



SAN DIEGO
DEFENSE LAWYERS

THE UPDATE

WINTER 2015

Beware the Reptile!

By Elizabeth A. Skane
SKANE WILCOX LLP

“What the heck just happened?” That was my reaction not long ago walking out of a deposition of my client in a case venued in Nevada. It was a big damages case but low probability of liability. My client was a bit of a talker so I spent hours and hours of time preparing him for deposition. I was confident that he was well prepared to answer whatever questions were posed. Boy was I wrong. By the end of the deposition, he had essentially admitted to liability. I had been REPTILED.

I caution all you defense lawyers out there. BEWARE THE REPTILE. A case that I had valued nowhere near the limits was now an excess case and at the end of the day, the case was settled for policy limits. And, I might tell you I was thankful that it did. The reptile is a very scary creature.

So what is the reptile? And why do defense attorneys need to be worried? The reptile is a strategy employed by Plaintiff’s lawyers to appeal to what they call the reptile emotions, essentially the very basic human instinct to avoid danger at all costs. Now I understand from reading a number of articles written by neuroscientists such as the brilliant Bill Kanasky that the theory is essentially flawed. That said the reptile approach does work, but

for other reasons then expressed in the book. Nevertheless the authors of “Reptile” explain that the reptile brain is a region of the brain that houses our survival instincts. When the reptile is threatened with danger it goes into survival mode to protect itself and its community. The line that Plaintiffs sell to the jury is that the courtroom is a safety arena. It is the job of a jury to protect and guard their community. An award of damages to the Plaintiff is the way a jury can enhance safety for themselves and their community. Put simply, the authors put forth a very basic formula, namely “safety rule plus danger = reptile”.

The theory posits that once you tap into the reptile brain you awake survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society. Now in reading this you might think this is all a bit silly, but in the hands of the right Plaintiff’s counsel it can be very effective.

The tactic is discussed and evaluated in a book called “Reptile”, written by Don Keenan

and David Ball. These two individuals ran a series of studies on how juries react. What they found was that even more effective than appealing to a juror’s emotions of sympathy, that an a juror’s own instinct for self-preservation is so much more effective. I have heard the reptile compared to the golden rule. But truly the reptile is so much more than that.

Frankly I geek out on these kinds of things so I ordered and read the book as well as the companion book on Damages called “Damages 3”. The books are fascinating, but expect to be set back a few hundred dollars for the paperback editions. (Call me if you want to save yourself some cash, you can borrow my books.)

As a baby lawyer I was trained that Plaintiff’s attorneys appeal to sympathy and emotion. But the reptile changes that tactic and for good reason. As pointed out

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Outgoing President's Message

By David B. Roper
LORBER, GREENFIELD & POLITO, LLP

It was a great honor to be a President of San Diego Defense Lawyers in 2014, and a member of the Board of Directors for the past 4 years. I've seen that the work that SDDL does, and the services it provides, are important to its members and the legal community. San Diego is the second most populace city in California, the eighth most populace city in the United States, and yet it has managed to retain the feel of a much smaller community, with the professionalism and comity which has been lost in other cities. San Diego Defense Lawyers has played an important part in helping to preserve that collegial atmosphere.

This past year we once again provided MCLE programs totaling eighteen credits which annually fulfill the continuing education requirements of each of our members. We hosted quarterly social events open to both members and non-members to foster cordiality among both friends and adversaries. We held our annual Golf Tournament to benefit the Juvenile Diabetes Research Foundation. And once again, our Annual SDDL Mock Trial Tournament was acknowledged as one of the premier tournaments in the nation, expanded, literally by popular demand, to 22 teams from 15 different law schools from all over the United States.



Our social events are more than just an excuse for tying one on. They give members of the defense bar a chance to meet one another, put a face with the name that's been showing up in your in-box, sometimes for years. And these events aren't available to members only, guests, and yes, even members of the plaintiff's bar are invited. We all know how much harder it is to send a flaming nasty-gram to someone you just shared a pint with.

I want to thank all the Board members who helped make my tenure a pleasure, and the members of SDDL who made it all worthwhile. I look forward to continued participation in this great organization for years to come. ♦

SDDL 2015 Calendar of Upcoming Events

- | | |
|------------|--|
| March 24 | Happy Hour at Downtown's Dublin Square
Authentic Irish Pub & Grill at 5:30 p.m. |
| May 6 | Happy Hour at Bar Basic at 5:00 p.m.
(Co-Hosted with CASD) |
| July 24 | Golf Tournament at the Country Club
of Rancho Bernardo |
| Oct. 22-24 | Mock Trial Tournament |

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

THE UPDATE

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LUNCH AND LEARN

The State of The Union California Ethics

By Alexandra N. Selfridge
LAW OFFICES OF KENNETH N.
GREENFIELD

On January 21, 2015, Patrick J. Kearns, Esq. presented SDDL's first Lunch & Learn program of the year. He had everyone laughing while they were learning at this well-attended seminar! Mr. Kearns is a partner with the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP. He is the current Committee Chair for the San Diego County Bar Association's Legal Ethics Committee and speaks frequently on matters involving legal ethics. Patrick is also a member of the Board of Directors for both the Association for Southern California Defense Counsel and for the San Diego Defense Lawyers.

