

THE UPDATE

SPRING 2019



SAN DIEGO
DEFENSE LAWYERS

The Art of Winning Vol. 1: Personalizing the Corporate Defendant

By Bob Tyson and Emily Straub
TYSON MENDES

We were about to start closing arguments when Plaintiff's counsel requested a sidebar. . . .

Plaintiff's Counsel: *Your Honor, before we proceed with closing arguments, I want to object to Mr. Tyson making any more references to Hamilton Meats & Provisions being a family-owned business. Mr. Tyson told the jury in opening statement that Mr. Hamilton is a third-generation owner of the company. He went on and on about Hamilton Meats & Provisions being in business in this community for over 50 years. But he never offered any evidence of these things during trial. I object to any further mention of these matters during the defense's closing argument.*

Judge: *That is right, Mr. Tyson. You did say all those things in your opening statement, but did not introduce any evidence about your client or anything else for that matter.*¹

They got us. Plaintiff's counsel was right. The judge was right. Counsel's objections were sustained. After two weeks, we had introduced no witnesses, no documents, no evidence at all in this admitted liability, damages-only jury trial. That trial, and the appeals that followed, resulted in the multi-billion dollar landmark California Supreme Court decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. My client won at trial and the insurance industry ultimately won big before the Supreme Court.

So why are we telling you about this? Hamilton Meats' victory was, in part, due to the story we told about the company. This story started in opening statement.

We personalized our client to the members of the jury by telling them its corporate story. Not a boring summary off a website, but a very personal story. A story of family, and pride in ownership, and standing in the community. You must always personalize your client, regardless of whether you represent a corporation, an LLC, an LLP, a general partnership, a sole proprietorship or an individual. You must even humanize your

corporate client when you are introducing no evidence!

We live in a consumer-driven society that runs on business brands. Think about the number of products you use every day.

Whether it is the toothpaste you use to brush your teeth, the car you commute in, or the coffee you drink every morning, some type of business creates essentially everything you consume. Yet, we would venture to guess you do not normally think about what lies behind the brand name of the products you use. It would be unnatural for people to contemplate the history of the companies that produce those products. The stories of the employees and officers who comprise those businesses, the corporate values and visions, and how such businesses effect or transform the communities in which they operate. But this is exactly the type of information that enables jurors to relate to corporate defendants.

Getting a jury to identify with your corporate client is critical, especially when it comes to damages. Why? Jurors will impose higher damages awards against corporate defendants when they cannot relate to the

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President's Message

By Colin M. Harrison, Esq.
WILSON GETTY LLP

2019 has gotten off to a great start for the San Diego Defense Lawyers Association. The board of directors has been working hard to find new ways to give back to our membership. We have been hard at work securing guest speakers and we have already completed six heavily attended Lunch and Learn programs. Special thanks to attorney Ben Howard for his standing room only "Reptile" presentation, the Teagan Dow, Esq. discussion of Socialization and Social Media in the workforce and its impact on the law, Brian Rawers, Esq. breakdown of Voir Dire, David J. Daren of Momentum Engineering Corp with an intro to Event Data Recorder ("EDR" and most recently David Braff, M.D., evaluating med-legal claims of PTSD. We held our first quarter Happy Hour event in March at the Prep kitchen and had a great mix of new and old members. And in keeping with our promotion of civility with our colleagues on the other side of the aisle, we had another great Happy Hour in May at Bar Basic, co-hosted with the Consumer Attorneys of San Diego. Please mark your calendars for SDDL's Annual Golf Tournament and Juvenile Diabetes Research Foundation Benefit on September 27, 2019, when we return to Encinitas Ranch Golf Course. Please also make yourself available to judge a round at the Annual Mock Trial Competition, which will be co-sponsored with CASD and will take place on October 24, 25, and 26. I am extremely excited for the second half of the year and look forward to seeing many of you at all the great events we have planned. ■



Upcoming Events

MCLE

July 9, 2019: Stress, Metal Health & Substance Abuse by Dr. Morton H. Schaevitz

Happy hours/events

July 26, 2019: Annual Padres Game & Tailgate sponsored by US Legal – Giants v. Padres (see page 17)

September 27, 2019: 19th Annual Golf Tournament benefits JDRF (see page 16)

October 24-26, 2019: 2019 Annual Mock Trial Competition

January 25, 2020: SDDL's 36th Annual Installation Gala

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SDDL UPDATE

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Meet the Board Members – June 2019



CODIE DUKES

Q: Favorite series on Netflix?

A: Conversations with a Killer: The Ted Bundy Tapes

Q: How do you relax after a long day at work?

A: A glass of wine and a good book

Q: What is your favorite movie? |

A: Pride and Prejudice

Q: What hobby would you get into if time and money weren't an issue?

A: Gourmet cooking

Q: What would you sing at Karaoke night?

A: Love on the brain - Rhianna



VANESSA WHIRL-GRABAU

Q: What is your favorite thing about San Diego?

A: We have everything here! Beaches, mountains, good food, hiking,

nightlife, entertainment, etc. And you can't beat the weather!

Q: What is your favorite thing about being a lawyer?

A: The moments when you get to share victor with your client based on your hard work... that's when you know it was all worth it.

Q: Who is the one person (living, dead, or fictional) you would like to have dinner with?

A: I never got to meet my maternal grandfather and I heard he was an amazing man. I choose him.

Q: What's something you've been meaning to try but just haven't gotten around to it?

A: Skydiving...although now that I'm a mom, that seems pretty irresponsible until my kids are much much older.

Q: What would you sing at Karaoke night?

A: Janis Joplin – Piece of my Heart



CHRISTINE POLITO

Q: What do you enjoy doing when you are not lawyering?

A: Spending time with my husband by walking our pug, traveling, or trying a new restaurant! I also

love going to spin classes at Spark Cycle.

Q: What is your favorite dish? And, can you cook it?

A: I love all food and fancy myself a pretty good cook! Most of my favorite dishes are seafood and/or Asian inspired (Thai, sushi, crudo) and that is still a work in progress! I prefer to eat out for those types of meals.

Q: Why do you enjoy being a part of SDDL?

A: The people – both the social aspect and the network of resources.

Q: What is your spirit animal?

A: Probably a pug. I love mine. His personality always brightens my day and makes me laugh.

Q: What would you sing at Karaoke night?

A: Anything Taylor Swift.



LAWRENCE ZUCKER

Q: What book are you reading right now?

A: I'm not a big reader outside of the profession. It's been a couple years since I have read a book in

its entirety.

Q: What would be your Olympic sport?

A: Winter Games – Bobsledding. Summer – Baseball, if it's back, if not, Diving

Q: What made you want to become a lawyer?

A: I wanted to be a sports agent. Having played my share of sports and having numerous friends at the professional and collegiate levels I wanted to stay involved. However, after completing law school, looking

at my debt and having just started a family, I needed stable employment. The rest is history.

Q: What's something you've been meaning to try but just haven't gotten around to it?

A: Scuba diving

Q: What's the most unusual thing you've ever eaten?

A: I have traveled the world and eaten my fair share of weird and unusual foods over the years. I've eaten 1000 year old eggs, stinky tofu, fried scorpions and a freshly caught blue fin tuna heart 100s of miles out to sea, but by far the most unusual thing was the durian fruit. It's a large oval shaped fruit with a hard spiky outside shell. You need a hammer to crack it open and then when you finally do it releases an odor that will make you gag. After you get past all of that the actual "fruit" is similar to putting bitter paste in your mouth. It was just a horrible experience all the way around, but some people love it.



DAVID HOYNACKI

Q: When did you join the Board?

A: 2019

Q: What is a secret skill that you have?

It will no longer be a secret...

A: I can speak fluent Spanish.

Q: What game or movie universe would you most like to live in?

A: John Wick

Q: What area of law do you practice?

A: Medical Malpractice, Commercial Litigation

Q: What is your spirit animal?

A: Turtle ■

On the Road Again:

Overcome Co-Defendant Transportation Companies' Most Common Motion for Summary Judgment in Personal Injury Actions with This Handy Code of Federal Regulation

By Margarite Sullivan

TYSON MENDES

Under the Non-delegable Duty Doctrine, a hirer is presumed to have delegated their duties to the independent contractor performing the work unless a relevant statute or regulation prohibits delegation. (*Vargas v. FMI, Inc.* (2015) 233 Cal. App. 4th 638, 639.)

The Restatement Second of Torts provides guidance on the non-delegable duty doctrine in §424 and §428. Under §424, “One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.” (Rest.2d Torts, §424; see *Vargas*, supra, 233 Cal. App. 4th at p. 652-654)

§428 provides, “an individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.” (Rest.2d Torts, §428; see *Vargas*, supra, 233 Cal. App. 4th at p. 652-654.)

In *Eli v. Murhphy* (1952) 39 Cal.2d 598, the Supreme Court applied the Non-delegable Duty Doctrine and found that a motor carrier is liable for the negligence of its independent contractor driver. Applying §428 of the Restatement Second of Torts, the Court held that highway common carriers owe a non-delegable duty to the public. The Court concluded, “both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier’s duties as non-delegable.” (*Eli*, supra, 39 Cal.2d at p. 599-600.) “Highway common carriers may not, therefore, insulate themselves from liability for negligence occurring in the conduct of their business by engaging independent

contractors to transport freight for them.” (*Id.* At p.601.)

The court in *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475 extended *Eli*, “[T]he rule is that a carrier who undertakes an activity (1) which can be lawfully carried on only under a public franchise or authority and (2) which involves possible danger to the public is liable to a third person for harm caused by the negligence of the carrier’s independent contractor.” (*Serna*, supra, 110 Cal.App.4th 1475, 1486)

In *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, the Supreme Court considered whether the Privette Doctrine applied outside the peculiar risk context to a case alleging breach of a non-delegable duty under §424 of the Restatement Second of Torts. (*SeaBright Ins. Co.*, supra, 52 Cal.4th at p. 596.) The court held “unless the relevant statutes or regulations provide otherwise, a hirer is presumed to have delegated to an independent contractor any tort law duty it owes to the contractor’s employees to ensure the safety of the workplace that is the subject of the contract.” (*Id.* at p. 594 & fn. 1.)

California extended the application of the Federal Motor Carrier Act to drivers of leased vehicles. (*Vargas*, supra, 233 Cal. App. 4th at p. 654-658.) In *AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal. App.4th 981, the Court of Appeal adopted the federal circuit’s reasoning in *Johnson v. S.O.S. Transport* (6th Cir. 1991) 926 F.2d 516, extending a hirer’s liability to drivers of leased vehicles for the negligence of co-drivers or vehicle owners. (*Vargas*, supra, 233 Cal. App. 4th 638; *AmeriGas Propane, L.P.*, supra, 184 Cal.App.4th 981, holding that motor carriers are liable to drivers of leased vehicles for the negligence of co-drivers or vehicle owners.)

In *Vargas v. FMI, Inc.* (2015) 233 Cal. App. 4th 638, two drivers were transporting goods for a motor carrier when the driver operating the tractor trailer lost control and caused the

trailer to roll over, injuring his co-driver who was asleep in the sleeper berth. The court found that the company who hired each driver as independent contractors was vicariously liable for the injuries sustained by the sleeping co-driver. The decision was based on the non-delegable duties established for motor carriers that are subject to the Federal Motor Carrier Act and related regulations. (*Vargas*, supra, 233 Cal. App. 4th 638.)

Further, the presumption in *Tverberg* “that the independent contractor receives authority to determine how the work is to be performed and assumes a corresponding responsibility to see that the work is performed safely” does not apply where the injured party is “neither in the cab nor, indeed, awake.” (*Id.* at p.651-652; “It is illogical to suggest that a driver can or should be responsible for ensuring his own safety during hours that he is neither in the cab nor, indeed, awake.”)

Consequently, “A motor carrier, although acting through an independent contractor driving a leased vehicle, retains ultimate responsibility for the vehicle’s safe operation and, in the event of an accident, for satisfying a judgment for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property.” (*Id.* at p. 654.)

Applicable Statute or Regulation - The Federal Motor Carrier Act

Vargas, operated as a motor carrier engaged in the movement of cargo and as such, is subject to the Federal Motor Carrier Act (“Act”) and regulations promulgated thereunder, referred to as the Federal Motor Carrier Safety Regulations (“Regulations”). (*Vargas*, supra, 233 Cal. App. 4th at p. 654-655.)

