THE UPDATE

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SAN DIEGO
DEFENSE LAWYERS

PRESIDENT'S MESSAGE

Greetings SDDL members. This is my first chance as President to say hello to the many defense counsel out there I have not had an opportunity to yet meet. I want to thank our sponsors and everyone who was able to attend our Installation Dinner at Loews Coronado. It was great to be able to gather in person to honor Hon. Tamila E. Ipema (Ret.) and Susan Hack, Esq. for their achievements and their dedication to the San Diego legal community. The Board is grateful to our members and sponsors for the support we received throughout last year. Because of you, it was a success.

I am excited to take on this year as President of the San Diego Defense Lawyers. I am equally as excited to take on this year with a phenomenal Board of Directors. The Board has been hard at work planning our monthly Lunch & Learns for the year, in-person quarterly social events and happy hours. Our first quarter Happy Hour was in April at the Carnitas Snack Shack, and in the spirit of cross-bar relations, in March we co-sponsored "A View From the Bench" Judge's Panel with CASD. We are lucky to have active, engaged leaders in the various Bar-related organizations and we hope to see more joint activities in the near future. This year we will continue the tradition of the Padres tailgate and trivia night. In addition, mark your calendars for the upcoming SDDL Golf Tournament. If it's not broke don't fix it, this year's event will once again take place at Rancho Bernardo Inn Golf Course, on September 22, 2023. Finally we are pleased to announce that our annual mock trial competition is back! We are looking forward to hosting approximately 16 schools in this years competition which will be held in October, please let us know if you would like to be involved.

We will, of course, keep you apprised of the details for all of our social events as we get closer to them.

I look forward to a great year, and hope to see you at the next event.

Aloha, Low

IN THIS ISSUE

MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are $160.00 for new members for the first year and $175.00 per year for renewing members. The dues year runs from January 1 to December 31. You can apply at www.sddl.org.

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Appellate Drama in the Wake of Viking River Cruises

By Steven Brunolli
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Last summer, the United States Supreme Court issued its landmark decision in *Viking River Cruises, Inc. v. Moriana,* holding that (1) representative claims under California's Private Attorneys General Act ("PAGA") can be compelled to arbitration on an individual basis and (2) the remaining "representative" component of the claim must be dismissed by the Superior Court for lack of standing.

Employers were hopeful the decision would alleviate the sweeping PAGA litigation that has become popular in recent years, like a similar holding involving class action waivers did several years ago to that type of litigation. However, a two-paragraph *concurring* opinion from Justice Sotomayor threw the foundation of the entire opinion into question. Since then, California intermediate appellate courts have issued decisions rejecting the U.S. Supreme Court's opinion, and the California Supreme Court has taken up the issue. This article details the unfolding drama.

Background: PAGA and the FAA

The critical issue in this line of cases involves the interplay between PAGA, a California law, and the Federal Arbitration Act ("FAA"), a federal law.

PAGA provides a remedial scheme by which an "aggrieved employee" can bring a civil action on behalf of the State of California to enforce the Labor Code and to collect civil penalties for Labor Code violations. The "aggrieved employee" can collect penalties for Labor Code violations they themselves suffered, as well as—critically—for violations suffered by *other* current and former employees. The result of this scheme is that these representative PAGA actions often take on class action-like scope and appearance, seeking millions of dollars in civil penalties.

The FAA is the federal law that establishes the federal policy that arbitration agreements are valid and enforceable. Important to the issue at hand, the FAA preempts any state law that discriminates against arbitration agreements or otherwise puts arbitration agreements on a separate footing than other contractual agreements.

At the time of the United State Supreme Court's decision in *Viking River,* California law held that a PAGA claim could not be subject to a "class and representative action waiver" in an arbitration agreement—i.e., an agreement that the employee will litigate only his or her own individual claims in arbitration. The reasoning—and, again, this is critical—was that a PAGA claim is a singular claim brought on behalf of the State and *cannot* be severed between an "individual" component (comprised of Labor Code violations suffered by the plaintiff) and a "representative" component (comprised of Labor Code violations suffered by other current and former employees). As such, there was, according the law then, no way to arbitrate just an "individual" PAGA claim. Enter *Viking River Cruises*.

Viking River Cruises Makes a Splash

In a long-awaited decision, the U.S. Supreme Court held that California law is preempted to the extent it does not allow the parties to an arbitration agreement to arbitrate the individual portion of a PAGA claim. The Court explained: "[A] PAGA action asserting multiple code violations affecting a range of different employees does not constitute 'a single claim' in even the broadest possible sense, because the violations asserted need not even arise from a common 'transaction' or 'nucleus of operative facts.'" Accordingly, the PAGA scheme is more akin to a joinder mechanism that allows the "aggrieved employee" to join the claims of non-party current and former employees "which could have been raised by the State in an enforcement proceeding." Within that framework, it would be "incompatible with the FAA" to disallow an employee to agree to arbitrate just the Labor Code violations they themselves suffered. Accordingly, PAGA claims can be severed, and the individual component may then be compelled to arbitration pursuant to a "class and representative action waiver."

The controversial portion of the Court's analysis came next. Justice Alito, writing for the majority, opined that under California law an "aggrieved employee" loses statutory standing to maintain the "representative" component of the claim in Superior Court once the "individual" component is compelled to arbitration. Specifically, he reasoned that "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." Accordingly, those claims must be dismissed.

The upshot of that controversial portion of the holding is that an employee who has signed a "class and representative action waiver" can individually arbitrate the PAGA claim as to Labor Code violations personally suffered but would be precluded from litigating the sweeping representative component as to Labor Code provisions suffered by others.

On its face, *Viking River Cruises* appeared to do to PAGA claims what the Court's decision in *AT&T Mobility LLC v. Concepcion* did to class actions over a decade ago. That is, make parties' agreements to arbitrate their claims on an individual basis—and *only* on an individual basis—enforceable as a matter of black letter law. However, Justice Sotomayor put a major and lasting dent in the majority opinion's reasoning.

Justice Sotomayor's Concurrence Opens the Door to Dissent

Although *Viking River Cruises* was an 8-1 decision (with Justice Thomas unsurprisingly dissenting on the grounds that the FAA *never* applies in state court), it was far from a settled and decisive majority.

Justice Sotomayor drafted a short dissent that California courts have since latched onto. Although she tentatively agreed with the standing analysis, she opined that "if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word." She further mused that even if the Court got the standing analysis right, "the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits." In short, she provided a roadmap for either the courts or the Legislature to essentially abrogate the portion of the holding pertaining to standing.

For their part, Justices Barret, Kavanaugh, and Roberts all also concurred but noted they would have ruled PAGA claims could be severed and "nothing more than that," hinting they too thought the standing analysis was a step too far.

California Courts Reject the U.S. Supreme Court's Holding

Almost immediately after the *Viking River Cruises* decision came out, the California Supreme Court granted review in *Adolph v. Uber Technologies*. If there was any doubt as to whether the Court was thinking of addressing *Viking River Cruises,* it granted review on the narrow issue of: "Whether an aggrieved employee who has been compelled to arbitrate claims under [PAGA] that are 'premised on Labor Code violations actually sustained by' the aggrieved employee maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' in court or in any other forum the parties agree is suitable."

Eight months later, the first Court of Appeal chimed in on the issue with a published opinion. In *Galarsa v. Dolgen California, LLC,* the Fifth District rejected the U.S. Supreme Court's standing analysis. In doing so, the court developed a shorthand for the two types of claims: "Type A" refers to claims seeking recovery of Labor Code violations personally suffered by the plaintiff (the 'A' is for arbitration). "Type O" claims refer to those claims seeking recovery of Labor Code violations suffered by others (the 'O' is for others). The Court did not analyze the issue particularly deeply other than to reason: "We predict that the California Supreme Court will conclude that California law does not prohibit an aggrieved employee from pursuing Type O claims in court once the Type O claims are separated from the Type A claims ordered to arbitration. The reason for this prediction is simple—it is the interpretation of PAGA that best effectuates the statute's purpose, which is "to ensure effective code enforcement."

Next, our own Fourth District rejected the *Viking River Cruises* standing analysis in *Piplack v. In-N-Out Burgers*. Specifically, the Court analyzed *Kim v. Reins International California, Inc.* and determined that, under California precedent, "aggrieved employees" maintain standing to bring a PAGA claim, even after resolution of their individual claims. In a very conciliatory tone, the court held: "Despite the deep deference we afford the United States Supreme Court, even on purely state law questions where the United States Supreme Court's opinions are only persuasive, not binding, we conclude we must follow *Kim* and hold that plaintiffs retain standing to pursue representative PAGA claims in court even if their individual PAGA claims are compelled to arbitration. We simply cannot reconcile the *Viking* decision's standing analysis with the *Kim* decision."