Mr. Kearns' seminar focused on the current status of California's Rules of Professional Responsibility, and where we might be heading in the world of Legal Ethics. He spoke about the California Bar's attempts, which began in 2001, to bring the state's rules of professional conduct in line with the ABA Model Rules. The latest development occurred on September 19, 2014, when the California Supreme Court asked the State Bar to establish a new commission, and essentially start over. Despite nearly 15 years of work, California remains the only state in the union to not have adopted some form of the model rules – perhaps because of too much kale and yoga?

Based on the State Bar's attempts to change our rules, we have a good idea of which ones will probably remain the same, and which may actually change in the future. For example, California's rules regarding the Duty of Confidentiality are the most restrictive in the Country, and it looks as though they will remain that way. This duty is set forth in not one, but two places: Cal. Bus. & Prof. Code, § 6068 and Rule of Prof. Conduct 3-100. Even if a court orders an attorney to disclose confidential client information, according to San Diego County Bar Association Opinion 2011-1, the attorney is still prevented from doing so by Section 6068. As Mr. Kearns said, "California Takes this Serious, Dude." There were no plans during the revision process to change this.

In contrast, California may actually change its rules regarding sexual relations with clients.

Currently, California Rule 3-120 allows such relations, so long as the attorney does not: (1) require or demand sexual relations with a client incident to or as a condition of any professional representation; (2) employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or (3) continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently. During the attempted revision process, the committee tried to ban all sexual relations with clients, unless a consensual sexual relationship existed between the lawyer and client at the time the professional relationship commenced. This change would mirror ABA Rule 1.8.

Mr. Kearns ended his presentation by urging the attending attorneys to read the California Rules of Professional Conduct.

As always, the SDDL's Lunch and Learn programs are free to SDDL members and a catered lunch is provided. We hope to see you at the next presentation in March! Patrick Kearns can be reached at Patrick.Kearns@wilsonelser.com ♦

Bottom Line

Case Title: George Mardikian and Lillian Mardikian v. Wawanesa General Insurance Company

Case Number: CIV 517132

Judge: Hon. Elizabeth K. Lee

Plaintiff's Counsel: Montie S. Day (Law Offices of Montie Day)

Defendant's Counsel: Alexandra "Sasha" Selfridge (Law Offices of Kenneth N. Greenfield)

Type of incident/Causes of Action: Breach of Contract and Insurance Bad Faith

Result: Motion for Summary Judgment granted as to Plaintiff Lillian Mardikian. The Court found that there was never any coverage for the underlying automobile fire loss because Plaintiff Lillian Mardikian was not a "named insured" on the insurance policy. In addition, Plaintiff Lillian Mardikian was not entitled to coverage because the vehicle was not transferred to her as a gift; therefore, she did not have an insurable interest in the vehicle. ♦



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31st Annual San Diego Defense Lawyer's Installation Dinner a Great Success

The 31st Annual San Diego Defense Lawyer's Installation Dinner was held on January 24, 2015, at the U.S. Grant Hotel. The event celebrated the selection of Heather Rosing of Klinedinst as San Diego Defense Lawyer of the Year and honored Presiding Judge David J. Daniels with the Bench & Bar Service Award.

The event also featured the installation and swearing in of this year's Board of Directors for SDDL and its new president, Sasha Selfridge. The new directors are Colin Harrison of Wilson Getty LLP, Ben Cramer of LaFollette Johnson, Ken Purviance of Hughes & Nunn, LLP, and Eric Dietz of Wingert Grebing Brubaker & Juskie, LLP.

At the dinner, SDDL presented its annual donation to the Juvenile Diabetes Research Foundation. The funds for the donation were raised during SDDL's golf tournament last summer. The annual donation to the Juvenile Diabetes Research Foundation is made in remembrance of San Diego defense lawyer, Tom Dymott, who passed away in August 2002, after a long battle with diabetes. This summer's golf tournament will be held on July 24 at the Country Club of Rancho Bernardo. Please save the date! ♦



▲ Heather Rosing



▲ Hon. David J. Daniels



▲ Hon. Joel R. Wohlfeil

Bottom Line

Case Title: Dubizhansky v. HMS Construction

Case Number: 37-2014-0000058

Judge: Jacqueline Stern

Plaintiff's Counsel: Plaintiff in Pro Per

Defendant's Counsel: Elizabeth Skane and Richard Seely for HMS Construction, Inc., and Wirtz Tile & Stone, Inc.