The Act defines “motor carrier” as “a person providing motor vehicle transportation for compensation.” (49 U.S.C.S. §13102(14).) A person may provide transportation as a “motor carrier” only if they are registered

under 49 U.S.C.S. §13901(a). The Secretary of Transportation will make a determination “that the person is willing to comply with” various regulations, including those prescribed by 49 U.S.C.S. §13902(a)(1) which govern control and financial responsibility.

Exclusive Possession, Control, and Use

The Act and Regulations enumerate a variety of requirements related to safety and control. 49 U.S.C.S. §14101(a) requires a motor carrier to “[...] provide safe and adequate service, equipment, and facilities.” This requirement extends to leased vehicles. (49 C.F.R. §376.12(c)(1) (2017).) The lease “shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease” and “shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.” (49 C.F.R. §376.12(c)(1) (2017); *Vargas*, supra, 233 Cal. App. 4th at p. 656.)

Further, 49 U.S.C.S. §14102 prohibits a motor carrier from fully delegating responsibility for the operation of motor vehicles to independent contractors.¹ (49 U.S.C.S. §14102; *Vargas*, supra, 233 Cal. App. 4th at p. 655.)

Financial Responsibility

49 U.S.C.S. §13906 enumerates the financial responsibility² requirements applicable to motor carriers. (*Vargas*, supra, 233 Cal. App. 4th at p. 657; 49 USCS §13906 (2017).) Motor carriers must carry and provide proof of public liability insurance or financial responsibility. (49 U.S.C.S. §13906 (2017).) “A motor carrier transporting property must obtain public liability insurance or other proof of financial responsibility in an amount prescribed by the Secretary, which “must be sufficient to pay ... for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property.” (*Vargas*, supra, 233 Cal. App. 4th at p. 657; 49 U.S.C.S. §13906(a)(1) (2017); see 49 C.F.R. §387.7(a) (2017) [“No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in the regulations.”].)

The insurance endorsement required by the Act is for “public liability” and

excludes employees. (49 C.F.R. §387.15 (2017); *Vargas*, supra, 233 Cal. App. 4th at p. 657.) Independent contractors are not explicitly excluded from coverage. (*Vargas*, supra, 233 Cal. App. 4th at p. 657, citing 49 C.F.R. §387.15 (2017).) “Nothing in the regulations suggests that a motor carrier’s financial responsibility does not extend to its independent contractors. To the contrary, the insurance endorsement required by the regulations covers, among other things, “injury to the body, sickness, or disease to *any person*.” (*Vargas*, supra, 233 Cal. App. 4th at p. 657.) “The endorsement further provides that “[s]uch insurance as is afforded, for public liability, does not apply to injury to or death of the insured’s *employees* while engaged in the course of their employment, or property transported by the insured, designated as cargo,” it does not contain a similar exclusion for the insured’s independent contractors.” (Id. at p. 657, emphasis added.)

Takeaway

If you are a motor carrier hiring independent contractors, do not count your chickens before they hatch. Motor carriers will likely be subject to liability exposure for the torts of your independent contractors even though they are not employees. If you are a co-defendant opposing a motor carrier’s motion for summary judgment rest easy knowing the party in the best position to cover the loss will not be able to hide behind the shroud of its drivers’ status as “independent contractors.” ■

¹ “The reason for these requirements has been described as follows: During the first half of the twentieth century, interstate motor carriers attempted to immunize themselves from liability for negligent drivers by leasing trucks and nominally classifying the drivers who operated the trucks as “independent contractors.” In order to protect the public from the tortious conduct of the often judgment-proof truck-lessor operators, Congress in 1956 amended the Interstate Common Carrier Act to require interstate motor carriers to assume full direction and control of the vehicles that they leased “as if they were the owners of such vehicles.” The purpose of the amendments to the Act was to ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants.” (*Vargas*, supra, 233 Cal. App. 4th at p. 657, [internal cites and quotes omitted].)

² The purpose of the financial responsibility requirement “is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.” (49 C.F.R. §387.1 (2017); *Vargas*, supra, 233 Cal. App. 4th at p. 657.)



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PAY EQUALITY

Are we “crazy” for striving to bridge the pay gap?

Or are we “steely” for remaining composed while waiting for the gap to close on its own?

By Pamela Palpallatoc
TYSON MENDES

What is the current status of the pay gap?

The 2018 data compiled to calculate pay inequality showed that women earn 80 cents for every \$1.00 paid to Caucasian males. Latina/Hispanic women earn 54 cents per \$1.00, Native American women earn 57 cents per \$1.00, African American women earn 63 cents per \$1.00, Caucasian women earn 79 cents per \$1.00, and Asian American women earn 85 cents per \$1.00.

Institutional pay discrimination, occupational segregation, wage theft and inadequate minimum wage, pay secrecy, and pregnancy and caregiving responsibilities are current challenges and factors prolonging the gap.

How can law and policy help bridge the gap at the hiring stage?

First, the following states and cities have enacted laws or policies to help eliminate historic pay discrimination: California, Delaware, Massachusetts, New Jersey, New York, Oregon, New Orleans, New York City, Philadelphia, Pittsburgh and San Francisco. Several companies headquartered in the aforementioned states have banned inquiries into potential employees' past salaries at the hiring stage: Amazon (Seattle, WA), American Express (New York, NY), Bank of America (Charlotte, NC), Cisco Systems (San Jose, CA), Facebook (Menlo Park, CA), Google (Mountain View, CA), Wells Fargo (San Francisco, CA).

Second, the recent updates to California's pay equity laws, including the effects of California Assembly Bill 2282 (in effect January 1, 2019), clarifies the state law that bans salary history inquiries. Therefore, there are laws and policies directly addressing pay discrimination on an institutional level at the hiring stage, but achieving sustainable pay equality requires more.



What practices can be implemented in workplace retention to help bridge the gap?

The insurance industry faces challenges in diversity and inclusivity, especially in executive and leadership roles. Thus, businesses such as Tyson & Mendes, have launched or implemented diversity and inclusion initiatives to help foster an inclusive workplace, which in turn supports retention of a diverse workforce. Examples of successful components of initiatives include focus groups, mentorship programs, and employee resource groups. By raising awareness of the issues, and identifying and implementing best practices, progress can be achieved.

Challenge: What happens if we say or do nothing about interactions that perpetuate the gap?

A judge recently imposed a \$500 sanction on a plaintiff's trial attorney. He commented on her “steely” composure as evidence of her intentionally failing to follow the court's instructions during opening statements. The judge said that the fact that she was “steely” while he interrupted her during openings, served as evidence that she knew she was violating his orders. What if she piped up instead and challenged the judge during her opening statement? Opening statements may have turned into opening debates, and surely, no judge would permit an opening debate between the bench and counsel to occur during the time allotted for opening statements.

The judge explained that the sanction would be imposed on her law firm. The sanction may directly affect this plaintiff attorney's pay, depending on how her firm perceives the situation and whether the sanction will be a negative event in the evaluation of her performance. The sanction surely would have directly affected her pay if she was a sole practitioner. Daily interpersonal and professional interactions underscoring gender-stereotyping can further support the gap.

Progress: What happens if we take action and advocate for pay equality?

We might be called crazy, dramatic, nuts, delusional, or unhinged. Or, we might become leaders of our industries, like Tricia Griffith, CEO of Progressive Insurance. Ms. Griffith began her career in insurance as a claims representative in 1988, moved up the ranks, and pushed for inclusion and diversity during her journey to become CEO.

A transcript of “Dream Crazier” – Nike, February 24, 2019 stated the following:

If we show emotion, we're called dramatic. If we want to play against men, we're nuts. And, if we dream of equal opportunity, delusional. When we stand for something, we're unhinged. When we're too good, there's something wrong with us. And if we get angry, we're hysterical, irrational, or just being crazy. But, a woman running a marathon was crazy. A woman boxing was crazy. A woman dunking - crazy. Coaching an NBA team - crazy. A woman competing in a hijab, changing her sport, landing a double cork 1080, or winning 23 grand slams, having a baby, and then coming back for more - crazy crazy crazy crazy and crazy. So if they want to call you crazy, fine, show them what crazy can do.¹

Takeaway

- Evaluate hiring practices. Cease salary inquiries that perpetuate historic pay discrimination. Monitor updates to state or local laws that require elimination of salary inquiry at hiring. Even without a law or policy in your jurisdiction, create fair, internal policies which support bridging the gap.
- Foster workplace inclusivity to retain a diverse workforce by implementing best practices in encouraging mentorship, supporting employee resource groups, and being advocates in interpersonal interactions and professional appearances.
- Participate in dialogue on pay equality and relevant topics. ■

Press Releases

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Jury Finds San Diego Accountant Not Liable in Professional Malpractice Trial

SAN DIEGO (March 11, 2019) – Following a two-week trial in San Diego, a California Superior Court jury has found accountant Roy Hosaka and his firm, Hosaka Nagel & Co., not liable in a \$2 million malpractice case. Tyson & Mendes attorneys Dan Fallon and Garry McCarthy represented Mr. Hosaka and Hosaka Nagel & Co. in the high-stakes professional malpractice case, which alleged fraudulent nondisclosure and breach of fiduciary duty.

According to Mr. Fallon, plaintiff suffered significant financial misfortune beginning in 2009, which she claimed resulted from improper advice provided by Mr. Hosaka. “Plaintiff in this case refused to take responsibility for her own high-risk investments and after many years of litigating against investment advisors and former lawyers, decided her financial downfall was the result of advice allegedly given to her by Mr. Hosaka. We were able to prove to the jury that these claims were absolutely meritless.”

Mr. McCarthy noted plaintiff had been referred to Mr. Hosaka for tax preparation services by her investment advisor, who was a client of Mr. Hosaka. “Plaintiff lost significant amounts in high-risk, speculative investments, then claimed it was caused by her tax accountant, Mr. Hosaka. Plaintiff also claimed Mr. Hosaka failed to disclose the investment advisor was a client of his, and that she would not have taken Mr. Hosaka’s advice had she known that.”

The Tyson & Mendes trial team used hard-hitting defense techniques to prove to the jury Mr. Hosaka and his firm did nothing wrong. “Our clients take seriously the responsibility to provide accurate and ethical tax advice to their clients. However, this was a house of cards built on a foundation of completely false claims – plaintiff’s claims were unsupported

by any corroborating evidence because they simply never happened,” said Fallon.

After deliberating for just 80 minutes, the jury agreed. They found Mr. Hosaka and his firm not liable for plaintiff’s losses and awarded a unanimous defense verdict.

Jury Awards Full Defense Verdict in \$7.4 Million Multi-car Accident Case Tyson & Mendes Law Firm Successfully Defends Chino Hills Ford

RIVERSIDE, Calif. (April 17, 2019) – Following a three-week trial, a San Bernardino County jury on April 10, 2019, found Chino Hills Ford not liable for a serious car accident which allegedly caused seizures to a child. Tyson & Mendes LLP attorneys Kristi Blackwell and Christopher Schon represented Chino Hills Ford and secured a full defense verdict in which the injured plaintiff sought more than \$7.4 million in damages.

The case arose from two separate vehicle accidents that occurred on the evening of April 21, 2014, at the intersection of Kimball Avenue and Euclid Avenue in Chino. Jereme Hsu was driving his Ford F-150 truck westbound on Kimball Avenue when his driver-side, rear tire disengaged from his vehicle and rolled into eastbound Kimball Avenue traffic lanes. Mr. Hsu’s wheel hit the front of Ramesh Bandaru’s Ford Focus, and Mr. Bandaru quickly stopped his vehicle in the eastbound traffic lane.

Meanwhile, Rene Cervantes and his family were driving a Chevrolet Silverado eastbound on Kimball Avenue directly behind Mr. Bandaru. Mr. Cervantes was able to slow his vehicle and come to a stop without hitting Mr. Bandaru. But Jadah Pointer, who was driving a Honda Civic eastbound directly behind the Cervantes’ vehicle, was unable to stop and hit the rear of the Cervantes’ Chevrolet Silverado.

Plaintiff Celina Cervantes, who was in the right rear seat of her family’s vehicle, sued Chino Hills Ford under the theory that one of its mechanics under-torqued the lug nuts when he put the left rear tire on the back of Mr. Hsu’s vehicle, causing his tire to detach. She also claimed she later developed a seizure disorder as a result of the accident and sought more than \$1 million in damages for the future cost of her prescription medications.