Two other cases followed—*Gregg v. Uber Technologies, Inc. and Million Seifu v. Lyft, Inc.*(both Second District)—employing the same *Kim* analysis from *Piplack*. Both decisions expressly invoked the Sotomayor dissent and held they were "not bound by the United States Supreme Court's interpretation of California law" and "PAGA standing is a matter of state law that must be decided by California courts." Both decisions followed the U.S Supreme Court's holding regarding severability of PAGA claims but rejected its interpretation of California law on the standing issue. At the time of drafting, not a single published California case has agreed with the *Viking River Cruises* standing analysis.

The California Supreme Court Will Have the Final Word

Although the Courts of Appeal have been unanimous in rejecting the U.S. Supreme Court's holding on standing to pursue "representative" component—or Type O—claims, the California Supreme Court will necessarily have the last word. From the Court's docket, it appears the Court is eyeing a May date for oral argument, so we are likely to have a decision by the end of the year.

The result of all this is that what initially appeared as a "big win" for employers has thus far turned into muddy water and uncertainty. As the law stands now, arbitration agreements that contain PAGA representative action waivers may be a bigger headache to enforce than they are worth. Rather than reaping the benefits of arbitration, employers will have to defend parallel actions in both Superior Court and arbitration.

Timing is Everything: Wrongful Death Suit Tossed for Failure to Comply with California State Law Timing Requirements

By Tiffany Gruenberg
TYSON MENDES

Factual Background and Procedural History

In *Curtis et al. v. Palomar Health et al.,* plaintiffs filed suit based on the alleged wrongful death of their mother and negligent conduct by Palomar Hospital and its staff.[1] However, the suit was dismissed because of the plaintiffs' failure to comply with the Government Claims Act, which sets forth timing requirements that cannot be circumvented. The Act requires that any individual seeking to file suit against the government provide notice of their intent to sue within six months of a claimed injury. [2]

The plaintiffs contended that the death of their mother, which occurred on December 26, 2018[3], was the result of medical malpractice on the part of Palomar Hospital. Because Palomar Hospital is owned by Palomar Health, which is a public entity, the Act [4] applied to the plaintiffs' claim. The Act requires that the clock begins running once a potential plaintiff has reason to believe that a negligent or wrongful act occurred.

Here, the defense provided evidence that the plaintiffs "first suspected that something was wrong" at the time of their mother's death on December 26, 2018, but failed to provide notice to the defense until December 20, 2019, which was well outside the six months contemplated by the Act. In response, the Hospital returned the claim to the plaintiffs, notifying them that their "only recourse at this time is to apply without delay […] for leave to present a late [c]laim." [5] Then, in February 2020, the plaintiffs mailed a request to present a late claim, but no response was given.

The plaintiffs then proceeded to file a lawsuit against Palomar Hospital, but the lawsuit was dismissed on a motion for summary judgment on the basis of the plaintiffs' noncompliance with the Act. The plaintiffs then appealed. [6]

Analysis

In their appeal, the plaintiffs repeated the same arguments they made in opposition to the motion for summary judgment, arguing both substantial compliance and that their claim did not accrue on the day their mother died because the hospital stated nothing improper occurred in caring for her as a patient.

The panel disagreed, noting that a wrongful death claim generally accrues on the date of death, and that the plaintiffs' claim was simply not timely. [7] Further, the panel held that ignorance does not delay or toll a cause of action.

Significantly, the plaintiffs tried to rely on the substantial compliance doctrine to argue that their claims should not be dismissed. However, the panel clarified that substantial compliance relates to the signature and content requirements of a claim, and not to the timely presentation requirement. [8]

The panel also made clear that although at times there are ways to cure or request relief, these filings must also be timely. The plaintiffs' application for relief was outside the acceptable time period as it was filed after the one-year time period for the filing of a late claim. When a late filing occurs, the party responsible must submit a motion to obtain leave from the court; this was also not done by the plaintiffs.

The plaintiffs did try to craft creative arguments that they lacked knowledge of the medical staff's employer within enough time to provide notice of intent to sue under the Act, but this argument was also rejected. The panel reasoned that if a lawsuit against the public entity cannot move forward, the same applies to any of its employees. [9]

Takeaways

The plaintiffs here encountered multiple procedural deficiencies that ultimately could not be cured. The panel also stressed that if an argument is not raised at summary judgment level, it is waived. The court rejected public policy arguments that were not timely raised and emphasized that the plaintiffs had ample time to ascertain the medical staff's employment status before the time lapsed to file an intent to sue a government entity claim. Procedural requirements such as those set forth in the Act can be helpful to defendants at the summary judgment stage. Of note here, it was the plaintiffs' own responses in discovery that provided evidentiary support for defense counsel who moved for, and were granted, summary judgment. Defendants and their counsel should craft their discovery with an eye toward any advantage available, including time bars such as those at issue here.

[1] *Curtis et al. v. Palomar Health et al., State of California Court of Appeal, Fourth Appellate District. Case Number D073266*

[2] *Id*

[3] *Id*

[4] *Id*

[5] *Id*

[6] *Id*

[7] *Id*

[8] *Id*

[9] *Id*

2023 *Installation Dinner*

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Supreme Court May Need to Review COVID-19 Loss Coverage in California

By David Kahn, Senior Counsel
TYSON & MENDES

A recent California Court of Appeal decision overturned an order sustaining a demurrer in favor of commercial liability carrier regarding coverage for COVID-19 business loss. In an unpublished opinion issued on December 14, 2022, the Second District Court of Appeal held the complaint, which alleged COVID-19 droplets caused physical damage to property, was sufficient to survive demurrer and potentially trigger coverage.

The case is *Shusha, Inc. v. Century-National Insurance Company* ("CNIC") 2022 WL 18110247. The holding in *Shusha* doubles down on the Second District Division Seven published opinion, *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Co.* issued earlier in 2022.[1] The Second District's decisions in both *Marina* and *Shusha* are in direct conflict with a decision from Division Four of the same district, *United Talent Agency v. Vigilant Insurance Company*, which upheld an order below sustaining a demurrer on the same issue.[2] The conflicting appellate level decisions on the same issue in different divisions of the same Appellate District makes this issue ripe for California Supreme Court review.

Underlying Facts

Shusha Inc. owns La Cava, a restaurant in the Sherman Oaks area of Los Angeles. CNIC furnished a policy of commercial property and general liability insurance to Shusha. The policy provided CNIC would cover the actual loss of business income sustained due to the necessary suspension of operations during a period of restoration when the suspension was caused by "direct physical loss of or damage to property."[3] The policy also afforded coverage for loss of business income caused by action of civil authority that prohibits access to the premises "due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any covered cause of loss."[4]

On March 4, 2020 the governor issued a state of emergency due to the rapid spread of COVID-19[5]. On March 15, 2020, the mayor of Los Angeles issued a public health order preventing restaurants from serving food on their premises.[6] On March 19, 2020, the governor issued an executive order requiring residents to shelter in place.[7] On the same day, the Los Angeles mayor issued a public "Safer at Home" order, finding "the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surface for prolonged periods of time."[8] The governor did not lift the shelter-in-place order allowing restaurants to reopen for outdoor dining until January 5, 2021.[9]

In compliance with the March 15, 2020 orders, La Cava suspended business operations on March 16, 2020.[10] Two days later, on March 18, 2020, La Cava submitted a claim to CNIC for loss of income due to the virus and related public orders.[11] La Cava reopened on April 1, 2020 in a limited capacity for take-out and delivery only.[12] In a letter dated April 9, 2020, CNIC denied the claim because La Cava's suspension of business was not caused by a "direct physical loss of or damage to property" at the restaurant, and the government directives did not prohibit access to the restaurant resulting from a loss or damage at premises "other than your designated premises."[13]

On July 7, 2020, La Cava filed suit against CNIC for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices in violation of the Unfair Competition Law.[14] Each cause of action was based on CNIC's denial of coverage for business income losses due to the COVID-19 pandemic.[15] Specifically, the complaint alleged La Cava suffered physical loss of or damage to its dining rooms and other property caused by the actual presence of virus droplets in the air and on the surfaces of its restaurant including on the walls, floors, tables, chairs, silverware, dishes, and other surfaces.[16] The complaint further alleged 10 commercial businesses in Sherman Oaks had employees with COVID-19, and three La Cava employees had COVID-19 at various times throughout the year.