Type of Incident/Causes of Action: Negligence and Fraud

Motion Type: Demurrer and Anti-SLAPP Motion to Strike

Ruling: Demurrers sustained and Judgment Re: Dismissal Entered in Favor of Defendants.

In early, 2014, Plaintiff, in pro per, filed a complaint against a general contractor and a tile installation subcontractor (among others) involved with the Trolley Renewal Program to renovate trolley station platforms in San Diego. Plaintiff also named two individuals, including

an attorney representing the San Diego Association of Governments ("SAND AG"). The complaint, filed in the Vista courthouse, alleged that the defendants injured Plaintiff by causing Plaintiff's two prior qui tam actions to be dismissed (the qui tam actions were dismissed after SANDAG intervened and conducted investigations and discussions regarding Plaintiff's original allegations). Despite the dismissals, Plaintiff filed another action in his own name and alleged general negligence and fraud against all defendants for submitting unspecified and non-conforming materials for approval at a public trolley stop. Plaintiff sought compensatory damages in the amount of \$1,189,489.00 in conjunction with his role as a "whistleblower" for public funds being fraudulently used. Skane Wilcox, LLP, on behalf of the general contractor and tile subcontractor, filed demurrers.

The demurrers presented the court with legal arguments as to why plaintiff's assertions were without merit, and the court dismissed the actions against our clients and entered

judgment in our client's favor. Admittedly, the demurrers were unopposed, as Plaintiff's custom and practice throughout the action was to argue his case during any motion hearing or a case management conference. While our clients were successful with demurrers, the other defendants were successful with anti-SLAPP motions to strike that were heard months prior to our clients' demurrers. However, this office was impressed with the thoroughness of the court and the care taken in the tentative rulings which became final. The rulings outlined why, even without formal opposition, the arguments set forth in the demurrers were the correct approach. It seemed imperative to the court to outline the merits in the demurrers, since a simple "motion granted, no opposition" ruling could have occurred. The court proceeded this way for all motions, as it was obvious that all procedural precautions must be taken, since Plaintiff was not complying with procedure at all. ♦

New Court of Appeal Opinion Re: Insurance Code Section 11583 and Tolling of Medical Malpractice Statute of Limitations

By Brittany H. Bartold

LEWIS BRISBOIS BISGAARD & SMITH LLP

The Court of Appeal, Second Appellate District, Division Six (Ventura) issued an opinion in *Coastal Surgical Institute v. Blevins* (2015) 232 Cal.App.4th 1321, analyzing whether Insurance Code section 11583, which provides that the applicable statute of limitations is tolled when advance or partial payment is made to an injured and unrepresented person without notifying him of the applicable limitations period, applies to a medical malpractice action. In a case of first impression, the court held “that the tolling provisions of section 11583 apply to the one-year limitations period for medical malpractice actions.” (*Id.* at p. 1324.)

The case arose out of a surgery performed on plaintiff’s knee at defendant’s surgical facility. (*Coastal Surgical Institute v. Blevins*, *supra*, 232 Cal.App.4th at p. 1324.) After the surgery, respondent’s knee became infected.

Defendant paid plaintiff \$4,118.23 for the medical expenses plaintiff incurred in treating the knee infection. Defendant did not give plaintiff, who was not represented by counsel at the time of payment, written notice of the applicable statute of limitations for a medical malpractice action. More than 15 months later, plaintiff sued defendant. The trial court, relying on Insurance Code section 11583, ruled that the one-year limitations period of Code of Civil Procedure section 340.5 was tolled by defendant’s payment of plaintiff’s medical expenses. The jury then rendered a special verdict in favor of the plaintiff. (*Id.* at pp. 1324-1325.)