According to Tyson & Mendes Partner

Kristi Blackwell, the defense team highlighted two major reasons Chino Hills Ford was not liable for the accident. “First, Mr. Hsu had driven more than 550 miles between when his vehicle was serviced at Chino Hills Ford and when the accident occurred. If the Chino Hills Ford mechanic had under-torqued the lug nuts, Mr. Hsu’s wheel would have fallen off within a few miles of the service appointment,” she said.

The Tyson & Mendes team also successfully argued that the tire coming off of Mr. Hsu’s truck did not cause the accident. Instead, Ms. Blackwell said the proximate cause was Ms. Pointer rear-ending the Cervantes’ truck after Mr. Cervantes was able to stop in time without hitting Mr. Bandaru’s car.

While Ms. Blackwell sought a defense verdict, she asked the jury to award \$300,000 should they find the evidence in support of any liability on behalf of Chino Hills Ford. “Plaintiff asked the jury for an award we found to be unreasonable,” Ms. Blackwell said. “We gave the jury a number better supported by the evidence plaintiff brought forth to prove her damages in the event they found our client liable.”

After deliberating for one day, the jury agreed Chino Hills Ford was not liable for either accident and issued a full defense verdict in the case overseen by Judge Donald R. Alvarez.

“There was simply no evidence of negligence by our client,” said Ms. Blackwell. “The jury was able to see that, and at the end of the day, justice prevailed.”

Defendant Jereme Hsu previously settled with plaintiff Celina Cervantes for his \$100,000 policy limits, while defendants Jadah and Nandi Pointer settled with her for their \$50,000 policy limits. ■

*About Tyson & Mendes LLP Headquartered in San Diego with offices throughout the country, Tyson & Mendes LLP is an AV-rated litigation firm specializing in insurance defense. Firm principals Robert Tyson and Patrick Mendes, seasoned trial attorneys who collectively have a nearly 50-year background, have grown the firm to more than 130 attorneys defending corporations, insurance companies, and their clients in civil litigation matters throughout California, Arizona, Colorado, Nevada, Washington and Florida. The firm is most widely recognized for winning the landmark *Howell v. Hamilton Meats California Supreme Court* case on the “billed vs. paid” medical damages issue, which forever changed the state’s litigation landscape by significantly impacting the damages a plaintiff may recover. Visit www.tysonmendes.com.*

Sex-Based Stereotyping Endures: Revisiting *Price Waterhouse v. Hopkins*, 30 years later

By *Margarite Sullivan*

TYSON MENDES

Thirty years ago, the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) held that the decision not to promote a woman by giving weight to comments based on stereotypes associated with the woman's sex was a violation of Title VII of the Civil Rights Act.

Ann Hopkins, the plaintiff in the underlying action and respondent on appeal, worked for Price Waterhouse for five years at the time she was ripe to be proposed to partnership. One notable accomplishment included Hopkins' effort to secure a \$25 million contract with the Department of State. The trial judge noted, "none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."

Hopkins was described by partners at Price Waterhouse and its clients as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity", "extremely competent, intelligent", "strong and forthright, very productive, energetic and creative," a person with "intellectual clarity," and "a stimulating conversationalist."

However, internal complaints from staff indicated Hopkins was aggressive and abrasive. In Price Waterhouse partners' written comments regarding Hopkins candidacy for partner were comments describing Hopkins as "macho"; suggestions that she "overcompensated for being a woman"; advice that Hopkins should take "a course at charm school"; criticisms about Hopkins' use of profanity with the suggestion her swearing was objectionable "because it's a lady using foul language." An alleged supporter of her candidacy explained Hopkins "had matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate."

The straw that broke the proverbial camel's back and put the cherry on top of this obvious discrimination based on sex was the

following comment made by a partner: if Hopkins wanted to improve her chances of partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Hopkins was not the first victim of Price Waterhouse's obvious sex-based stereotyping. In previous years, "one partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers." "Candidates were viewed favorably if partners believed they maintained their femininity while becoming effective professional managers."

Double-Edged Sword

The problems faced by Ann Hopkins are sadly still prevalent in our culture. Consider the criticisms of Hillary Clinton in her bid for the presidency. Ever-present were the concerns a woman was unfit to serve as the commander-in-chief and the contrasting criticisms Hillary Clinton is a "Nasty Woman." In fact, Kamala Harris has repeatedly been asked if the United States is ready for the first woman of color president. *The very existence of this question demonstrates women's constant battle to justify their existence in spaces traditionally occupied by men.*

Although anecdotal, my experiences in academia and professional life show no deviation from the treatment suffered by Ann Hopkins. Being told I have a "tone problem" by opposing counsel; my first boss calling aggressive women adversaries vulgar names to me; being told I am too aggressive and then later that I am not cut out to be a lawyer and should consider part-time work; and the list goes on. I am a witness to my women colleague's treatment as well.

Sex-Based Stereotyping is Harmful to Men Too

Exclusively using "masculine" and "male" as the norm against which we judge individual's efficacy harms the male workforce as well.



A primary example of harmful sex-based stereotyping toward men can be found in a diminished access to paternity leave and workplace flexibility concerning childcare. Men take substantially less leave after the birth or adoption of a child. A 2012 Department of Labor survey found 70 percent of men taking leave for parental reasons took 10 days or less. See <https://www.dol.gov/asp/policy-development/PaternityBrief.pdf> at Fn. 15. The fathers in the 2012 survey cited workplace pressures as a factor in the length of leave they took. "Other studies have found that fathers who reduce their work hours or leave work for family reasons may incur a 'flexibility stigma.'" <https://www.dol.gov/asp/policy-development/PaternityBrief.pdf>.

In an article published by Laurie A. Rudman and Kris Mescher in the *Journal of Social Issues*, the authors found the following:

"Men who request a family leave are viewed as poor organizational citizens and ineligible for rewards. In addition to a poor worker stigma, [...] male leave requesters suffer femininity stigma. Compared with control targets, male leave requesters were viewed as higher on weak, feminine traits (e.g., weak and uncertain), and lower on agentic masculine traits (e.g., competitive and ambitious). Perceptions of weakness uniquely predicted greater risk for penalties (e.g., being demoted or downsized) and fully accounted for the effect of poor worker stigma on male leave requesters' penalties. By contrast, the poor worker stigma and both agency and weakness perceptions contributed to their reward recommendations." See <https://spssi.onlinelibrary.wiley.com/doi/10.1111/josi.12017>.

The “penalized” sex-based stereotyping is attributed to a man’s failure to adhere to masculine norms by participating in stereotypically “feminine” work such as childcare.

Take Away

From a purely business standpoint, sex-based stereotyping undermines the goal of employing an intelligent, competent, creative, and diverse workforce. Not only does sex-based stereotyping harm the labeled individual, it also impacts the efficacy of the workforce as a whole. Why limit the success of society with socially constructed norms and rules that have never served us? As a society, we should implore one another to deviate from the norm and accept that *both women and men* can be aggressive and nurturing. Think about a person’s biases and sex-based stereotyping and consider whether these beliefs are helpful in *any way*. Thus, embrace the traits that make employees’ and colleagues’ successful, regardless of their binary characterization as traditionally masculine or feminine. ■

Happy Hour Recap

On March 27, 2019, SDDL hosted its first quarter happy hour at Prep Kitchen in San Diego. This well-attended event was graciously sponsored by Litivate. The Old-Fashioneds were flowing and the bacon-wrapped dates were a sleeper hit. SDDL’s happy hours are a great way for members to unwind after a long day, network with fellow defense attorneys, and enjoy tasty bites at some of San Diego’s stellar restaurants.

On May 01, 2019, SDDL co-hosted the annual Joint Mixer with the Consumer Attorneys of San Diego (CASD) at Bar Basic in San Diego. This event was graciously sponsored by Marjorie Ford Smith Settlement Consulting, Judicate West, ADR Services, Inc., and Westlaw. Unfortunately, this event had to compete with the SCAHRM Annual Educational Conference which drove down the defense lawyer attendance. Nonetheless, good times were had by all who attended and this annual event continues to prove as a great opportunity to share in civility and libations with our colleagues from the plaintiffs’ bar. ■



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COVER STORY CONTINUED FROM PAGE 1:

corporation on a human level. Without that connection, a corporate defendant runs the risk of being viewed as a faceless brand name with a big bank account. The defense can of course request the judge instruct the jury that a corporation is “entitled to the same fair and impartial treatment” as a human being [CACI 104]. It is very dangerous to rely on the law without a personal connection to your business client.

Defense counsel must provide the jury with a basis to identify with their client via its corporate story. This story should include a corporate representative who is present every day of trial. The story telling itself will take place during jury selection, opening statement, witness examinations, and closing argument.

Corporate Representatives

Selecting a corporate representative is an important decision. He or she will be the face of your client’s business. You will want this person to be present during trial proceedings as much as possible, hopefully every day. This person may never testify, but they will serve as a representative in the courtroom the jury can use to tie a face to a defendant company. Of course, make sure this individual has a pleasant demeanor and cares about the company.

Mick Hamilton, the president and owner of Hamilton Meats, was our corporate representative in Howell. He was introduced to the jury on the first day of trial. Thereafter, Mr. Hamilton sat through each and every day of trial proceedings. It created a lasting impression on the jury. His presence alone demonstrated to the jury his business cared about the lawsuit and was equally invested in the outcome. His presence humanized the corporation.

Voir Dire

Jury selection is the defense’s only opportunity to weed-out prospective jurors who hold anti-corporate sentiments. It is also the defense’s first opportunity to begin telling their corporate story.

While typical jury instructions advise jurors they must “not let bias, sympathy, prejudice, or public opinion influence your verdict” [e.g., CACI 100], the reality is nobody can completely leave their biases at the door when they walk into a courtroom. It is impossible. For this reason, it is crucial to question prospective jurors about their feelings towards

corporations, whether they think they should be punished (regardless of whether there is a claim for punitive damages), and whether there are any personal or family experiences that could lead them to view corporations in a negative light.

The questioning should also begin to incorporate background facts about your client’s business. This will set the stage for when the full corporate story comes out during trial. You want to begin to frame your client’s story as early as possible. The earlier you do, the more likely it is the jury will remember the information.

Opening Statement

The best time to tell the corporate story is during opening statements. Plaintiff attorneys typically focus on the defendant’s conduct during their opening statements, not the actions of the Plaintiff. For this reason, defense counsel should utilize opening statements to reframe the story. Part of reframing the picture presented by Plaintiff’s counsel involves telling the jury about the history of your corporate client’s business and the corporate representative sitting in the courtroom. It also involves telling the jury about the business’ mission, its purpose, and what it has done for the community. You want the jury to hear this story from the very beginning, as it will shape the way they view the evidence presented during trial.

Witness Testimony

Depending on your defense strategy, you may not end up calling any client witnesses for examination. This was the case in Howell. If, however, you plan to question the client witnesses, make sure to remind them of the business’ history during preparation. During trial, ask them questions about the company’s story and contributions to the community. Also, make sure to elicit testimony from the witnesses about their personal involvement in the company, and what it is they love about their job. Such testimony fosters a connection between the jury and your corporate defendant. It humanizes your client.

Closing Argument

For all of the reasons set forth above, do not wait until closing arguments to convey the corporate story. Delaying this story until closing will simply be too late to have any real impact on the jury. Furthermore, you run the risk of never being able to tell the tale if you do not present sufficient evidence to support

it during your case in chief. You must tell the jury what an honor it has been to represent the company and how thankful you are for the attendance of the corporate representative. Convey it to the jury however you want, but make sure the jury knows what good your client has done for the community and ideally solidify a connection with your company.

Takeaway

It is a well-known tenant of trial lawyers that you must never tell the jury anything in opening statement that is unsupported by the evidence. Lawyers are taught we will be crucified if we say anything in opening that we cannot prove. So what do you do in a case where you are introducing no evidence? Break the rule!

Did plaintiff’s counsel get up in the closing of the Howell trial and say Mr. Hamilton was not a third generation small business owner? That Mr. Hamilton was not a stalwart of our community? That it was not an honor to represent him and his family business? Of course not!

As demonstrated by the Howell verdict, personalizing the corporate client is an essential defense strategy to reduce potential exposure at trial. Putting a face to a company name with your corporate representative and weaving your corporate story throughout trial, will diffuse juror anger, appear reasonable in your defense arguments, and minimize the likelihood of a runaway jury verdict.