The Demurrer

CNIC demurred to the complaint, arguing the phrase "direct physical loss or damage to property" in an insurance contract requires physical alteration of the insured property.[17] CNIC cited nearly two dozen decisions from federal district courts in California sustaining demurrers, reasoning COVID business closures did not result from direct physical loss of or damage to property.[18] Based on the federal court decisions, CNIC argued its denial of coverage was based on a genuine dispute as to the existence of coverage.[19] On July 16, 2021, the trial court entered a judgement of dismissal after sustaining CNIC's demurrer.[20] La Cava appealed.

Analysis

The Court of Appeals began its analysis by discussing the rules of contract interpretation for insurance contracts.[21] When a policy provision is ambiguous, California courts interpret the provision broadly in favor of the insured.[22] The court then discussed its holding in *Marina*, which reversed the trial court's

order sustaining the insurer's demurrer.

The court reasoned the undefined term "direct physical loss or damage" meant the owners had to allege an external force acted on the insured property, causing a "distinct, demonstrable, physical alteration of the property."[23] California's liberal pleading standard is key to the court's analysis. This standard requires the court to accept pleading allegations as true regardless of the plausibility of the allegations.[24] As in *Marina*, here, the court held La Cava's pleading allegations of direct physical loss to the property caused by COVID-19 virus droplets were sufficient and reversed the trial court's order sustaining CNIC's demurrer.[25]

The court distinguished numerous federal district court decisions which either did not have similar factual allegations or, if they did, the federal pleading standards allowed the court to consider the plausibility of the allegations.[26] The court distinguished two published California Court of Appeals decisions affirming an order sustaining an insured's demurrer. Those cases involved allegations of loss of use as a result of government ordered closures to limit the spread of COVID-19 and did not include a claim the virus caused physical damage to the insured property.[27]

However, the court was unable to distinguish the holding in *United Talent Agency v. Vigilant Ins. Co.* decided by colleagues in Division Four of the Second District because the pleading allegations were similar to those of La Cava.[28] However, the *Shusha* court disagreed with its colleagues' approach in *Vigilant*.[29] The *Vigilant* court upheld an order sustaining the insurer's demurrer because the presence of a virus which exists worldwide wherever infected people are present can be mitigated through disinfection practices, social distancing, vaccination, and use of masks and therefore the allegations of the virus causing direct physical loss or damage were not sufficient as a matter of law.[30]

Finally, the court held La Cava sufficiently pleaded bad faith notwithstanding the genuine coverage dispute because La Cava alleges CNIC summarily denied the claim in a form letter sent just three weeks after claim submission without conducting any investigation of whether the virus had caused physical damage to the property.[31]

Takeaway

Although the *Shusha* case is not citable authority, it is instructive for providing further insight into this court's reasoning in the previous *Marina* holding and highlighting the difference of opinion on this issue even within the same appellate district. The law on this issue is dynamic and is in a nascent stage of development. With a clear split in authority between the holdings in *Marina/Shusha* and *Vigilant*, the issue of whether allegations of virus droplets causing physical damage to property are sufficient to support a breach of contract and bad faith claim against an insurer is ripe for Supreme Court review.

Whether CNIC will file a writ of certiorari for Supreme Court review remains to be seen. However, on January 3, 2023, because of the split in state appellate court decisions, the Ninth Circuit certified a question to the California Supreme Court asking for guidance on whether the actual or suspected presence of COVID-19 at an insured property can be "direct physical loss or damage" to trigger coverage.[32] Until the Supreme Court weighs in on this issue, commercial property insurers should monitor developments and follow the advice of their defense counsel regarding the filing of demurrers. As always, insurance carriers should conduct a thorough investigation of a claim and avoid sending out form denial letters even when there exists a genuine coverage dispute.

[1] (2022) 81 Cal.App.5th 96

[2](2022) 77 Cal. App. 5th 821

[3] Shusha Inc. v. Century-National Insurance Company, 2022 WL 18110247, p. 1

[4] Ibid.

[5] Id. at p. 2

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Id. at p. 3

[12] Id. at p. 2

[13] Id. at p. 3

[14] Id. at p. 2

[15] Ibid.

[16] Ibid.

[17] Id. at p. 4

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Id. at p. 5

[22] Ibid.

[23] Id. at p 6 (citations omitted.)

[24] Ibid.

[25] Id. at p. 11

[26] Id. at p. 6

[27] Ibid, citing Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc. (2022) 77 Cal.App.5th 753 and Inns-by-the-Sea v. California Mutual Ins. Co. (2021) 71 Cal.App.5th 688

[28] Id. at p. 7, United Talent Agency v. Vigilant Ins. Co. (2022) 77 Cal.App.5th 821

[29] Ibid.

[30] Ibid.

[31] Id. at p. 10

[32] Another Planet Entertainment LLC v. Vigilant Insurance Co., case number 21-16093, in the U.S. Court of Appeals for the Ninth Circuit; see LAW 360 article dated January 3, 2023 "9th Circ. Asks Calif. High Court To Rule On Virus Coverage" by Riley Murdock

CALIFORNIA COURTS OF APPEAL

Arbitration

Iyere v. Wise Auto Group (2023) _ Cal. App.5th _ , 2023 WL 314122: The Court of Appeal reversed the trial court's order denying defendant's motion to compel arbitration of plaintiffs' complaint alleging numerous employment claims including discrimination, harassment, retaliation and wrongful termination. The trial court denied the motion, concluding that defendant had failed to prove the authenticity of plaintiffs' signatures on the arbitration agreement, and also concluding the arbitration agreement was procedurally and substantively unconscionable. The Court of Appeal disagreed. It concluded that plaintiffs did not offer any admissible evidence creating a dispute as to the authenticity of their signatures. Plaintiffs did not say in their declarations that they did not sign the arbitration agreement or that their signature was forged. Instead, they declared that they were given a lot of documents, asked to quickly sign them, and did not recall reading or signing any arbitration agreement. The Court of Appeal also concluded that while plaintiffs had shown procedural unconscionability, they did not show any element of substantive unconscionability. The arbitration agreement stating that it was governed by the Federal Arbitration Act was not unconscionable, neither was the provision that allowed the defendant to choose between two arbitration providers. (C.A. 1st, January 19, 2023.)

Civil Procedure

Chen v. BMW of North America (2023) _ Cal.App.5th _ , 2022 WL 18407504: The Court of Appeal affirmed the trial court's post-verdict order awarding plaintiff m $53,509.51 in attorney fees and costs in his action alleging breach of warranty and violation of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790, et seq.) and the Consumers Legal Remedies Act (Civ. Code, § 1750, et seq.). During the litigation defendant sent a Code of Civil Procedure section 998 offer, agreeing to pay plaintiff $160,000 (exclusive of recoverable costs and attorney fees accrued to the date of the offer), and attorney fees and costs as awarded by the trial court. Plaintiff rejected the 998 offer, the litigation continued for two more years, and the parties settled on the day of trial with the settlement terms being essentially identical to the section 998 offer. The trial court properly concluded the 998 offer was valid, plaintiff did not do better than the offer, and properly limited the award of plaintiff's fees and costs to $53,509.51, the fees and costs plaintiff accrued through July 2017, 45 days after the section 998 offer was made. (C.A. 6th, filed December 29, 2022, published January 23, 2023.)

Employment

Adanna Car Wash Corp. v. Gomez (2023) _ Cal.App.5th _ , 2023 WL 225122: The Court of Appeal affirmed the trial court's order dismissing plaintiff's trial de novo appeal from the Labor Commissioner's award of back wages and other damages in favor of plaintiff's former employee, Jesus Gomez. The trial court properly dismissed the appeal for lack of jurisdiction because plaintiff failed to post with the trial court an appeal bond required by Labor Code section 98.2. It also properly concluded that plaintiff's earlier filing of a surety bond under Labor Code section 2055, a bond required of all car wash owners as a condition of operating a car wash business, did not satisfy the appeal bond requirement under section 98.2. (C.A. 2nd, January 18, 2023.)

Elder Abuse

Valero v. Spread Your Wings, LLC (2023) _ Cal.App.5th _ , 2023 WL 1858882: The Court of Appeal affirmed the trial court's order sustaining defendants' demurrer, without leave to amend, to plaintiff's complaint for malicious prosecution. Plaintiff, a caregiver for Richard Barton, sued defendant Sabrina Dellard (another care giver for Barton) and her employers Spread Your Wings, LLC, and Spread Your Wings, Inc. (collectively defendants). Plaintiff alleged defendant Dellard made a knowingly false report that plaintiff Valero tried to kill Barton by smothering him with a pillow, and also alleged that defendant Dellard later coerced Barton to confirm the false report that plaintiff had tried to smother him. Defendants argued in their demurrer that because defendant Dellard was a mandatory reporter, defendants were entitled to statutory immunity under Welfare and Institutions Code section 15634(a), which provides absolute immunity from civil and criminal liability to mandatory reporters under the Elder Abuse and Dependent Adult Civil Protection Act (the Act; Welf. & Inst. Code, § 15600 et seq.). Plaintiff argued that intentionally false reports should be excluded from the absolute immunity afforded to mandatory reporters under section 15643(a). Both the trial court and the Court of Appeal rejected plaintiff's argument that an exception to immunity should be created for false reports. (C.A. 6th, filed January 11, 2023, published February 9, 2023.)

