) because Metropolitan Fireline of Financial Tile Company because it was a suspended corporation (Revenue & Tax. Code, section 23010), which lacked legal capacity to possess any property. (C.A. 1st, filed May 17, 2017, published June 7, 2017.)

Crossroads Investors v. Federal National Mortgage Association (2017) Cal.App.5th 2017, 2131694: 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 Beryl v. Adams (2016) 1 Cal.5th 376, the Court of Appeal reversed the trial court’s ruling 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. Under section 473 of Code of Civil Procedure, the Court reversed, in part, the trial court’s denial of former boxing champion defendant’s anti-SLAPP motion to strike plaintiff’s claims for violation of plaintiff’s First Amendment rights to freedom of speech and therefore providing opinion and viewpoint. The Court of Appeal ruled that the trial court had erred and applied the correct legal standard by imposing a burden on plaintiffs to establish a prima facie case of a violation of the First Amendment.” (C.A. 2nd, filed June 29, 2017, published July 27, 2017.)

Crossroads Investors v. Federal National Mortgage Association (2017) Cal.App.5th 2017, 2131694: 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 Beryl v. Adams (2016) 1 Cal.5th 376, the Court of Appeal reversed the trial court’s ruling 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. Under section 473 of Code of Civil Procedure, the Court reversed, in part, the trial court’s denial of former boxing champion defendant’s anti-SLAPP motion to strike plaintiff’s claims for violation of plaintiff’s First Amendment rights to freedom of speech and therefore providing opinion and viewpoint. The Court of Appeal ruled that the trial court had erred and applied the correct legal standard by imposing a burden on plaintiffs to establish a prima facie case of a violation of the First Amendment.” (C.A. 2nd, filed June 29, 2017, published July 27, 2017.)

Fox Factory, Inc. v. Superior Court (2017) Cal.App.5th 2017, 1507929. The Court granted a writ petition and reversed the trial court’s order denying defendant’s motion to dismiss for failure to state a cause of action under, 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 display of private life, and affirmed the trial court’s ruling that 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.)

Jackson v. Meyssonier (2017) Cal.App.5th 2017, 1131869. The Court reversed, in part, the trial court’s denial of former boxing champion defendant’s anti-SLAPP motion to strike plaintiff’s claims for violation of plaintiff’s First Amendment rights to freedom of speech and therefore providing opinion and viewpoint. The Court of Appeal ruled that the trial court had erred and applied the correct legal standard by imposing a burden on plaintiffs to establish a prima facie case of a violation of the First Amendment.” (C.A. 2nd, filed June 29, 2017, published July 27, 2017.)

San Diego Zoo Global v. San Diego Zoo Global (2017) Cal.App.5th 2017, 1684295: The Court affirmed the trial court’s order granting an anti-SLAPP motion to strike plaintiff’s complaint that asserted that contracts between KPBW and inseason 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 provides public space and related newsgathering facilities in exchange for investigative news stories
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. 365-2015-00012644-CU-1(PL)-T1

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 R. Sato of Kiesel Law LLP Beverly Hills

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

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


Factual Background: On April 17, 2017, 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 spine/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 surgery 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 period of care.

The parties discussed the use of high/low offers as follows, but no agreement could be reached. Plaintiff’s Demand high/low of $9,899,474 and Green $53,774, for a total of $14,833,247.

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. Plaintiff’s Demand high/low of $6,000,000 / $1,900,000 and Defendants’ Offer high/low of $2,000,000 / $450,000.

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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 MISREPRESENTATIONS IN THE POLICY MAY BE RESCINDED. (Ins. Code, § 650.)**

In the case styled by Southern Ins. Co. v. WCAB (filed May 5, 2017) 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 was submitted.

Southern Insurance Company (“Southern”) issued a workers’ compensation insurance policy based on the express representation that the employee’s employers 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 employer would be left without coverage. The appeals court disagreed. The 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.

[Continued on Page 20]

Published May 24, 2017.


The Court affirmed the trial court’s order denying class certification in a wage and hour class action at law.... § 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 event, 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.” 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’ compensations cases prior to the arbitration. If the insurer fails to do that, 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 IMMD FULL POLICY LIMITS TO SETTLE ONE OF MULTIPLE EXISTING CLAIMS

In the decision styled Film Alliance, L.L.C., v. N.Y. Marine and General Ins. (filed May 23, 2017) 2017 WL 2529671, the United States District Court, Central District of California, found that a general liability and

from complaints made by persons other than those identified in the statute. Finally, plaintiff’s expert declared that the insurer was likely to be able to create a triable issue of fact with respect to the elder abuse cause of action. (C.A. 4th, June 7, 2017.)


The trial court was persuaded that no elder abuse claim had been stated primarily because the applicable statutes of an intent to limit the right to bring a claim for discrimination or retaliation were not set forth in the complaint, and because the two plaintiff police officers had 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 defendant to the second cause of action for violation of the Public Safety Officers Bill of Rights Act because the defendant did not timely move in part of the trial court’s order sustaining a defendant without leave to amend. The trial court properly sustained the defendant 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 reasonable expectation as to the time of the raid that their communications had not been intercepted, watched, or recorded.

Vacation policy violated state law because it required employees who worked for less than one year full-time to leave at least one week of paid time off at the conclusion of their employment. 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.)


Real Property
Gonwy 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. Plaintiff failed to plead facts sufficient to set forth a cause of action for intentional or negligent misrepresentation because it did not properly plead actual reliance or damages proximately caused by defendants’ false statements to support a claim for punitive damages or fraud.
To get your case on the path to resolution, please contact Richard’s case manager Kathy Purcell at (619) 238-7282 or email kpurcell@westcoastresolution.com.

Your Path to Resolution

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.

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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.