¹ *This dialogue does not depict actual trial testimony. It is merely a paraphrased reenactment of select portions of the jury trial in Howell v. Hamilton Meals & Provisions, Inc. (2011) 52 Cal.4th 541.*

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California Case Summaries: Free™

Five New California Civil Cases Published In May 2019

By Monty McIntyre, Esq.
ADR SERVICES, INC.



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affirm the trial court's order confirming the arbitration award but denying costs to respondent. A request for costs under section 998 is timely if filed with the arbitrator within 15 days of a final award. An arbitrator has authority to award costs to the requesting party, but if the arbitrator refuses to award costs, judicial review is limited.

(May 30, 2019.)

defendant's motion to compel arbitration in a wage and hour action. The trial court correctly concluded that plaintiff was a transportation worker engaged in interstate commerce under 9 U.S.C. § 1 and thus exempt from Federal Arbitration Act coverage. Even though plaintiff did not physically transport goods across state lines, his employer was in the transportation industry, and the vast majority of the goods he transported originated outside California. Thus, California Labor Code section 229 required staying the prosecution of his cause of action for unpaid wages while the other five causes of action proceeded to arbitration. (C.A. 4th, May 1, 2019.)

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CALIFORNIA SUPREME COURT Civil Procedure

Black Sky Capital, LLC v. Cobb (2019) _ Cal.5th _ , 2019 WL 1984289: The California Supreme Court affirmed the decision of the Court of Appeal regarding the application of the anti-deficiency rule in Code of Civil Procedure section 580d. When a creditor holds two deeds of trust on the same property, section 580d does not preclude the creditor from recovering a deficiency judgment on the junior lien extinguished by a nonjudicial foreclosure sale on the senior lien. (May 6, 2019.)

Heimlich v. Shivji (2019) _ Cal.5th _ , 2019 WL 2292828: The California Supreme Court reversed the Court of Appeal directing it to

CALIFORNIA COURTS OF APPEAL Attorney Fees

Dane-Elec Corp. v. Bodokh (2019) _ Cal. App.5th _ , 2019 WL 2238428: The Court of Appeal affirmed in part, reversed in part, and remanded the trial court's orders granting attorney fees in an action where plaintiff prevailed on its complaint to recover on a promissory note and also defeated defendant's cross-complaint to recover allegedly unpaid wages. The trial court found that defendant had not brought the wage claim in bad faith and declined to award plaintiff attorney fees incurred solely in connection with the wage claim, but it awarded plaintiff attorney fees incurred in defending the wage claim that were inextricably intertwined with the contract claim. The Court of Appeal disagreed, ruling that, unless a trial court finds a wage claim was brought in bad faith, Labor Code section 218.5(a) prohibits, as a matter of law, an award of attorney fees to a nonemployee prevailing party for successfully defending a wage claim that is inextricably intertwined with a claim subject to a contractual prevailing party attorney fees provision. To the extent the wage claim and the contract claim are inextricably intertwined, section 218.5(a)'s prohibition on recovering attorney fees controls over the contractual attorney fees provision. (C.A. 4th, May 24, 2019.)

Arbitration

Muller v. Roy Miller Freight Lines, LLC (2019) _ Cal.App.5th _ , 2019 WL 1929662: The Court of Appeal affirmed the trial court's order granting in part, and denying in part (as to one cause of action for lost wages)

Civil Procedure

Global Financial Distributors v. Superior Court (2019) _ Cal.App.5th _ , 2019 WL 2083249: The Court of Appeal granted a writ of mandate and reversed the trial court's order denying defendant's motion to stay or dismiss an action on the ground of inconvenient forum because it was untimely under Code of Civil Procedure section 418.10(e). The Court of Appeal ruled that section 410.30 applies after a defendant has made a general appearance, and because defendants filed their motion to stay or dismiss on the ground of inconvenient forum after they had appeared in the action by filing demurrers, section 410.30 applied, and the motion was not untimely under section 418.10(e). (C.A. 2nd, filed April 16, 2019, published May 13, 2019.)

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Insurance Law Update

Both the California state and federal courts handed down during the past several months a variety of decisions—both published and unpublished—which present victories to both policyholders and insureds alike.

A DRONE ACCIDENT WAS EXCLUDED FROM COVERAGE UNDER A COMMERCIAL GENERAL LIABILITY POLICY’S AIRCRAFT EXCLUSION. In an apparent case of first impression in California filed December 7, 2018, styled *Philadelphia Indemnity Insurance Company v. Hollycal Production, Inc.*, et al., 2018 WL 6520412 (2018), the United States District Court, C.D. California, held that a drone accident was excluded from coverage under a commercial general liability policy’s aircraft exclusion.

In October 2016, Philadelphia Indemnity Insurance Company (“Philly”), the insurer of Hollycal Productions under a commercial general liability policy, received notice from Darshan Kamboj that she was injured when a drone operated by Satyam Sukhwal (“Mr. Sukhwal”) made contact with her eye. Mr. Sukhwal was operating the drone on behalf of Hollycal Productions to photograph a wedding Ms. Kamboj was attending. Ms. Kamboj claims she lost sight in her eye as a result of the collision. Philly declined to provide coverage for the claim based on, inter alia, the policy’s aircraft exclusions. Ms. Kamboj’s counsel responded to Philly’s denial of coverage and argued that a drone did not fall within the policy’s aircraft exclusion because a “drone equipped with a camera is not capable of transporting persons or cargo,” but rather is “unmanned and operated remotely.” Thus, Ms. Kamboj’s counsel argued the drone was “a piece of equipment,” not “an aircraft or vehicle.” In response, Philly’s counsel reiterated its position that the aircraft exclusion applied to the claim. Ms. Kamboj filed a lawsuit against Hollycal Productions, asserting causes of action for general negligence. Philly agreed to defend Hollycal Productions under a reservation of rights.

The Philly policy does not apply to: “Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft . . . owned or operated by or rented or loaned to any insured. . . . Another similarly-worded exclusion establishes that the Philly policy does not apply to bodily injury

“[a]rising out of the ownership, operation, maintenance, use, loading, or unloading of any flying craft or vehicle, including, but not limited to, any aircraft, hot air balloon, glider, parachute, helicopter, missile or spacecraft.”

It is well settled in California that liability insurance policies provide that the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for a covered claim. An insurer’s duty to indemnify runs to claims that are actually covered, in light of the facts proved. It arises only after liability is established and as a result thereof.

The Philly policy specifically excluded any bodily injury arising out of the use of an aircraft operated by an insured. While the policy does not define the term “aircraft,” the term “aircraft” is unambiguous and its ordinary meaning, as defined by Merriam–Webster’s Collegiate Dictionary, is “a vehicle (such as an airplane or balloon) for traveling through the air.” Here, Ms. Kamboj was injured when a drone, hovering at eye level and operated by Mr. Sukhwal, came into contact with her eye. A drone, as a “vehicle . . . for traveling through the air” is an aircraft under the policy’s ordinary and plain definition. The ordinary definition of an aircraft does not require the carrying of passengers or cargo. Additionally, that a drone is unmanned and operated remotely does not make it any less of an aircraft. Philly received facts from Ms. Kamboj’s counsel and its insured prior to the tender which detail the injury and leave no possibility of a covered claim.

INSUREDS COULD STATE A CLAIM FOR INVASION OF PRIVACY AGAINST AN INSURER’S COVERAGE COUNSEL AND LAW FIRM, WHERE COUNSEL HAD DISSEMINATED INADVERTENTLY PRODUCED TAX RETURNS TO INSURER AND FORENSIC ACCOUNTANTS WHILE EVALUATING COVERAGE. In the case filed January 4, 2019, styled *Strawn v. Morris, Polich & Purdy, LLP*, 30 Cal.App.5th 1087 (2019), the Court of Appeal, First District, Division 2, held that insureds could state a claim for invasion of privacy against an insurer’s coverage counsel and law firm, where the counsel had disseminated inadvertently produced tax returns to forensic accountants while evaluating coverage.

Dennis and Diane Strawn’s home and

pickup, which were insured by State Farm General Insurance Company (“State Farm”), were damaged and destroyed by fire in 2009. They immediately notified State Farm.

Dennis Strawn was prosecuted for arson in connection with the fire, but the case was ultimately dismissed in February 2013. In August 2015, State Farm informed the insureds that it was denying their claims on the ground that Dennis Strawn had intentionally set the fire and Diane Strawn had fraudulently concealed evidence of this wrongful conduct.

In 2016, the Strawns filed a complaint alleging causes of action including invasion of privacy against State Farm, and attorney Douglas K. Wood, the attorney who represented State Farm, and Morris Polich & Purdy, LLP, the law firm in which Wood was a partner. The gist of the privacy invasion claims was that attorney Wood, as representative for State Farm, repeatedly demanded that the insureds produce financial records, including tax returns; that insureds were aware that tax returns are privileged against disclosure and refused to waive the privilege; that insureds authorized their accountant to provide to attorney Wood and State Farm financial records that were used to prepare the tax returns, but not the actual tax returns; that the accountant’s office mistakenly provided the returns along with the other financial information; and that attorney Wood, despite having been expressly informed that the insureds were not waiving their privilege, failed to advise the insureds of the error and sent the tax returns to State Farm and the forensic accounting firm it hired, which used information from the returns in the analysis it provided to State Farm. The insureds alleged that in “publishing” the tax returns to “third parties,” including State Farm employees, attorney Wood and his firm violated the insureds’ right to privacy under Article 1, Section 1, of the California Constitution.

As the trial court explained, the insureds’ cause of action for invasion of privacy was based on attorney Wood’s alleged transmittal of their tax returns to State Farm and the forensic accountant. The trial court found the litigation privilege applicable because at the time the returns were transmitted, attorney Wood and his firm were representing State Farm “in anticipation of a possible lawsuit concerning the claim made by [the insureds] for the fire damage to their residence and vehicle.” The insureds challenged that

determination by arguing that their claim was based on attorney Wood's conduct, while the litigation privilege applies only to communication, and that this conduct occurred while State Farm was investigating the insurance claim, well before any litigation.

The Court found the insureds' argument was not persuasive. The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature. The following acts, according to the Court, have been deemed communicative and thus protected by the litigation privilege: attorney pre-litigation solicitations of potential clients and subsequent filing of pleadings in the litigation, and testimonial use of the contents of illegally overheard conversation. The following acts, according to the Court, have been deemed noncommunicative and thus not privileged: prelitigation illegal recording of confidential telephone conversations; eavesdropping on a telephone conversation; and physician's negligent examination of patient causing physical injury.

The insureds' complaint alleged that attorney Wood received the tax returns and transmitted them to State Farm and the accountants, who used the returns in the analysis they provided to State Farm. The communication and subsequent use of the information by the accountants occurred during State Farm's investigation and processing of the insureds' insurance claim. No litigation was pending at the time: the criminal prosecution had concluded, and the civil litigation was not instituted until August 2016, almost a full year after State Farm denied the claim. This timing alone raises at least a question as to whether litigation was "imminent" at the time attorney Wood passed the tax returns along as alleged.

The Court did not question the assumption that, in the context of an insurance claim being investigated following the dismissal of criminal charges of arson against the insured, it may have appeared "likely" that denial of the insurance claim would lead to a civil action against the insurer. But attorney Wood and his firm cannot gain the protection of the privilege to protect their own communications merely by establishing that they anticipated a potential for litigation, as the privilege only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that

is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute. That State Farm had a basis for suspicion of Dennis Strawn did not necessarily preordain the denial of the Strawns' insurance claim, nor did the Strawns' retention of counsel necessarily reflect serious contemplation of litigation as opposed to a desire for assistance in a complicated insurance claim process.

The Court concluded that an insurer's coverage counsel cannot gain the protection of the litigation privilege to protect their own communications merely by establishing that they anticipated a potential for litigation, as the privilege only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute. As such, for parties to be able to take advantage of the litigation privilege by applying it to their own communications, they must establish that at the time they made the subject communications, they themselves actually contemplated prospective litigation, seriously and in good faith.

INSURED MANUFACTURER'S SELF-INSURED RETENTION APPLIED ONLY TO THE FIRST LAYER OF UMBRELLA LIABILITY POLICY COVERAGE AND DID NOT CONTINUE TO APPLY IN EACH OF THE HIGHER LAYERS OF "FOLLOWING FORM" EXCESS POLICIES. In the case filed February 25, 2019 (as modified on denial of rehearing on March 26, 2019), styled *Deere & Co. v. Allstate Ins. Co.*, 32 Cal.App.5th 499 (2019), the Court of Appeal, First District, Division 4, held, inter alia, that a manufacturer's self-insured retention applied only to the first layer of its umbrella policy coverage and did not continue to apply in each of the higher layers of "following form" excess policies.