Evidence

LAOSD Asbestos Cases (2023) _ Cal. App.5th _ , 2023 WL 354915: The Court of Appeal reversed the trial court's order granting defendant Avon Products, Inc.'s (defendant) motion for summary judgment against plaintiffs Alicia

Ramirez (Alicia) and her husband Fermin Ramirez (collectively plaintiffs) in their complaint for damages against several defendants due to Alicia's development of mesothelioma. Defendant's motion for summary judgment relied on a declaration from Lisa Gallo (Gallo Declaration), an employee who did not begin work at Avon until 1994, halfway through Alicia's alleged exposure period. Plaintiffs objected to the Gallo Declaration and attached exhibits on the grounds they lacked foundation, lacked personal knowledge, and contained hearsay. The trial overruled the objections and granted the motion for summary judgment, finding the declaration was the sole evidence which shifted the burden to the plaintiffs to produce evidence sufficient to create a triable issue of material fact. The Court of Appeal disagreed, concluding that the trial court erred in overruling plaintiffs' objections based on lack of foundation, lack of personal knowledge and the hearsay nature of the documents. Because Lisa Gallo was a lay witness, not an expert witness, she was limited to testimony reflecting her personal knowledge and could not testify to hearsay. There is no special category of "corporate representative" witness. Moreover, a person deposed as a corporate person most qualified (PMQ deponent) may only testify at trial according to the rules of evidence which apply to ordinary lay witnesses. The rules relating to witness testimony at a trial or hearing apply equally to defendants and plaintiffs. The trial court abused its discretion in admitting the declaration and hearsay documents. Without the Gallo Declaration, defendant did not offer evidence which shifted the burden to plaintiffs. The Court of Appeal rejected defendant's argument that the summary judgment should still have been granted because plaintiffs' discovery responses were factually devoid, because defendant failed to adequately develop this theory in the trial court and on appeal and it was therefore forfeited. (C.A. 2nd, January 23, 2023.)

[1] Alicia died while the appeal was pending, and the action was then prosecuted by Fermin in his individual capacity and as Alicia's successor-in-interest.

Lunch and Learn Summaries

February 2023

On February 22, 2023, SDDL hosted an MCLE covering the importance of accident reconstruction relevant to high exposure trucking and large equipment cases by license Senior Forensic Engineer, Elvis Desai, MSME, ACTAR at Momentum Engineering Corp. Mr. Desai provided a summary of what accident reconstruction entails, how it is applied and can be utilized with other experts such a human factors expert. Mr. Desai provided case studies involving Tesla's autopilot and an accident involving a large tractor trailer and road construction vehicles demonstrating the precision that can be achieved from data recorders, video recording and other tracking devises vehicles and trucks may be equipped with. In turn, this can help develop your clients theme, assist with early resolution or avoid a large verdict at trial. Importantly, Mr. Desai discussed the challenges with accident reconstruction and ability to obtain information off a vehicles data recorder in certain vehicles, such as Porsche, stressing the importance of early retention of accident reconstruction experts to evaluate the potential recoverable data available. He further discussed methods and strategy used to challenge an opposing party's accident reconstruction findings, reports and recreations. Mr. Desai's presentation was informative for anyone handling motor vehicle, trucking and other motorized vehicle accidents and those staring down an accident reconstruction report by an opposing party.

March 2023

SDDL was lucky to have the Honorable Frederick Link (Ret.) host our March MCLE Lunch n' Learn webinar. Judge Link discussed the differences between Mandatory Settlement Conferences and Mediation. Judge Link feels strongly that these are two very different forums which each require individual approaches for success. Judge Link suggested knowing the value of your case when determining which forum and time is appropriate for engaging in either alternative dispute resolution conference. He suggested knowing your mediator's experience, prior legal experience, and any training in mediation they may have before selecting a neutral. He commented one of the biggest mistakes attorneys can make when walking into either situation, is being stubborn or unreasonable in your expectations. Judge Link fielded many participant questions and gave invaluable advice from both his perspective of serving on the bench for over forty years and more recently serving as a mediator neutral with Judicate West. If you missed this session, it was recorded and is available on the SDDL website for viewing and 1.0 hours of MCLE credit. Thank you Judge Link!

MEET *THE BOARD*

Questions:

1. Why did you become a lawyer?
2. If you were not a lawyer what would you be doing?
3. If you could spend one day anywhere in the world where would it be and what would you be doing?
4. What is the one animal you would never own and why?
5. Who is the coolest famous person you have ever met?

SARA BLOCH Answers:

1. I come from a long line of attorneys. My mom is an attorney. Her siblings are attorneys and my grandpa is an attorney. I think I've been saying I planned to be an attorney since I was six years old. I took a small detour to teach, but ultimately decided being a lawyer was my dream and applied to law school. The rest is history.
2. If I wasn't an attorney, I'd be running an education-related foundation. Something comparable to the Bill & Melinda Gates Foundation. I truly believe education is the remedy for fixing a lot of the social problems we face.
3. I'd be somewhere in Tuscany wine tasting and enjoying the sun!
4. I would never, ever, ever own a spider.
5. I met Kareem Abdul Jabbar at LAX. He was as nice as he is tall.

RACHEL DONNELLY Answers:

1. It is cliché, but I chose to become a lawyer during my second year as an undergraduate at UCSD because I wanted to devote my professional life to helping others.
2. If I was not a lawyer, I would be a high school teacher. I have no idea what I would actually teach, though!
3. Without a doubt, I would be sitting on one of those white balconies on Santorini drinking wine while looking out at the ocean with my family.
4. A snake! Just like Indiana Jones, I hate snakes!
5. I have not met many famous people unfortunately. I did meet Jessica Biel once in person and she was incredibly down to earth.

KAITLYN JENSEN Answers:

1. I think it was always in my DNA, but college mock trial sealed the deal. I'm highly motivated by wanting things to be fair, and I believe there's no problem that can't be solved with logic and a little creativity. (Plus, everyone said not to do it!)
2. Poetry or philosophy. Don't worry, I won't quit my day job.
3. I would be on a tropical island playing Survivor.
4. A parrot, because some peace and quiet within the next 50 years would be nice.
5. I met Stan Lee at Comic-Con while dressed up as Jessica Jones.

MATTHEW MAJD Answers:

1. In 6th grade I was randomly chosen to be an attorney in a mock trial in front of my whole school. The fact pattern was regarding the Salem Witch Trials. I really enjoyed it, and it ended up going well. I was always drawn to the profession after that and started taking the necessary steps to set myself up to become an attorney.
2. I would be a residential and commercial real estate agent.
3. Exploring the islands of Greece.
4. I would never own a cat. I'm a dog kind of guy.
5. David Spade in the elevator at the Wynn hotel.

Popular California Movie Theater Seeking Coverage for Covid-19 Insurance Policy Protections

By Tiffany Gruenberg
TYSON MENDES

Factual Background and Procedural History

In *Boffo Cinemas LLC v. Fireman's Fund Insurance Co.*, a popular California movie theater chain sought recovery of over $30 million under a breach of contract cause of action, due to funds lost from closures related to Covid-19. The pandemic is alleged to have triggered a policy it had in place that did not require any showing of an actual physical loss. [1]

The trial court held that Covid-19 related closures for business interruption were not recoverable as they did not trigger such an insurance policy. The trial court relied on an appellate court decision exploring the same issue, which held that recovery would not be permitted despite Covid-19 leading to business disruptions.[2] The plaintiff appealed, and in a unanimous and unpublished decision, a three-judge panel reversed the trial court. While the panel agreed that the Inns-by-the-Sea decision does preclude the claim for business interruption coverage, it held that the plaintiff should be permitted to amend its suit to assert claims under separate provisions. [3]

Analysis

Exclusions in insurance coverage based on business disruptions typically include an exclusion clause for viruses such as Covid-19. However, in this instance, the contract for insurance coverage did not include these typical virus exclusions. The defendant insurer stressed that the owner of the movie theater was required to show that there was an actual physical disruption or "alteration" to the property.