This insurance coverage dispute arises from numerous claims filed, in various jurisdictions, against Deere & Company ("Deere") for personal injuries arising from alleged exposure to asbestos-containing brakes, clutch assemblies, and gaskets used in Deere machines. Deere filed suit for declaratory relief and breach of contract with respect to over 100 umbrella and excess general liability policies issued to Deere from 1958 through 1986.

The Court noted at the onset of its opinion that before delving into the issues on appeal,

it is necessary to provide an overview of some key concepts in multi-layered, complex insurance-coverage disputes. Liability insurance is often purchased in towers (e.g., \$1 million primary, \$5 million first-level excess, \$10 million second-level excess, \$20 million third-level excess, and so on), which benefits both the insurer (allocating the risk) and the insured (reducing premium costs). Liability insurance policies often contain a "deductible" or a "self-insured retention" (SIR) requiring the insured to bear a portion of a loss otherwise covered by the policy. The term "retention" (or "retained limit") refers to a specific sum or percentage of loss that is the insured's initial responsibility and must be satisfied before there is any coverage under the policy. It is often referred to as a "self-insured retention" or "SIR." Although an SIR is, in some ways, similar to a deductible in an insurance policy, unlike a deductible, which generally relates only to damages, an SIR also applies to defense costs and settlement of any claim. Another difference is that the SIR does not reduce available policy limits. Rather, the policy limits apply on top of the SIR. For example, if the policy limit is \$500,000 and there is a \$50,000 SIR, the policy will provide \$500,000 coverage once the SIR is satisfied. A \$50,000 deductible, however, reduces the \$500,000 policy limit, leaving \$450,000 after the deductible is satisfied. In other words, a deductible represents a portion of a covered loss lying within the terms of the policy where a retention is the initial portion of a loss that lies outside the policy. A retention represents the risk the insured has agreed to retain for itself before coverage is triggered. The position of a primary insurer over a self-insured retained limit can be analogized to the position of an excess insurer over a primary policy. However, the analogy between "primary" and "excess" insurance should not be carried too far. The distinction between excess and primary insurers is significant because different rules govern the obligations of excess and primary insurers. Primary insurance provides immediate coverage upon the happening of an occurrence that gives rise to liability. Excess insurance then pays after the limit of the primary insurance is exhausted. There are two principle types of excess insurance coverage: "umbrella" coverage and "following form" coverage. A "following form" excess policy has the same terms and conditions as the primary policy but has a different liability limit. Umbrella excess

INSURANCE LAW UPDATE
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policies provide coverage in addition to that provided by the underlying insurance. Because umbrella policies provide coverage for certain losses for which there may be no underlying insurance, they typically also provide for a self-insured retention, often referred to in the umbrella policy as the “retained limit” or “retained amount.” In other words, both “following form” and umbrella excess policies typically provide coverage for losses that are within the scope of losses covered by the underlying policy or policies, but the amount of which exceeds the limits of liability set forth in the underlying insurance. Umbrella policies may also provide coverage for certain losses not covered by underlying insurance in the event the amount of those losses exceeds the specified self-insured retention.

Deere, a renowned manufacturer of farm equipment, has a complex, multi-layered tower of coverage. From 1958 through 1986, Deere’s coverage consisted of numerous primary, umbrella, and excess policies. The primary policies did not cover products-liability claims and, as such, were not implicated in the underlying asbestos claims giving rise to this appeal. Rather, coverage for products liability was provided by a series of first-layer umbrella policies that provided coverage to Deere in excess of a specific dollar amount (ranging over time from \$50,000 to \$2.5 million) paid by Deere. This dollar amount represented the risk Deere retained for itself or its SIR. In this respect, the first-layer umbrella policies sat above Deere’s retained limit. The first-layer policies were subject to per-occurrence and aggregate limits. During this same time frame, Deere also purchased and maintained several layers of excess insurance policies, which sat above the first-layer umbrella policy limits. Thus, in a typical case, Deere’s coverage would play out as follows: Upon being sued in a products liability case, Deere would commence its defense, pay its retained limit, and then look to the first layer to provide coverage. The first layer would then pay out its per-occurrence and aggregate limits, and then Deere would look to the next level of coverage and so on and so forth all the way up the tower.

The issue before the Court was whether coverage under the higher-layer excess policies is triggered after the aggregate underlying limits have been satisfied—without Deere paying additional SIRs for subsequent claims submitted. The Court found that the

plain language of the first-layer umbrella policies and the higher-layer excess policies makes clear that Deere has no obligation to pay additional retained limits once the aggregate limits of the underlying policies have been satisfied. The Court observed that language in the higher-layers policies provides that the only precondition to liability attaching to the higher-layers policies is that the “Underlying Umbrella Insurers have paid or been held liable to pay the full amount of their respective ultimate net loss liability” of \$10 million (varies per policy) per occurrence, but \$10 million (varies per policy) in the aggregate. The policies’ language further states that the higher-layer insurer “shall then be liable to pay only the excess thereof...” The policies’ language says nothing about higher-layer excess coverage being conditioned on Deere paying any additional SIR or retained limit before liability attaches. Moreover, there is no language in those provisions that justifies treating Deere as an Underlying Umbrella Insurer or treating the retained limits in the underlying policies as “insurance” for this purpose.

Because the policies’ language is clear and unambiguous, it must be interpreted according to its plain meaning. The first-layer policies are invoked only after the applicable SIR has been paid by Deere. And the higher-layer policies are triggered once both the underlying limits, of which the SIRs are a part, have been exhausted. This conclusion is reinforced by the fundamental purpose of excess insurance—which is to protect the insured against amounts of loss or damage in excess of the underlying policy’s limits. That the following-form excess policies exclude the underlying policies’ limits is entirely consistent with this purpose.

Here, Deere is not seeking to avoid its SIR obligations. Rather, once Deere has paid its self-insured retentions under its first-layer umbrella policies and once the first-layer umbrella policies are exhausted, Deere may seek coverage from the higher-layer excess policies. It will be Deere’s exhaustion of its SIRs that will trigger coverage under its first-layer policies. And, the exhaustion of the first-layer policies is what will trigger coverage under the higher-layer policies. Continually requiring Deere to pay SIRs for each successive layer would have the effect of affording Deere far less coverage than it had purchased. The higher-

layer policies “follow form” except, as relevant here, regarding limits of liability. Thus, the higher-layer policies do not “follow form” as to the SIRs, which are written in terms of liability limits. The SIR is properly classified as a limit of liability, providing further support to the finding that the follow-form clause incorporates the scope (i.e., products liability coverage) of the first-layer policies but not the monetary caps on liability provided in the Limits of Liability section.

AN INSURER WHO REFUSED TO INDEMNIFY ITS INSURED SUBCONTRACTOR FOR THE AMOUNT OF A DEFAULT JUDGMENT WAS LIABLE TO THE JUDGMENT CREDITOR’S SUBROGEE UNDER INSURANCE CODE SECTION 11580 FOR THE AMOUNT OF THE DEFAULT JUDGMENT AGAINST THE SUBCONTRACTOR.

In the case filed March 1, 2019, styled *The Insurance Company of the State of Pennsylvania v. American Safety Indemnity Company*, 32 Cal. App.5th 898 (2019), the Court of Appeal, Second District, Division 8, held that a developer’s default judgment against a grading subcontractor on a claim for indemnity following an arbitration award in favor of the homeowners was based upon property damage such that the developer’s excess insurer, as subrogee, could bring an action against the defaulted subcontractor’s commercial general liability (“CGL”) insurer to recover on the judgment because it was undisputed in the underlying arbitration that the home was damaged due to settling from improper soil compaction, and the indemnity claim was based on a claim for property damage.

In this dispute between insurers, The Insurance Company of the State of Pennsylvania’s (“ICSP”) insured, a general contractor, secured a default judgment against American Safety Indemnity Company’s (“ASIC”) insured, a subcontractor, after a homeowner obtained an arbitration award of more than \$1.1 million against the general contractor. While ICSP indemnified the general contractor for the arbitration award, ASIC refused to indemnify the subcontractor for the amount of the default judgment. In this lawsuit, ICSP (as subrogee of its insured) sought recovery from ASIC under Insurance Code section 11580 of the amount of the default judgment against the subcontractor.

ASIC contends the default judgment was not for property damage, but rather was for indemnity of an arbitration award that awarded “economic loss for diminution in property value,” and that, “[a]s a matter of law, diminution in value is economic loss,

not property damage.” The Court declined to adopt this constricted view of section 11580. The Court observed that the record established that physical injury to the homeowner’s property first occurred during the ASIC CGL policy term, and thus the CGL policy covered the physical injury to the home. The arbitration award in favor of the homeowners’ action against ICSP’s insured established the time when the homeowners noticed “drywall and stucco cracks, separation and cracking along the mortar joint of interior tiles,” as well as “lifting of exterior flagstone work,” and the homeowners subsequently complained to the developer—ICSP’s insured.

It is well established under California insurance law that an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify its insured for the entirety of the ensuing damage or injury. As such, ICSP had standing to prosecute as its insured’s subrogee, a claim against ASIC under Insurance Code section 11580 an action to enforce the judgement against ASIC.

INSURER’S INVOCATION OF THE ATTORNEY-CLIENT PRIVILEGE DID NOT CONSTITUTE “BAD FAITH.”

In the unpublished case filed March 29, 2019, styled *Berns v. Sentry Select Insurance Company*, 2019 WL 1427981 (2019), the United States Court of Appeals, Ninth Circuit, held, inter alia, that under California law, the invocation of the attorney-client privilege by an insurer in its insured’s action against the insurer for breach of contract and bad faith regarding the insurer’s failure to defend and indemnify its insured in a wrongful-termination action, did not constitute bad faith because there is no exception to the privilege applied given that the insurer did not raise either the advice-of-counsel defense or raise a claim of attorney disparagement.

Berns was insured under a commercial general liability insurance policy issued by Select Insurance Company (“Sentry”). The insurance policy stated that Sentry would defend Berns for an “act” of “wrongful termination” or “harassment” committed in the course of his employment, with the exception of any “dishonest, malicious, fraudulent, criminal or intentional ‘act.’” In September 2011, Berns’s sister sued Berns for wrongful termination and harassment. Berns requested that Sentry defend him, and Sentry denied his tender of defense, reasoning that his acts were “intentional,” thus falling

within the policy’s exclusion for “intentional” acts. Sentry interpreted “intentional” to mean “voluntary and deliberate.” Berns then sued Sentry for breach of contract and bad faith.

Among Berns’ arguments before the Ninth Circuit was that Sentry acted in bad faith by invoking the attorney-client privilege to protect various communications between Sentry and its counsel, which Berns viewed as demonstrative of Sentry’s bad faith. The Court found that Sentry was not required to provide their privileged communications to him. Although Berns cited cases that he claims show there can be exceptions to the attorney-client privilege when “fairness requires” or a party uses it as a “sword and a shield,” the cases that he cited did not apply here because they involve (i) advice-of-counsel defense, (ii) attorney disparagement, and (iii) the trade-secrets privilege—each of which is generally an exception to the attorney-client privilege. In this case, Sentry had not raised any of those exceptions. As such, Sentry did not act in bad faith in asserting the attorney-client privilege.

HOMEOWNER’S INSURANCE POLICY’S “LEGAL ACTION AGAINST US” CLAUSE WHICH CONTAINED BOTH A CONDITION PRECEDENT AND A ONE-YEAR SUIT-LIMITATION PERIOD THAT BEGAN AFTER A LOSS OCCURRED, PRECLUDED SUIT AGAINST IT BY ITS INSUREDS WHEN SUIT WAS FILED MORE THAN ONE-YEAR AFTER A LOSS OCCURRED. In the unpublished case filed April 1, 2019, styled *Keller v. Federal Insurance Company*, 2019 WL 1440947 (2019), the United States Court of Appeals, Ninth Circuit, held that insureds who fail to comply with the one-year suit-limitation provision in a homeowner’s policy after their insurer denied coverage for a sewage backup and water damage to floors, failed to comply with the policy’s “legal action against us” clause and thus could not maintain an action against their carrier.