The trial court agreed and found the plaintiff could not amend its complaint, as it was originally framed in a manner that attributed its losses to the compulsory shutdown versus claiming any additional insurance coverage was triggered. As the panel noted, however, the trial court overlooked certain key insurance provision details by failing to opine on the additional policies that were in place allowing for insurance coverage.[4]

The additional insurance that was in place did not require the showing of physical damage for coverage, instead requiring a situation involving "crisis management" and "event cancellation" or "postponement." Assuming the plaintiff is able to amend its complaint, the trial court will need to analyze the definition of "covered crises event" per the policy language.

Takeaways

The panel emphasized that as the original complaint stands, it does not implicate coverage under this additional insurance policy for crisis management or a specific "covered special event." The panel did agree with the defendant insurer that the plaintiff's claim for business disruption coverage is precluded, but left open the door for the plaintiff to amend the complaint before a dismissal takes place.

It is important that defendant insurers and their counsel are mindful of existing precedent that may bar a plaintiff's claims as well as any other policies that might subject the insurer to liability. The panel's decision here illustrates trial courts that take a cookie cutter or narrow approach to insurance coverage issues as they relate to Covid-19 closures may face reversal.

[1] *Boffo Cinemas LLC v. Fireman's Fund Insurance Co.*, Case Number D079665, Court of Appeal of the State of California, Fourth Appellate District.

[2] *Id.*; Inns by the Sea v. California Mut. Ins. Co., (2021) 71 Cal. App.5th 688

[3] *Id.*

[4] *Id.*

SULLIVAN HILL ATTORNEYS NAMED 2023 TOP LAWYERS IN SAN DIEGO

San Diego, CA. Sullivan Hill is pleased to announce that **Robert Allenby** (Insurance), **Timothy Earl** (Insurance), **Jim Hill** (Bankruptcy), **Shailendra (Shay) Kulkarni** (Construction), **Joseph Marshall** (Business Transactions), **Donald Rez** (Antitrust & Trade Regulation), **Gary Rudolph** (Insolvency & Commercial Bankruptcy), **Jonathan Dabbieri** (Commercial & Business Litigation), **James Drummond** (Construction) and **Kathleen Cashman-Kramer** (Business & Commercial Litigation) have been recognized by San Diego Magazine as 2023 Top Lawyers in San Diego.

The Top Lawyer list is published annually by San Diego Magazine. The 2023 Top Lawyers list reflects those local attorneys who have been recognized by Martindale-Hubbell as 2023 AV® Preeminent™ Peer Review Rated attorneys. Martindale-Hubbell® is the preeminent objective attorney rating service.

DUNN DESANTIS WALT & KENDRICK ATTORNEYS NAMED AS 2023 SUPER LAWYERS

San Diego, CA. The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce that **Kevin V. DeSantis** and **James A. McFaul** have been selected as 2023 Super Lawyers.

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.

DeSantis has been selected to the Super Lawyers list in the area of Civil Litigation: Defense. Managing Partner of the firm and Certified by the State Bar of California as a specialist in the area of legal malpractice law, 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.

McFaul has been selected to the Super Lawyers list in the areas of Professional Liability: Defense, and Employment Litigation: Defense, and Business Litigation. McFaul's practice focuses on defending and advising professionals, as well as providing general business representation, including risk management counseling, strategic advice and complex civil litigation matters, focusing on employment and labor disputes, commercial disputes, and class actions. He has also defended an array of personal injury and product liability matters for several large national companies.

DUNN DESANTIS WALT & KENDRICK NAMES ANDREW G. THOMPSON AS PARTNER

The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce the addition of **Andrew G. Thompson** as partner of the firm effective January 1, 2023.

"We are pleased to welcome Andrew as partner," said Kevin DeSantis, managing partner of the firm. "Andrew's strengths are his commitment to his clients' goals, unfailing attention to detail, and understanding that his clients want comprehensive, but focused and efficient advice." A fifth generation San Diego attorney starting with his great, great grandfather Adam Thompson in 1905, Thompson continues his family's legacy and joined the business group of Dunn DeSantis Walt & Kendrick in 2016. Thompson's practice is focused on mergers and acquisitions, start-ups, general corporate governance, contract negotiation, as well as other business and real estate transactions. Having started and run his own small businesses prior to becoming an attorney, Thompson is uniquely qualified to guide clients through their start-up legal planning and structuring, growth, maintenance, and long-term exit strategies.

Bottom Line

Case Name: Schotz v. The Regents of the University of California and John Bell, M.D.

Case No: 37-2018-00005224-CU-MM-CTL

Judge: Honorable Katherine Bacal

Type of Action: Elder/Dependent Abuse

Type of Trial: Jury Trial

Length: 5 weeks

Facts: Plaintiff, via his Guardian ad litem, alleged Dependent Abuse/Neglect related improper medication administration to over sedate him, neglect leading to a fall, a failure to timely diagnose resulting cauda equina syndrome resulting from the fall, and improper discharge leading to a delay in diagnosis of urosepsis. Plaintiff claimed these injuries resulted in multiple spine surgeries, leading to fusion from C2 to sacrum, and permanent bed ridden status requiring 24 hour per day care. Plaintiffs also alleged Defendants discharged Decedent prematurely and tried to conceal the fact Decedent fell.

Result: Motion for Nonsuit Granted at close of evidence

Plaintiff's Counsel: The Feldman Law Group – Michael Feldman; Simpson Law Group – Sean Simpson

Defense Counsel: Peabody & Buccini; Tom Peabody and Natalie Buccini

Plaintiff's Expert(s): Sylvain Palmer, M.D. (neurosurgery); Ryan Klein, M.D. (internist); Scott Simon (urology); Frederick de La Vega, M.D. (psychiatry & neurology)

Defense Expert(s): Allison Habas, M.D. (internist); Dallas Poffenroth, RN (nurse); Lawrence Shuer, M.D. (neurosurgery); Mark-Rally L. Pe, M.D. (urologist); Frederic Martin, M.D. (neurology)

Damages / injury claimed: Elder Abuse

Settlement Demand: $2.75m, reduced to $999,000 in trial

Defense Settlement offer: Waiver of Costs

Exercise Caution and Do Not Disclose Confidential Information to AI Programs

By Ian R. Friedman
WINGERT GREBING BRUBAKER & JUSKIE

It is hard to go a day or two without getting an email about some new virtual assistant application (i.e., ChatGPT or Bing Chat). While these tools can greatly increase attorney efficiency with things like preparing sample demand letters or draft agreements, it is important to understand how these programs learn and the ethical concerns raised by sharing potentially privileged and/or confidential information with these computers.

First, some background. Virtual assistants are large language models designed to learn from the information they receive from users and the internet at large. This means that all information shared with a virtual assistant becomes part of the database to be accessed and analyzed when future users make requests.

As a basic refresher, California Rules of Professional Conduct, Rule 1.6 requires "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule."

Under the State Bar Act, an attorney has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Cal. Bus. & Prof. Code, § 6068, subd. (e) (1).)

The State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") has attempted to explain how a lawyer's duty to maintain client confidences is impacted by modern technology. (See Formal Opinion No. 2010-179 [addressing whether an attorney violates "the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties"].)

COPRAC has outlined "appropriate steps" lawyers should evaluate before using any particular technology in their law practice: "1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."

Virtual assistants fail in almost every element of the precautions outlined by COPRAC. These programs admit that once information is shared with the assistant, that information becomes part of a larger network of data to be analyzed and used for purposes beyond the client's control.

For example, imagine summarizing a meeting with a client and then submitting a draft letter to a virtual assistant to clean up the writing. Immediately, all information from the client meeting is then saved in the virtual assistant database. That information is then free to be regurgitated to another user in the future if someone asks a question focusing on a similar subset of facts. While the client's name may not be tied to the second output, it is not hard to envision an instance where a competitor or litigation adversary could search for similar information and then learn secret information about your client.

In fact, this exact situation just came up in the context of an involuntary trade secret disclosure by Samsung employees. There, an employee used an AI tool to help fix a source code question and inadvertently disclosed Samsung's trade secret source code and made it available to competitors. (See https://www-businesstoday-in.cdn.ampproject.org/c/s/www.businesstoday.in/amp/technology/news/story/samsung-employees-accidentally-leaked-company-secrets-via-chatgpt-heres-what-happened-376375-2023-04-06.)

If you or any member of your firm are going to use a virtual assistant, it is always good practice to keep clients informed and obtain their informed written consent regarding what information can and cannot be shared with any virtual assistant. This way it is the client's decision regarding how this technology is used.

While virtual assistants, like ChatGPT, can be helpful in many contexts, clients and attorneys should be aware of the potential risks involved in sharing confidential information. Attorneys must understand the dangers of disclosing such information to virtual assistants to that client confidentiality is maintained and respected in all settings.

California Federal Court Maintains Broad Duty of Insurer to Defend

By Samuel Frasher
TYSON MENDES

A California federal court has held that the potential for coverage underlying lawsuits arising from the September 2020 Bobcat Wildfire "is clear" and requires Greenwich Insurance Company to defend Southern California Edison Co. as an additional insured under a policy it issued to a vegetation management company whose negligence allegedly caused the wildfire.

FACTS AND ANALYSIS

Under California law, a liability insurer owes a broad duty to defend its insured against claims that create a potential for coverage.[1] This broad duty encompasses claims that are "merely potentially covered" considering the facts alleged[2] and does not require a showing of actual liability or evidence supporting the claims alleged.[3]

In an opinion issued in January [4], the Eastern District of California held that detailed allegations of negligence in 20 underlying lawsuits against Utility Tree Service (UTS) establish the potential for coverage under the policy.

Edison contracted with UTS to manage vegetation maintenance around its power lines to prevent potential tree-to-conductor contact which allegedly occurred in September 2020 according to the lawsuits. The contract required UTS to have insurance with excess coverage for wildfire liability that lists Edison as an additional insured if UTS negligently performed maintenance.

Greenwich argued that it had no duty to defend Edison without any allegations of negligence levied against the named insured, UTS.

The Court disagreed, reasoning that a bare possibility of liability is all that is required to obtain coverage—saying that it was "reasonable to infer that [SCE's] liability (if any) may arise from UTS's acts or omissions" which triggers Greenwich's duty to defend under the contract. [5]

TAKEAWAY

This decision echoes the chorus California courts have maintained for decades: construe the duty to defend broadly and in favor of policyholders wherever possible. If there is any possibility for coverage under an insurance policy based on the complaint's allegations, the insurer must defend its insured against the entire lawsuit unless it can prove with undisputed facts to the contrary.

[1] *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal.4th 1076, 1081.*

[2] *Buss v. Superior Court, (1997) 16 Cal.4th 35, 46.*

[3] *Isaacson v. Cal. Ins. Guarantee Ass'n (1988) 44 Cal. 3d 775, 793.*

[4] *Southern Cal. Edison Co., et al. v. Greenwich Ins. Co. (E.D. Cal. Jan. 18, 2023) No. 2:22-cv-05984-JFW-JEM.*

[5] *Id.*

California's Continued Support for the Ability to Litigate PAGA Claims

By Harry Harrison, Partner
TYSON & MENDES
&
Kristen Cardenas, Associate
TYSON & MENDES

The ability of aggrieved individuals to pursue PAGA (Private Attorney General Action) claims in California has proven to be a powerful tool for plaintiffs, particularly in the employment context.

A California Court of Appeal recently affirmed a trial court's order denying a motion to compel arbitration in an action seeking unpaid wages and damages by plaintiffs. In *Juan Navas et al v Fresh Venture Foods LLC*,[1] Defendant Fresh Venture Foods ("FVF") moved to compel arbitration of the claims of three plaintiffs based on executed arbitration agreements. The court affirmed the denial of the motion to compel arbitration, and did so notwithstanding FVF's contention plaintiffs "gave up the right to represent others in litigation or to participate in any class, collective, or representative action in a court of law."[2]

Facts

The *Navas* plaintiffs filed a class action lawsuit against FVF alleging a failure to pay both minimum and overtime wages.[3] Plaintiffs also alleged a PAGA cause of action seeking civil penalties "for themselves and other current and former employees" for "labor law violations."[4]

FVF moved "to compel arbitration" of plaintiffs' claims, citing the signed arbitration agreements, which addressed, among other things, plaintiffs' ability to participate in class action litigation against FVF.

The trial court determined FVF failed to prove all plaintiffs entered into arbitration agreements, and it also found the arbitration agreement Navas signed was procedurally and substantively unconscionable.[5] Notably, the arbitration agreement Navas signed also contained "an acknowledgement that a waiver of PAGA rights occurred."[6]

Analysis

Under PAGA, an "aggrieved employee" may file a civil action against an employer seeking "a civil penalty" for violations of the Labor Code "on behalf of himself or herself *and other current or former employees.*"[7] Considerations on appeal included whether this provision was enforceable and whether it was unconscionable under the law: "Courts may refuse to enforce unconscionable contracts and this doctrine applies to arbitration agreements."[8] "Unconscionability has procedural and substantive aspects."[9]

With regard to PAGA, Nava claimed the arbitration agreement was unenforceable because it "requires employees to renounce…their…right to bring a PAGA action," and such a waiver makes the agreement substantively unconscionable.[10] The arbitration agreement provided, in relevant part, "There will be no right or authority for any dispute to be brought, heard, or arbitrated as *a representative action* under the Private Attorney General Act (PAGA) of California…"[11] "I will be giving up the right to represent others in litigation or to participate in any class or *representative* action in a court of law."[12] Later in the agreement, a separate unilateral provision states, "*Fresh Venture Foods reserves the right" to enforce "the Waiver of Individuals to self-Representation in Trials (Private Attorney General Waiver)."*[13]

The court held employers may not force employees to waive their right to bring a PAGA action.[14] There are two types of PAGA lawsuits: 1) individual PAGA actions where the employee seeks damages for violations committed against the individual employee, and (2) "representative" actions where an employee seeks damages because of the employer's PAGA violations committed against a group of employees.[15] The California Supreme Court has held "where, as here, an employment agreement compels the *waiver of representative claims under the PAGA*, it is contrary to public policy and *unenforceable* as a matter of state law."[16]

The United States Supreme Court also recently considered this issue and did so in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906. The Court was charged with reconciling the lower court's holding, which held, "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."[17] The US Supreme Court held, "Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's *individual PAGA claim*."[18]

Reliant on this rationale, the *Navas* court concluded that the *Iskanian* rule requiring mandatory joinder of individual and representative PAGA claims was preempted.[19] The employer and employee may indeed agree to arbitrate an individual PAGA claim.[20] However, the *Navas* court went on to find the agreement in the matter before it *did not* give the employee a choice.[21] Instead, FVF had: unilaterally declared a right to forfeit an employee's individual PAGA

claim without first: 1) explaining to the Spanish-speaking employee what is an individual PAGA claim, and 2) obtaining the employee's *consent* to waive the right to file an individual PAGA claim in court.[22]

The *Navas* court ultimately upheld the trial court's order, which held the agreement improperly contained "an acknowledgment" that "the right to self-representation" in PAGA cases *had been waived* prematurely and without an employee's consent.[23] That waiver amounted to an automatic forfeiture before the employment relationship was even established.[24]

Takeaways

The *Iskanian* rule requiring mandatory joinder of individual and representative PAGA claims is preempted. An employer and employee may agree to arbitrate an individual PAGA claim. However, although a portion of *Iskanian* is preempted, the standards for obtaining individual PAGA waivers under California state law remain intact. An employee with an individual PAGA claim "*is free to forgo the option of pursuing a PAGA action. But it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises."*[25]

(Endnotes)

1 *Juan Navas, et al., v Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Lab. Code, §§ 2699, subd. (a), italics added, 2698.

8 *Salgado v Carrows Restaurants, Inc.* (2019) 33 Cal.App.5th 356.

9 *Id* at 362.

10 *Juan Navas, et al.*, *supra,* at 6.

11 *Id* at 7.

12 *Id.*

13 *Id.* (Emphasis in original.)

14 *Juarez v Wash Depot Holdings, Inc.* (2018) 24 Cal.5th 1197, 1203.

15 *Juan Navas et al., supra,* at 7.

16 *Iskanian v CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384.

17 *Id., citing Viking River Cruises, Inc. v. Moriana* (2022) 213 L.Ed.2d 179, 200. (Emphasis in original).

18 *Id.*

19 *Juan Navas, et al.*, supra, at 8.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* **(Emphasis in original)**

24 *Id.*

25 *Id., citing Iskanian v CLS Transportation Los Angeles, LLC, supra, 59 Cal.4th at 387 (Emphasis in original.)*

Bottom Line

Case Name: Ranus v. Goyne, M.D., et al

Case No: CIVDS1508517

Judge: Honorable Khymberli S.Y. Apaloo (San Bernardino County)

Type of Action: Medical Malpractice

Type of Trial: Jury Trial

Length: 6 weeks

Facts: Minor Plaintiff alleged Defendants failed to timely diagnose and treat her neonatal infection, which she allegedly acquired in utero from a prolonged rupture of membranes. Due to Defendants' alleged negligence, Plaintiff claimed her condition worsened, she became hypoxic, and she required transfer to Loma Linda University Medical Center, where she was placed on ECMO and allegedly suffered severe and serious permanent neurologic/cognitive injuries.