Jacqueline Keller and Phillip Yaney sought to recover under a homeowner’s insurance policy issued by Federal Insurance Company (“Federal”). A backup of water and sewage in the downstairs bathroom flooded portions of the insureds’ home, damaging portions of their newly installed hardwood flooring. At issue in this appeal is whether a clause in the policy that provides for a one-year suit-limitation period prevents them from recovering under the policy. The policy has a “Legal Action Against Us” clause (“LAAU”), which reads as follows: “You agree not to bring legal action against us unless you have first complied with

all conditions of this policy. For property, you also agree to bring any action against us within one year after a loss occurs, but not until 30 days after proof of loss has been submitted to us and the amount of loss has been determined.”

Around November or December 2012, the insureds noticed “warping” or “cupping” in portions of their newly installed hardwood floors as a result of the flooding. By June or July 2013, they determined that the cupping was not diminishing and that it would not be resolved on its own. The insureds finally notified Federal of the sewage backup and damage to their floors in September 2014. After Federal denied coverage, Keller and the insureds filed their complaint in December 2015.

The Court concluded that the LAAU clause establishes both (i) conditions precedent—compliance with all conditions of the policy, and (ii) establishes a one-year suit-limitation period that begins “after a loss occurs.” The conditions precedent and the suit-limitation period are distinct elements of the clause, and each must be given effect. The insureds’ interpretation of the clause—that it does not create a suit-limitation period at all or, in the alternative, that the suit-limitation period is triggered only after a claim is filed and Federal makes its final determination regarding the amount of the insured’s claim—is inconsistent with the clear language that the suit-limitation period begins “after a loss occurs.” Their reading is also inconsistent with the purpose of the suit-limitation period, which is to preclude stale claims, require the insured’s diligence, and prevent fraud. The insureds failed to comply with the one-year suit-limitation provision in the LAAU clause because they filed their claim over one year after the loss occurred. The loss in this case occurred in November or December 2012, when they noticed the cupping of their floors. And even if the Court were to assume that the loss did not occur until July 2013, when they decided that the cupping issue would not resolve itself over time, they were still late in submitting their claim to Federal in September 2014. True enough, the limitations period was tolled while Federal was evaluating their claim between September 2014 and December 2015. But the December 2015 complaint was still time-barred by the LAAU’s suit-limitation provision because the insureds waited over a year after the loss occurred before even filing their claim with Federal. ■

San Diego Defense Lawyers

2019 Juvenile Diabetes Research Foundation Benefit



Friday, September 27, 2019 at 1:00 pm



Mark your calendars! On Friday, September 27, 2019 at 1:00 p.m., the San Diego Defense Lawyers will show off our finely-tuned golf skills and enjoy an afternoon filled with friends, colleagues and mulligans at **Encinitas Ranch**. A portion of the proceeds will benefit the **Juvenile Diabetes Research Foundation**.

Sign-up information and details to follow.

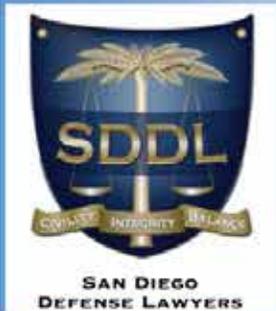
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 Direct Line—619.719.4704

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Contact Ben Cramer, bcramer@ljdfo.com, or Dianna Bedri-Burke, diannabedri@gmail.com, for additional information.



SAN DIEGO DEFENSE LAWYERS

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Friday, July 26, 2019



Members: \$15* | Guests: \$20*
 Includes all-you-can-eat Mexican food, drink tickets, and a game ticket!

Members: \$10* | Guests: \$15*
 Includes all-you-can-eat Mexican food and drink tickets only.

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<http://sddl.org/events.html#!event/register/2019/7/26/save-the-date-annual-padres-game-tailgate>

Tailgate at 5:15 pm | Game at 7:10pm

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American Safety Takes a Hard Fall after Ignoring Million-Dollar Claim against Insured Based on Soil Subsidence

By Senior Counsel, Robert G. Bernstein
TYSON MENDES

Liability insurer American Safety Insurance Company (“ASIC”) learned a tough and expensive lesson arising out of a dispute with Insurance Company of the State of Pennsylvania (“ICSOP”), in an appellate decision issued by the Second Appellate District, Division Eight, on March 1, 2019.

The Facts

This dispute between insurers arose out of an underlying construction defect action. Developer New Millennium Homes (“NMH”) constructed a residential project in Calabasas, California in the early 2000s. Among other trades and professionals, NMH contracted with Camarillo Engineering, Inc. (“Camarillo”) in 2004 for the latter to provide “mass grading, compacting and finish grading” services at the development. In short, Camarillo prepared the soil below the project for construction.

Camarillo’s subcontract required it to indemnify and hold NMH harmless from claims (including attorneys’ fees “incurred as a result thereof”) for property damage “arising out of or resulting from the activities of or work performed by Camarillo.” ASIC issued six commercial general liability policies to Camarillo covering annual periods commencing on December 1, 2003 and continuing through August 1, 2009. Each of the policies included a provision under which ASIC was obligated to pay “those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.” Property damage was defined as “[p]hysical injury to tangible property, including all resulting loss of that property.”

In December 2005, Amir and Brenda Moghadam (“Moghadams”) purchased a home in the development from NMH. By early 2009, the Moghadams began to notice several types of distress at their home, including drywall and stucco cracks,

separation and cracking of interior tiles and lifting of exterior flagstones. They complained about the problems to NMH in May 2005. A subsequent geotechnical investigation found the distress issues resulted from differential soil settlement and soil expansion, as well as an inadequate post-tension slab design and construction.

The Underlying Claim

In September 2011, the Moghadams filed a claim in arbitration against NMH for defective construction, alleging their total current damages were “at least \$2,347,592.” After hearings in June and July of 2012, the arbitrator entered an award in favor of the Moghadams and against NMH in the total amount of \$1,176,633. The award was subsequently confirmed as a judgment. ICSOP, the excess liability insurer for NMH, indemnified the developer and paid the judgment.

NMH’s Lawsuit against Camarillo

In December 2011, prior to the arbitration hearings, NMH sued Camarillo and two other parties for contractual and equitable indemnity, contribution and related claims arising out of the Moghadams’ arbitration claim. A paragraph in NMH’s complaint incorporated by reference the Moghadam’s arbitration claim, which asserted damages of “at least \$2,347,592,” and a copy of the arbitration claim was attached to the complaint as an exhibit. ASIC declined to defend Camarillo in the NMH lawsuit and Camarillo was defaulted in March 2012. NMH also tendered its defense and indemnity to ASIC as an additional insured under the Camarillo policies several times. In June 2012, ASIC advised NMH there was no such coverage for NMH under the policies issued to Camarillo. NMH ultimately obtained a joint and several judgment against Camarillo and another party, in the total amount of \$1,532,973.

ICSOP’s Lawsuit against ASIC

Pursuant to Insurance Code Section 11580, ICSOP brought a subrogation action (standing in the shoes of its insured NMH) against ASIC, as liability insurer for Camarillo, seeking to recover the default judgment entered against Camarillo, for \$1,532,973. The insurers filed cross-summary judgment motions, which were resolved in favor of ICSOP. ICSOP then obtained a judgment for the full amount sought against ASIC; ASIC appealed.

Arguments on Appeal

ASIC advanced four arguments in its appeal, contending:

1. The default judgment entered against Camarillo was invalid because NMH’s complaint did not specify the amount of damages sought against Camarillo, as required by California Code of Civil Procedure Section 580;
2. The arbitration award, upon which the judgment against NMH was based, was founded upon the diminished value of the Moghadams’ property, not “property damage” covered under the terms of ASIC’s policy;
3. There was insufficient evidence in the underlying proceedings regarding when damage to the subject property first occurred; and
4. The policies issued to Camarillo all contained self-insured retention (“SIR”) or deductible clauses which rendered Camarillo payment of an SIR or deductible a “condition precedent” to triggering coverage.

The Second District Court of Appeal rejected each of these arguments, holding:

1. NMH’s incorporation by reference and attachment of the Moghadam’s claim in arbitration, in which they alleged damages of “at least \$2,347,592” was sufficient to put Camarillo on notice

of the potential maximum damages sought against it, thereby satisfying the requirements of Code of Civil Procedure Section 580;

2. Although the measure of damages awarded to the Moghadams in the arbitration proceeding was the diminished value of their property, the award was based upon “property damage” within the meaning of the policy and the claim was subject to coverage under Camarillo’s ASIC policies;
3. ICSOP presented sufficient evidence from the underlying arbitration proceeding to establish that property damage occurred in May 2009, during ASIC’s sixth policy which commenced on August 1, 2008. The policy covered damage which occurred “during the policy period;” and
4. ASIC provided no evidence to establish that it demanded payment of an SIR by Camarillo (which was required under the terms of the ASIC policies) and that one of the policies contained a deductible clause, which did not require payment to trigger coverage.

The court also rejected arguments raised on appeal by ASIC which were not presented to the trial court until after ICSOP’s summary judgment motion was granted, finding that the judgment was not based upon them and that they were not material to ASIC’s appeal. The court’s opinion rejected ASIC’s appeal in full and affirmed ISOP’s judgment for \$1,532,973.

The Takeaway

Liability insurers are held to a high standard in California and must act promptly and reasonably in their investigation of claims. ASIC was undoubtedly certain that its coverage position in this matter was a strong one, however, in assuming and maintaining that position, it allowed its insured Camarillo to be subject to a judgment in excess of \$1.5 million, for which it was ultimately found to be responsible. Insurers must investigate claims fully, seek guidance from coverage counsel, and arrive at sound, reasonable, and supported coverage positions. Furthermore, they must be willing to reexamine those positions as they discover new facts, and alter their coverage analysis as necessary. ■

Dunn DeSantis Walt & Kendrick Attorneys Named as 2019 Top Lawyers in San Diego

The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce that **K. Elizabeth (Beth) Dunn** (Complex Litigation), **Kevin V. DeSantis** (Professional Liability Defense), and **Christopher Walt** (General Business Law) have been listed in San Diego Magazine as 2019 Top Lawyers in San Diego.

Dunn’s practice of over 30 years focuses on complex business litigation with an emphasis on employment litigation, risk management, regulatory matters and union negotiations and grievances. Dunn also provides employment law compliance advice and business management counseling and training to the firm’s diverse client base.

Certified by the State Bar of California as a specialist in the area of legal malpractice law, and Managing Partner of the firm, DeSantis represents clients in complex civil litigation matters and risk management focusing on professional liability, commercial disputes, transportation industry matters, employment and wrongful



termination. DeSantis also provides general business representation and strategic advisement services to companies of all sizes, from small local start-ups to national enterprises including design, engineering and transportation companies.

Walt has practiced for 40 years and focuses on representation of emerging and established companies in business, corporate and real estate transactional matters, mergers and acquisitions, and other transactional matters. He also represents investors and companies in early stage corporate financings.

San Diego Magazine’s 2019 Top Lawyers in San Diego list reflects those local attorneys who have been recognized by Martindale-Hubbell as 2019 AV® Preeminent™ Peer Review Rated attorneys. Martindale-Hubbell® is the preeminent objective attorney rating service.

Dunn DeSantis Walt & Kendrick provides a spectrum of legal services to a broad range of clients, from small, local start-ups and non-profits to large, national companies. The firm also maintains a strong commitment to its representation of public entities, charitable foundations and religious organizations. Dunn

DeSantis Walt & Kendrick has locations in San Diego, La Jolla, Irvine and Dallas. More information can be found at www.ddwklaw.com. ■

Sullivan Hill Attorneys Named 2019 Super Lawyers and Rising Stars

San Diego, CA. Sullivan Hill is pleased to announce that **Jim Hill, Donald Rez, Tim Earl and Candace Carroll** have been selected as 2019 Super Lawyers, and Erin Kennedy Clancy, Ashley Kerins, Shailendra (Shay) Kulkarni, and Kathryn Healy have been named 2019 Rising Stars.

Each year no more than 5 percent of the lawyers in the state are selected to receive the honor of being included in the Super Lawyers list and no more than 2.5 percent of the lawyers are selected to the Rising Stars list.