Result: Defense verdict; 11-1

Plaintiff's Counsel: The Law Office of Stein & Markus – Andrew Stein; Law Office of Katherine Cohan - Katherine Cohan

Defense Counsel: Peabody & Buccini; Tom Peabody and Natalie Buccini (Pediatrician); West Rosa – Stephen Rosa (Hospital)

Plaintiff's Expert(s): Jack Sills, M.D. (neonatologist); Stephen Nelson (pediatric neurologist); Marissa Palomino BSN (neonatal intensive care nurse); Brian King, M.D. (neuroradiologist); Phillip Sidlow, M.S. (economist); Brook Feerick, RN (Registered nurse and life care planner); Leah Ellenberg, PhD (neuro-psychologist); Karen Owens, PT (pediatric physical therapy)

Defense Expert: Randall Metsch, M.D. (pediatrician); Denise Suttner, M.D. (neonatology); Nathaniel Chuang, M.D. (pediatric neuroradiologist); Eugenia Ho, M.D. (pediatric neurologist); Robert Gray, PhD (Neuropsychological/Psychological); Heather Xitco (Economist); Melissa Keddington, RN, BSN, JD, CLCP (life care planner)

Damages /injury claimed: Hypoxic brain injury/cognitive deficits

Settlement demand: $2m policy limits demand

Defense Settlement Offer: $500,000 CCP 998

The Duty to Defend: No Easy Answers in California

By Richard Flood
TYSON MENDES

Does a physician, whose license has been suspended and is facing criminal charges for the unlicensed practice of medicine, have insurance coverage against a patient's claims arising out of medical treatment where the policy excludes physicians, incidents during professional license suspension, and criminal acts? The answer may surprise you in California.

Facts

In *General Star Indemnity Company v. F and M Radiology Medical Center, Inc. et al*, the United States District Court, Central District of California issued a ruling denying partial summary judgment as to whether a licensure exception excluded coverage.[1] The issue before the court was whether General Star Indemnity Company ("General Star") had a duty to indemnify or defend the defendants in the underlying lawsuit brought by a patient.[2]

What is the difference between the duty to indemnify and the duty to defend? As the court explained, "the duty to indemnify 'runs to claims that are actually covered' by a given policy 'in light of facts proved,' [and] the duty to defend 'runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed.'"[3] In other words, the insurance carrier must indemnify its insureds only for claims that have been proven, but the carrier must defend its insured where there is a "potential for coverage."[4]

An insurer "owes a broad duty to defend its insured against claims that create a potential for indemnity."[5] In fact, the duty to defend is "*so broad* that it only requires 'a bare "potential" or "possibility" of coverage as the trigger of a defense duty.'"[6] The court explained that an insured "need only show that the underlying claim *may* fall within policy coverage" to establish a duty to defend.[7] Indeed, "[t]he duty to defend arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause of action pleaded by the third party."[8] "'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.'"[9]

In the case at hand, the plaintiff insurer General Star filed a motion for partial summary judgment on its claims for declaratory relief that Dr. Julian was not covered by the insurance policy, the licensure and criminal act exceptions of the policy excluded coverage, and it had reserved its rights to seek reimbursement from F and M Radiology, Dr. Tabibian, and Dr. Heikali.[10]

This declaratory judgment action arose out of claims Fetemeh Shahriari made for gross negligence, fraudulent concealment, intentional misrepresentation, medical malpractice, medical battery, and breach of fiduciary duty against F&M, Dr. Tabibian, Dr. Heikali, and Dr. Julian after she received a knee injection at an urgent care center, contracted an infection, and sustained permanent damage.[11] At the time of the treatment, Dr. Tabibian was the CEO and director of F&M, and both Dr. Heikali and Dr. Julian were physically present when the injection was administered.[12] However, only Dr. Julian had a valid medical license; Dr. Heikali and Dr. Tabibian had their medical licenses suspended and were subject to criminal charges for the unlicensed practice of medicine.[13]

The insurance policy at issue applied only to certain medical workers and specifically excluded physicians from coverage.[14] Two policy exclusions were relevant: a "licensure exception" that excluded "any 'medical incident involving any Insured that: a. Occurs during any time such Insured's professional license has been suspended, revoked, or voluntarily surrendered,'" and a "criminal act exception" that excluded "'any criminal, malicious, dishonest or fraudulent act, error or omission committed by or at the direction of any Insured.'"[15]

General Star argued that Dr. Heikali and Dr. Tabibian were not covered by the policy on the basis that they were acting as physicians during the treatment at issue.[16] Shahriari, who was a defendant here but the plaintiff in the underlying lawsuit, responded that Dr. Heikali could have been acting as a medical assistant, not a physician, and Dr. Tabibian, as the CEO officer of F&M, would be responsible for those under his direction and control regardless of his involvement in the treatment.[17] The court determined that a medical license was not required to administer the injection and no evidence was presented on whether a medical license was required to serve as an officer of F&M.[18] Because the policy was not clear as to whether the licensure exception excluded those activities in which a medical license was not required, court denied summary judgment on that issue.[19]

Analysis

Why did the licensure exception not clearly apply to Dr. Heikali and Dr. Tabibian? In California, "'[a] policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.'"[20] "[C]overage provisions are interpreted broadly, and exclusions are interpreted narrowly."[21] The court determined that the policy at issue did not state whether the licensure exception "applie[d] when the Insured [was] operating in a capacity for which the suspended license would not be required."[22] Construing this ambiguity in favor of coverage, the court held that genuine issues of material fact existed as to whether unlicensed physicians "would be considered 'Insureds' under the Policy" and whether the licensure exception applies to "'medical incidents' for which the suspended license would not be required."[23]

Because Dr. Julian was a licensed physician, and the policy excluded coverage for physicians, and General Star issued a reservation of rights letter, the court did grant summary judgment as to those issues.[24] The court, however, deferred its ruling as to the criminal act exception as the criminal cases against Dr. Tabibian and Dr. Heikali were still pending.[25]

Takeaway

This case stands as a reminder that coverage issues can be complex. A policy exclusion may not necessarily extinguish the duty to defend. Insurers should understand the differences between the duty to defend and the duty to indemnify, as well as when the duty to defend arises.

(Endnotes)

1 (*Gen. Star Indemnity Co. v. F & M Radiology Med. Ctr., Inc. et al.* (C.D. Cal., Jan. 13, 2023, Case No. CV 22-2233-DMG (JCX)), 2023 WL 1959120, at *1).

2 *Id.*

3 *Id.* at *3(*quoting Buss v. Superior Ct.* (1997)16 Cal. 4th 35, 45–46.)

4 *Gen. Star Indemnity Co.* at *3 (*citing Manzarek v. St. Paul Fire & Marine Ins. Co.* (9th Cir. 2008) 519 F.3d 1025, 1031) [citations omitted.]

5 (*Montrose Chem. Corp. v. Superior Ct.* (1993) 6 Cal. 4th 287, 295 [861 P.2d 1153, 1157].)(*quoting Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal. 4th 1076, 1081 [846 P.2d 792, 795].)[citations omitted.]

6 (*Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Seagate Techs., Inc.* (9th Cir. 2012) 466 F. App'x 653, 655.)(*quoting Montrose Chem.* [861 P.2d at 1160].)[emphasis added.]

7 (*Gen. Star Indemnity Co.* at *3)(*quoting Montrose Chem.*, 6 Cal. 4th at 300)[emphasis in original.]

8 (*Crosby Est. at Rancho Santa Fe Master Ass'n v. Ironshore Specialty Ins. Co.* (S.D. Cal. 2022) 578 F. Supp. 3d 1123, 1129–30.) (*quoting Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal. App. 4th 500, 510 [108 Cal. Rptr.2d 657].)

9 (*Gen. Star Indemnity Co.* at *3.)(*quoting Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal. App. 4th 1058, 1068.)

10 (*Gen. Star Indemnity Co.* at *2.)

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at *1.

15 *Id.* at *2[quoting the insurance policy] [less emphasis].

16 *Id.* at *4.

17 *Id.*

18 *Id.*

19 *Id.*

20 (*Mirpad, LLC*, 132 Cal. App. 4th at 1069 [34 Cal. Rptr. 3d 136, 143].)(*quoting Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619) [citations omitted][less emphasis].