Shareholder Jim Hill has been selected to the Super Lawyers list for the last 13 years in the areas of Bankruptcy, Business Litigation, and Creditor Debtor Rights. A founding member of the firm, member of its Executive Committee and chair of the firm's Insolvency and Commercial Bankruptcy practice group, Hill practices primarily in the areas of bankruptcy, insolvency and commercial law. He is the inaugural Chair of the Board of Representatives of the California Lawyers Association.

Shareholder Donald Rez has been selected to the Super Lawyers list for the ninth year in the areas of Business/Corporate, Business Litigation, and Antitrust Litigation. Rez



focuses his practice in the areas of business and commercial litigation and antitrust and trade regulation.

Shareholder Tim Earl has been selected to the Super Lawyers list in the area of Insurance Coverage. Earl is chair of Sullivan Hill's Construction and Insurance practice group, and is an experienced litigation attorney practicing primarily in the areas of construction litigation, insurance coverage, and business litigation. His insurance coverage practice involves representation of policyholders and insurance companies in a variety of insurance coverage disputes primarily involving property damage or bodily injury arising out of construction defect and asbestos claims.

Candace Carroll, Of Counsel to the firm, has been selected to the Super Lawyers list for the tenth year in the field of Appellate Law. Carroll is a highly-regarded appellate practitioner with more than 40 years' experience handling appeals in the federal, state and bankruptcy appellate courts.

Shareholder Erin Kennedy Clancy has been selected to the Rising Stars for the second time in the areas of Construction Litigation, Civil Litigation, Business/Corporate, and Insurance Coverage. Clancy is part of the firm's Construction, Insurance, Real Estate, and Commercial and Business Litigation practice groups.

Associate Ashley Kerins has been selected to the Rising Stars for the third time in the areas

of Tax, Real Estate, and Business/Corporate. Kerins focuses her practice primarily in the areas of real estate, corporate, partnership and business transactions, and in tax planning, tax controversy resolution and estate planning.

Shareholder Shailendra (Shay) Kulkarni has been selected to the Rising Stars for the fifth year. He is recognized in the areas of Construction Litigation, Business Litigation, Real Estate, and Surety. Kulkarni focuses his practice primarily in the areas of construction, insurance coverage litigation and analysis, and complex civil litigation. He also practices in the areas of surety litigation and construction-industry contracts.

Associate Kathryn Healy has been selected to the Rising Stars for the second time in the areas of Bankruptcy and Creditor Debtor Rights. Healy concentrates her practice in the firm's Insolvency and Commercial Bankruptcy practice group. Within this practice area, she represents a variety of debtors, debtors in possession, creditors, and Chapter 7 and 11 trustees in commercial and business bankruptcy cases.

Super Lawyers, a Thompson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive and diverse listing of exceptional attorneys.

For decades Sullivan Hill has provided efficient, aggressive and responsive legal representation. The firm provides full service representation to clients in a variety of industries with an emphasis in insolvency, construction disputes, insurance coverage, real estate, business disputes, civil litigation, and transactional work. The firm has offices in San Diego and Las Vegas. More information can be found at www.sullivanhill.com. ■

Firm Updates

WILSON GETTY LLP ANNOUNCEMENTS

The law firm of Wilson Getty LLP is pleased to announce that **Colin M. Harrison** has been elevated to partner and also has been elected as President of the San Diego Defense Lawyers Association. Mr. Harrison's practice focuses on the defense of the long term care industry, both residential care facilities for the elderly and skilled nursing facilities. Colin has litigated, tried and participated in cases involving allegations of elder abuse and medical injuries to dependent adults. His practice also includes defending clients in general liability matters, including wrongful termination and personal injury claims. Colin is a board member and chair for the Long-term Care Litigation committee of the Association of Southern California Defense Counsel, and a prime member of the Association of Defense Trial Attorneys.

In addition, Wilson Getty LLP is proud to announce that attorneys Wendy Coulston and Kim Cruz have also recently joined their firm, and will be based in Orange County. Mrs. Coulston has enjoyed over 25 years defending clients in lawsuits, arbitrations, and before the medical and nursing boards, including physicians, nurse practitioners, physician's assistants, medical groups, Medicare Advantage Plans, skilled nursing facilities, assisted living facilities, and hospitals who have been sued for medical malpractice, elder and dependent neglect, general and premises liability, as well as pharmaceutical and psychiatric cases. Ms. Cruz has over 23 years of legal experience devoted primarily to the defense of healthcare providers in malpractice and elder abuse cases. Her current practice focuses on the defense of long term health care facilities, including residential care and skilled nursing facilities.

Wilson Getty LLP specializes in civil litigation, including long term care, medical malpractice, administrative actions, business litigation, general liability, transportation and



products liability. The firm currently has 17 attorneys and five paralegals who serve clients throughout the State of California.

ATTORNEY DOUG GILLIE JOINS DUNN DESANTIS WALT & KENDRICK

The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce the addition of attorney **Doug Gillie**.

Gillie practices commercial litigation, representing businesses and employers large and small. He has experience in a wide variety of civil actions, including complex commercial disputes, wage-and-hour, consumer class actions, employment discrimination and wrongful termination cases, patent and other intellectual-property lawsuits, and CERCLA (Superfund) litigation.

Dunn DeSantis Walt & Kendrick provides a broad spectrum of legal services to businesses of all sizes, from local start-ups to national and international enterprises. The firm also represents public entities, charitable foundations, non-profits and religious organizations. Dunn DeSantis Walt & Kendrick has locations in San Diego, La Jolla, Irvine and Dallas.



SHARON HUERTA JOINS SULLIVAN HILL AS SHAREHOLDER

The law firm of Sullivan Hill is pleased to announce that **Sharon A. Huerta** has joined the firm as a shareholder in the San Diego office. She will be a member of Sullivan Hill's construction and insurance practice group.

Huerta's primary area of expertise is in insurance coverage litigation and evaluation, bad faith, and developer representation. In addition, Huerta has significant experience in appellate writing and was primarily responsible for drafting briefs in numerous successful published and unpublished opinions.

Prior to joining Sullivan Hill, Huerta practiced in San Diego for over 20 years as a litigator.



Sullivan Hill has provided efficient, aggressive and responsive legal representation for more than 50 years. The firm provides full service representation to clients in a variety of industries with an emphasis in insolvency, construction disputes, insurance coverage, real estate, business disputes, civil litigation, and transactional work. The firm has offices in San Diego and Las Vegas. More information can be found at www.sullivanhill.com.

NEIL DYMOTT NAMES ALAN B. GRAVES AND DANE J. BITTERLIN SHAREHOLDERS

Neil Dymott is pleased to announce that on July 1, 2019, **Alan B. Graves** and **Dane J. Bitterlin** were elevated to Shareholders of the firm.

Alan Graves joined Neil Dymott as an associate in 2006. The emphasis of his practice is on professional liability and general liability, personal injury litigation, healthcare and elder abuse claims and employment matters. Mr. Graves is a member of the Association of Southern California Defense Counsel, Defense Research Institute, San Diego County Bar Association and the San Diego Defense Lawyers (SDDL).

Dane Bitterlin joined Neil Dymott as an associate in 2007. Mr. Bitterlin's practice focuses on transportation litigation, business and personal injury, professional liability, general liability and the defense of medical malpractice claims. He is a member of the Association of Southern California Defense Counsel, Defense Research Institute, San Diego County Bar Association and the San Diego Defense Lawyers (SDDL).

Neil Dymott was founded in San Diego in 1964 and is a multi-service law firm with offices in San Diego, and Palm Desert, California. The firm represents clients in a wide range of industries and specialty areas, including business transactions, employment law, litigation, estate planning, pharmaceutical and medical products manufacturers, trucking and transportation, intellectual property, insurance, medical, accounting and other professional practices. ■



MCLE Lunch-and-Learn Recaps

February 2019 Lunch and Learn – How to Deal with *Pebley v. Santa Clara Organics*

By Christine Polito

PETTIT KOHN INGRASSIA LUTZ & DOLIN

The February MCLE lunch n’ learn discussed the details of the 2018 seminal *Pebley v. Santa Clara Organics* decision. Steve Fleischman, of Hotvitz & Levy, presented along-side past SDDL president, Patrick Kearns, of Wilson Elser. Mr. Fleischman was heavily involved with the appeals process and gave SDDL a firsthand insight into the facts and circumstances which lead to the Court’s decision. The presentation covered the Howell, Corenbaum, Ochoa progeny, which defined the defense approach to damages in recent years. The *Pebley* decision sits at odds with this growing body of law, by holding that a Plaintiff who has insurance, but treated on lien is considered “uninsured” for purposes of damages analysis. This new decision created a battle of the experts – what defines the “reasonable market value” of Plaintiff’s medical treatment? Mr. Kearns focused on strategies for discovery, depositions, and trial motions designed to prepare defense experts for testifying with this new *Pebley* precedent.

March 2019 Lunch and Learn

By N. Ben Cramer

LA FOLLETTE JOHNSON DEHAAS FESLER & AMES

On March 20, 2019, David J. Daren of Momentum Engineering Corp. was the speaker at SDDL’s monthly Lunch & Learn. Mr. Daren discussed what an Event Data Recorder (“EDR”) is and what kind of information we can obtain from them. He provided fascinating examples and case studies. He covered the specific terminology used with EDR, what vehicles have them, and what info it collects. It was a great presentation and well-received by all in attendance. The tasty tacos were an added bonus! ■

April 2019 Lunch & Learn – The Reptile: Ten Years Later

By Colin M. Harrison, Esq.

WILSON GETTY LLP



On April 9, 2019, Ben Howard, Esq. presented at SDDL’s fourth “Lunch & Learn” program of the year entitled “The Reptile: Ten Years Later”. Mr. Howard shared several

examples of how “The Reptile” is being used in practice and some of the other new tactics being used by the plaintiff’s bar. Mr. Howard is a shareholder with the law firm of Neil, Dymott, Frank, McCabe & Hudson. He is a past president of SDDL. Mr. Howard’s seminar focused on defending clients by preparing them for the “Reptile.” During this well attended seminar, Mr. Howard shared his insight from recently attending the TBI seminar with a keynote speaker and author of “Reptile” David Ball. He offered several tips for defending a “Reptile” deposition and educating your trial judge about the “Reptile” method. Finally, he addressed how the “Reptile” has evolved through the years and the new methods being utilized by the plaintiff’s bar, including the “Trojan Horse.” ■



First Quarter Evening MCLE

On May 7, 2019, SDDL members were privileged with a presentation by social psychologist and jury consultant, Drury Sherrod, about his book “The Jury Crisis: What’s Wrong with Jury Trials and How We Can Save Them.” Mr. Sherrod shared the scary but true history of jury trials... Can you believe a panel of jurors would decide several



cases in one day, some that even included death sentences and were only presented in about 1 hour?! We learned how jury trials have developed – mostly for the better – over the past centuries, to bring us to what we know today. Mr. Sherrod shared the psychology behind jury decisions and how the information presented to them is significantly swayed by manner, order, and tone. Real life examples of trials we all know (Oj Trial, Bill Cosby Trial, etc.) were quoted straight out of the book. SDDL members were left with a better understanding of how jury trials developed to the present and how trial attorneys can better present information to tap into the social biases and psychology each juror brings with them to the jury box. If you missed the presentation you can always order a copy of the book from Amazon! ■

May 2019 Lunch and Learn – Socialization and Social Media in the Workplace by Teagan Dow

By Christine Dixon
DUNN DESANTIS WALT & KENDRICK, LLP



The May Lunch & Learn was a little different from the usual Lunch & Learns. Teagan Dow, Esq. of Dunn DeSantis Walt & Kendrick LLP spoke to our members about the benefits and pitfalls of social media from an employment law perspective. Ms. Dow explained how social media could implicitly bias employers against certain protected classes based on the information gleaned from their current and prospective employees' social media pages. She also discussed the rights employees have with respect to privacy, but, if an employee's posts are public, such rights may be diminished. Ms. Dow also discussed how social media can be used during investigations by employers into complaints by employees, as well as in litigation with a current or former employee. She recommended employers institute social media and email and internet use policies in order to clearly lay out their expectations of their employees' social media and internet usage, particularly while they are at work or acting on behalf of the employer.

In today's day and age, social media has a huge impact in our lives, even if you do not actively maintain your own social media pages. It is very likely that you are on someone else's social media page. Contact Ms. Dow if you have any questions about creating or updating social media and email and internet use policies. ■

June 2019 Lunch and Learn

By Nicole Melvani
NEIL DYMOTT FRANK MCCABE & HUDSON



SDDL's June Lunch and Learn featured Dr. David Braff, distinguished professor at UCSD School of Medicine's Department of Psychiatry. Dr. Braff led a lively discussion on

understanding and evaluating medical-legal claims involving Post-Traumatic Stress

Disorder, including discussion of common symptoms, review criteria for assessing stressor level, appropriate courses of treatment, the importance of evaluating prior psychiatric history, and how it is possible to disentangle "real" cases from "feigned" cases with comprehensive neuropsychiatric evaluation and testing. The informative event was highly attended by SDDL members eager to learn more about this complex condition and its implications in the context of civil litigation. ■

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Bottom Lines

Title: *Claimant v. Respondents*

Case No.: Not Applicable

Judge: Single Neutral Arbitrator from JAMS

Type of Action: Medical Malpractice

Type of Trial: Binding Contractual Arbitration

Length: 7 days

Factual Information:

The Claimant was a 61-year-old registered nurse who presented to the Respondents' Emergency Department on July 2, 2017, for severe right hip pain shooting down her leg. Claimant required 16 mg of IV morphine and 7 mg of IV Dilaudid to control her severe pain over 3.5 hours. Claimant was not noted to have any side effects from the medication administered. Claimant's pain was then reduced sufficiently for her to be discharged home to have an outpatient MRI to evaluate the cause of her pain. Approximately 2 minutes after the ED provider discussed discharge with the patient, the ED nurse then entered the room to review discharge instructions with the patient and to administer oral pain medication and noted the patient was in PEA arrest. Claimant was promptly resuscitated, intubated and transferred to the ICU. She was extubated the following day and discharged from the hospital a day later. Claimant asserted medical negligence regarding the emergency care, including orders of excess narcotic pain medication by the Emergency Department physician, the delivery of pain medication by the Emergency Department nursing staff and the alleged failure to properly monitor the patient while on medication. Claimant also contended negligence in the resuscitation of the Claimant. Claimant requested damages in the amount of \$2.2 million dollars.

Result: Defense Award

Claimant's Counsel: Robert F. Vaage and

Elizabeth Teixeira, The Law Offices of Robert Vaage

Respondents' Counsel: Vincent J. Iuliano and Gabriel M. Benrubi, Davis, Grass, Goldstein & Finlay

Claimant's Experts: Kenneth Corre, M.D. (emergency medicine), Carol Hyland (life care planner), Michael Nakada, Ph.D. (economist), and Lester Zackler, M.D. (neuropsychiatry)

Respondents' Experts: Miles Shaw, M.D. (emergency medicine), Debbie Bird, R.N. (emergency medicine - nursing), Heather Xitco, MBA (economist), Marc Norman, Ph.D. (neuropsychology), Roger Thrush, Ph.D. (vocational rehabilitation), Reg Gibbs, M.S. (life care planner), and Thomas Hemmen, M.D. (neurology).

Damages and/or injuries claimed: Claimant alleged that as a result an overdose of opioids in the ED, she suffered a PEA arrest leading to alleged physical, neurological, cognitive and psychological damages. Claimant alleged that she could no longer work as a nurse due to her alleged injuries and that she had intended to work an additional ten years, and that she required medication and therapy for PTSD as a result of the incident.

Settlement Demand: CCP 998 Offer prior to and during arbitration of \$750,000

Respondents' Settlement Offer: None

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**Title:** *Crawford v. Montgomery*

**Case No.:** 37-2016-41135-CU-MM-CTL

**Judge:** Honorable Timothy B. Taylor

**Type of Action:** Medical Malpractice

**Type of Trial:** Bifurcated jury trial.

**Trial 1:** Whether Plaintiff's causes of action for his left eye were precluded by the three-year statute of limitation.

**Trial 2:** Whether Defendants' breached the standard of care while treating Plaintiff's right eye.

**Length:** Trial 1: 4 Days; Trial 2: 6 Days

**Facts:** Plaintiff was a 71-year-old Dentist. Defendants were an Ophthalmologist and his Medical Corporation. Defendants first diagnosed Plaintiff with primary open angle glaucoma over 15 years before Plaintiff filed his lawsuit. Plaintiff was frequently non-compliant with his medication regimen and eventually abruptly transferred his care to a different physician after Defendants informed him he may need surgery to slow the progression of his glaucoma. Plaintiff never told his new physician about this surgical recommendation. Plaintiff treated with his new physician for over a year before again receiving a surgical recommendation for his left eye. Shortly thereafter, Plaintiff returned to Defendants for continued monitoring of his glaucoma. Plaintiff never informed Defendants he received an additional surgical recommendation from his last physician. Defendants re-established care of Plaintiff's glaucoma, but his glaucoma eventually progressed to the point where Defendants referred Plaintiff to a well-known glaucoma specialist for possible surgery on his left eye. Plaintiff underwent surgery on his left eye, but ultimately lost all vision in that eye. After a brief follow-up period after his left eye surgery, Plaintiff eventually stopped seeking any glaucoma treatment and ultimately went 10 months without evaluation. Plaintiff eventually returned to Defendants. Defendants once again re-established care of Plaintiff's glaucoma. After a few months, however, Defendants again had to refer Plaintiff to the glaucoma specialist for possible surgical intervention for his right eye. Plaintiff failed to present to the specialist for over one month. Plaintiff eventually received the surgery on his right eye, but ultimately lost vision in his right eye too. Plaintiff filed his lawsuit

# San Diego Business Journal Awards 2019 Most Admired CEO Award to John D. Klinedinst

over three years after losing vision in his left eye and nearly one year after losing vision in his right eye. Plaintiff asserted claims for medical negligence regarding Defendant's care and treatment of his glaucoma in both eyes and alleged Defendants failed to timely refer patient to a specialist.

**Result: Trial 1:** Defense Verdict (12-0);

**Trial 2:** Defense Verdict (Plaintiff elected not to pull the jury)

**Plaintiff Counsel:** Matthew T. Williams, Esquire; The Law Office of Matthew T. Williams

**Defense Counsel:** Robert W. Frank and Brandon D. Merritt; Neil, Dymott, Frank, McCabe & Hudson, APLC

**Plaintiff Experts:** Swaraj Bose, MD (neuro-ophthalmologist); Mitchell T. Williams, CPA (economist); non-retained treating physicians for Plaintiff

**Defense Experts:** John Bokosky, MD, FACS (ophthalmologist); Brian Brinig, JD, CPA, ASA (economist)

**Damages and/or injuries claimed:** Plaintiff alleged Defendants failed to make a timely referral to a Glaucoma Specialist, thereby causing irreversible vision loss which required Plaintiff to stop practicing as a Dentist and to have to sell his dental practices at a significant loss.

**Settlement Demand:** CCP 998 Offer prior to Trial 1: \$2.688 million; \$1.5 million; \$1,312,365.00; Non- CCP 998 Offer prior to Trial 2: \$683,395

**Defense Settlement Offer:** CCP 998 Offer prior to Trial 1: \$30,000 ■

LA JOLLA, CALIFORNIA – Klinedinst Founder and CEO **John D.**

**Klinedinst** has just been named a 2019 Most Admired CEO by the *San Diego Business Journal*. The award, recognizing John's stewardship in the medium-sized private company category, was announced June 19, 2019 at a special ceremony held on the La Jolla campus National University.

The Most Admired CEO Award distinguishes chief executives who have a strong vision for their companies, have shown commitment to culture in the workplace, and have made significant contributions to the San Diego community.

"John is absolutely deserving of this recognition," said Arthur Moreau, III, who serves as Chief Operating Officer for Klinedinst PC. "John is a visionary leader who believes in the power of the individual. He truly leads by example, and puts his business background to work every day for the benefit of our employees, our partners, and our clients."

Each year, the San Diego Business Journal receives submissions of Chief Executive Officers who lead businesses, grow revenue, create jobs and provide products and services that boost the region's economy. The San Diego Business Journal then evaluates all submissions and publishes its list of finalists for the award.

Of the dozens of finalists named this year from the business community, only six law



SAN DIEGO BUSINESS JOURNAL  
**CEO OF THE YEAR AWARDS**  
2019

firms had CEOs or managing partners that made it through to the finalist round. In recognition for their contributions and accomplishments, every one of the finalists was recognized at the awards ceremony before the winners in each category were announced.

"This is such an incredible and completely unexpected honor," said Klinedinst. "I have been fortunate enough to be in the right place, at the right time. I'm very honored, humbled and

proud to be a part of this amazing group of team members and the great work they do, day-in and day-out. My thanks to the San Diego Business Journal for highlighting our amazing business community, and to all of the CEOs making this a terrific place for business to happen."

## About Klinedinst

Klinedinst is the go-to firm for clients looking for litigation, trial experience, transactional representation, and legal counsel. The firm's offices in Los Angeles, Sacramento, San Diego, Santa Ana, and Seattle service the entire West Coast. What sets Klinedinst apart is the relationship our attorneys foster with each and every client. Klinedinst lawyers are indispensable strategic partners to business leaders, helping to achieve business objectives and create proactive solutions to resolve the many legal challenges that businesses are confronted with every day. Whether vigorously advocating for business clients in court, or guiding business transactions and negotiations, Klinedinst is the trusted legal advisor to have by your side. ■



## 2019 Half Yearly Membership Application

Name: \_\_\_\_\_

Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_ Yr. Admitted to Bar: \_\_\_\_\_

Does your practice emphasize defense work to where you can describe yourself as a lawyer primarily engaged in the defense of civil litigants? (More than 50%)  Yes  No

Membership Fees:

**\$85.00**

Half yearly association's dues year runs from June 1 to December 31

By this application I am:

applying for new membership

renewing my current membership

Payments can be made online at <http://sddl.org/sign-up.html#join>, or by check to:

San Diego Defense Lawyers  
 Membership Director  
 P.O. Box 124890  
 San Diego, CA 92112  
 Email: [sandiegodefenselawyers@gmail.com](mailto:sandiegodefenselawyers@gmail.com)

# SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the last several years an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the Update. In place of the membership list, the SDDL Board will instead recognize the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email [evan.kalooky@dbtlaw.org](mailto:evan.kalooky@dbtlaw.org) so that corrections can be made for the next edition.

- |      |                                                           |      |                                                      |
|------|-----------------------------------------------------------|------|------------------------------------------------------|
| #1   | Tyson & Mendes - 50 members                               | #13T | Dunn DeSantis Walt & Kendrick, LLP - 6 members       |
| #2T  | Farmer Case & Fedor - 18 members                          | #13T | Lotz Doggett & Rawers LLP - 6 members                |
| #2T  | Neil Dymott Frank McCabe & Hudson - 18 members            | #13T | Wingert, Grebing, Brubaker & Juskie, LLP - 6 members |
| #4   | Balestreri Potocki & Holmes - 17 members                  | #16  | Walsh McKean Furcolo LLP - 5 members                 |
| #5   | Wilson Elser Moskowitz Edelman & Dicker LLP - 15 members  | #17T | Carroll Kelly Trotter Franzen & McKenna - 4 members  |
| #6T  | Grimm Vranjes & Greer LLP - 12 members                    | #17T | Davis Grass Goldstein & Finlay - 4 members           |
| #6T  | Winet Patrick Gayer Creighton & Hanes - 12 members        | #17T | Higgs Fletcher & Mack - 4 members                    |
| #8   | Horton, Oberrecht, Kirkpatrick & Martha, APC - 10 members | #17T | Hughes & Nunn, LLP - 4 members                       |
| #9T  | Lorber Greenfield & Polito, LLP - 9 members               | #17T | Klinedinst, PC - 4 members                           |
| #9T  | Pettit Kohn Ingrassia Lutz & Dolin - 9 members            | #17T | LaFollette Johnson DeHaas Fesler & Ames - 4 members  |
| #11T | Lincoln, Gustafson & Cercos - 7 members                   | #17T | Tencer Sherman - 4 members                           |
| #11T | Ryan Carvalho LLP - 7 members                             | #17T | Wolfenzon Rolle - 4 members ■                        |



*SDDL Board of Directors (and friends) at Lawyer's Club Annual Dinner 2019: (left to right) Phil Stephan, Christine Polito, Nicole Melvani, Elizabeth Harris, Ben Kramer, David Hoynacki, Colin Harrison, Dianna Bedri-Burke, Christine Dixon, Rachel Fisher*

**SAN DIEGO DEFENSE LAWYERS**

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