21 (*Medina v. GEICO Indem. Co.* (2017) 8 Cal. App. 5th 251, 259 [213 Cal. Rptr. 3d 502, 509].)(*quoting Stellar v. State Farm General Ins. Co.* (2007) 157 Cal.App.4th 1498, 1503 [69 Cal.Rptr.3d 350].)

22 (*Gen. Star Indemnity Co.* at *4.)

23 *Id.*

24 *Id.* at *3–5.

25 *Id.* at *5.

Bottom Line

Case: Peterssen v. Bridge Home Health

Case No: 37-2020-00021104-CU-PO-CTL

Judge: Honorable Timothy Taylor

Type of Action: Medical Malpractice

Type of Trial: Jury Trial

Length: 8 days

Facts: Decedent, survived by her mother, alleged Bridge Home Health was negligent and neglectful in not properly caring for Decedent for complications of Multiple Sclerosis. Plaintiff claimed Decedent developed a urinary tract infection that was due to improper care, was not timely diagnosed, and caused her death.

Result: Defense verdict

Defense Counsel: Peabody & Buccini-Tom Peabody and Natalie Buccini

Plaintiff's Expert(s): Ted Gay, M.D (infectious disease).; Lisa Gildred, BSN, R.N.

Defense Expert: Heather Fazelinia, RN (home health nursing expert); Patrick Joseph, M.D. (infectious disease); Michael Lobatz, M.D. (neurology)

Damages / injury claimed: Non-economic loss for pain and suffering, and related to the loss of Plaintiff's daughter. Dependent Abuse dismissed on eve of trial.

Settlement Demand: None

Defense Settlement Offer: None

Social event summaries

Past President's 2022

The San Diego Defense Lawyers Past Presidents event was held on November 11, 2022, at the offices of Wingert Grebing Brubaker and Juskie. The event was a social cocktail hour, providing an opportunity for past presidents to mingle with each other and with the current board of the organization.

Attendees enjoyed an evening of drinks, hors d'oeuvres, and lively conversation, catching up with old friends and making new connections. The event was a great success, with attendees praising the opportunity to network with other legal professionals and the warm and welcoming atmosphere. The San Diego Defense Lawyers Past Presidents event provided a valuable opportunity for past and present leaders of the organization to connect and reflect on their shared experiences.

Padres Tailgate 2022

On August 19, 2022, the San Diego Defense Lawyers hosted a pre-game Padres tailgate event at Mission Brewery. The event provided an opportunity for members of the defense bar to socialize, network, and enjoy a fun-filled evening of baseball, beer and food.

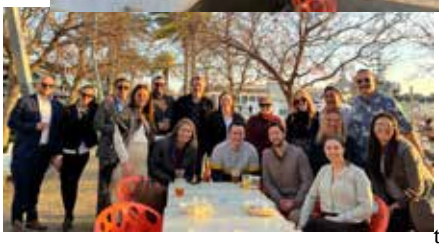
Attendees were treated to a great food trucks and drinks, including local craft beer. Members of the San Diego Defense Lawyers organization and their guests enjoyed mingling with each other, sharing stories and making new connections.

After the tailgate, attendees made their way to nearby Petco Park to watch the Padres take on the Washington Nationals. While the Pads didn't win, the San Diego Defense Lawyers pre-game tailgate was a great success, providing a fun and memorable evening for all who attended.

Spring Quarterly Happy Hour

We kicked off our First Quarter for 2023 in style with a First Quarter Happy Hour at Carnitas Snack Shack on April 4. The event was well attended and was a great chance for members to enjoy some delicious food and drinks.

Attendees were treated to an open bar, carnitas, quesadillas and the best chips and guac. The lively atmosphere provided a great opportunity for everyone to catch up with old friends and new colleagues.



The first quarter happy hour event was a fantastic way for members of the legal community to kick off the new year and continue building relationships within the profession.

SDDL & CASD: "A View From the Bench" Judge's Panel MCLE event

A huge thank you to our event co-sponsors, Consumer Attorneys of San Diego (CASD) and the San Diego County Bar Association (SDCBA), for making Judge's Panel MCLE event possible! Tuesday night's event was a testament to the importance of collaboration and learning from one another, irrespective of our legal backgrounds.

We are immensely grateful to the distinguished judges of San Diego - Supervising Judge, Hon. Katherine A. Bacal, Hon. Carolyn M. Caietti, and Hon. Cynthia A. Freeland - for sharing their wealth of knowledge, experience, and legal insights with us. We sincerely thank them for their time, wisdom, and commitment to excellence in all aspects of law practice.

"A View From the Bench" effectively united defense attorneys and plaintiff lawyers in the spirit of cooperation and compromise. And who can forget the lighthearted moment surrounding "learned treatises"? It just goes to show that even in the legal world, we can share a laugh together!

Let's continue to foster an environment of open dialogue and understanding, to create a stronger and more efficient legal system. We're grateful for the unity and commitment to professional conduct displayed at the Judge's Panel MCLE event and look forward to future collaborations!

Upcoming Events!

May 18, 2023
Second Quarter Happy Hour
Ballast Point, Little Italy

June 21, 2023
Trivia Event
The Local, Downtown

July 13, 2023
Third Quarter Happy Hour
Aero Club, Mission Hills

August 18, 2023
Padres Event
Mission Brewery/Petco Park

Late September/Early October 2023
Bingo Event
Portuguese Hall, Point Loma

October 12, 2023
Past Presidents' Event
Wingert Grebing Brubaker & Juskie LLP

Bottom Line

Case Name: Corona v. The Neurology Center, Andrew Inocelda, PA, Kalyani Korabathina, M.D. and Anchi Wang, M.D.

Case No: 37-2018-00064430-CU-MM-NC

Judge: Honorable Robert Dahlquist

Type of Action: Medical Malpractice

Type of Trial: Jury Trial

Length: 3 weeks

Facts: Plaintiff, Silvina Corona, alleged the medical defendants negligently diagnosed her with dementia and prescribed unnecessary medications for 10 years before the diagnose was proven inaccurate. Plaintiff claims injury / damage as a result of this conduct.

Result: Defense verdict

Plaintiff's Counsel: Daniel Callaway, Esq.

Defense Counsel: Peabody & Buccini; Tom Peabody and Natalie Buccini; Will M. Smith, Esq.

Plaintiff's Expert(s): Dr. Gregory Whitman (neurology); Dr. Zybher Zaffarkhan (pain management).

Defense Expert(s): Dr. Thomas Ela (neurology); Dr. Jerome Stenehjem (physical med/rehab).

Damages / injury claimed: Loss of balance, weakness, inability to live independently after improper medications.

Settlement Demand: $250,000

Defense Settlement offer: Waiver of Costs

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 David at david.hoynacki@wilsonelser.com so that corrections can be made for the next edition.

#1 Tyson & Mendes - 50 members

#2T Farmer Case & Fedor – 18 members

#2T Neil Dymott Frank McCabe & Hudson – 18 members

#4 Balestreri Potocki & Holmes – 17 members

#5 Wilson Elser Moskowitz Edelman & Dicker LLP – 15 members

#6T Grimm Vranjes & Greer LLP – 12 members

#6T Winet Patrick Gayer Creighton & Hanes – 12 members

#8 Horton, Oberrecht, Kirkpatrick & Martha, APC – 10 members

#9T Lorber Greenfield & Polito, LLP – 9 members

#9T Pettit Kohn Ingrassia Lutz & Dolin – 9 members

#11T Lincoln, Gustafson & Cercos – 7 members

#11T Ryan Carvalho LLP – 7 members

#13T Dunn DeSantis Walt & Kendrick, LLP – 6 members

#13T Lotz Doggett & Rawers LLP – 6 members

#13T Wingert Grebing Brubaker & Juskie, LLP – 6 members

#16 Walsh McKean Furcolo LLP – 5 members

#17T Carroll Kelly Trotter & Franzen – 5 members

#17T Davis Grass Goldstein & Finlay – 4 members

#17T Higgs Fletcher & Mack – 4 members

#17T Hughes & Nunn, LLP – 4 members

#17T Klinedinst, PC – 4 members

#17T LaFollette Johnson DeHaas Fesler & Ames – 4 members

#17T Tencer Sherman – 4 members

#17T Wolfenzon Rolle – 4 members

SDDL 2023 Board Back: Jeremy Freedman, David Hoynacki, Joey Kagan, Lawrence Zucker, Ian Friedman, Ethan Shakoori
Front: Rachel Donnelly, Sara Bloc, Rachel Fisher, Jacqueline Kallberg, Dianna Bedri-Burke, Madison Hutzler
Not pictured: Kaitlyn Jensen and Matthew Majd