On appeal from the judgment, defendant contended that section 11583 does not apply to medical malpractice actions and that the court erroneously denied its motion to conduct a bifurcated jury trial on its statute

of limitations affirmative defense. (*Coastal Surgical Institute v. Blevins*, *supra*, 232 Cal. App.4th at p. 1326.) The Court of Appeal disagreed holding that section 11583 applies to medical malpractice actions. (*Id.* at p. 1325.) According to the court, “the tolling provisions of section 11583 can extend the one-year period of section 340.5 up to a maximum of three years from the date of injury.” (*Id.* at p. 1327.) Thus, defendant was not entitled to a jury trial on its statute of limitations affirmative defense. (*Ibid.*) The court emphasized that the maximum three-year limitations period was not altered by its holding. (*Ibid.*) ♦

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Scrap The Separate Statement Requirement For Summary Judgment Motions

By James D. Crosby

HENDERSON, CAVERLY, PUM
& CHARNEY, LLP

This last week, my paralegal and I put together and filed an opposition to a motion for summary judgment or, in the alternative, for summary adjudication. It was one of several summary judgment motions and oppositions I have done this year. Now, I think summary judgment/adjudication motions are extraordinarily powerful weapons in the trial attorney's arsenal. Cases for which there is no defense can be adjudicated without the expense and delay of trial. Meritless or, more crassly put, BS cases can be dispensed with. Claims can be narrowed, defenses can be vetted, evidence can be challenged. Trials are interesting, challenging, and, in my view, the best part of this business. But, a client should not have to bear the risk, expense, and emotional misery of trial where there really is nothing that needs to be tried. Summary judgment/adjudication motions, when serving their proper function, separate the proverbial wheat from the chaff. They are essential to a proper-functioning civil justice system.

But, it is really time to get rid of the separate statement of undisputed/disputed facts requirement for such motions in California! Preparing and, more-significantly, responding to these statements is time-consuming, expensive to the client, and, in my view, a largely worthless undertaking.

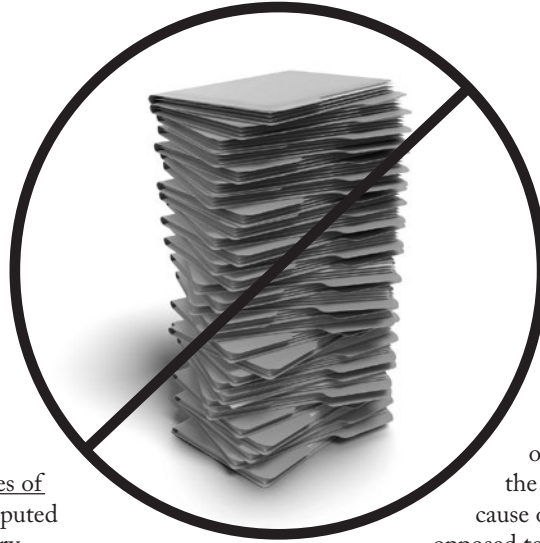
I know these requirements were put in place to attempt to streamline the summary judgment/adjudication process. But, at least from this trial attorney's perspective, they have done just the opposite. Regularly, even the simplest of summary judgment motions includes a separate statement with pages, and pages, and pages of redundant "undisputed facts", which are then, in the case of the customary alternative summary adjudication motion, cut and paste verbatim into the statement for each successive cause of action at issue. And, per statute, all of this largely meaningless redundancy and paper must be responded to with more meaningless redundancy and paper.

This is all made more complicated and onerous by the inability of many attorneys to recognize the difference between undisputed facts and evidence. Undisputed facts material to resolution of a case or cause of action

offered with supporting evidence, as contemplated by the statute, are often times replaced with pages and pages filled with formatted columns setting forth specific pieces of evidence as "undisputed facts". The summary

judgment motion I just opposed, a motion that involved fairly straight-forward substantive issues and limited evidence, came with a 69-page separate statement, including 234 separate "undisputed facts", all of which had to be responded to, per statute. My responsive separate statement was 85 pages long! And, really, the matters at issue were well-briefed, with references to the relevant evidence, in the 20-page points and authorities on each side. The opposing briefs succinctly teed-up the relevant issues for consideration. The separate statements were a largely meaningless sideshow.

It can be, it is, a real mess. Does this really streamline the summary judgment/adjudication process? Should a lawyer or paralegal have to spend hours and hours cutting pasting verbatim text from one column to another across pages of redundant "undisputed facts" to complete a separate statement? Do the judges actually read and review all of the pages and pages of separate statement materials accompanying the large majority of summary judgment/adjudication motions? How could they, and still effectively handle their now-crowded motion and trial calendars? And, most importantly, should clients have to pay for all this time and effort? Or, should attorneys have to eat what would otherwise be good billable time because



they cannot, in good conscience, bill a client for such busy work? The answers to these questions are self-evident.

I could, perhaps, envision a better separate statement procedure – maybe one centered around the actual elements of a cause of action or a defense, as opposed to one centered around

claimed "undisputed facts". If an element of a cause of action or a defense is claimed not to be subject to factual dispute, the separate statement could set forth that element and the corresponding evidence that establishes the absence or, conversely, the presence of a factual dispute. That might work better.

But, *really*, I think the whole separate statement thing should just be scrapped! Put it on the shelf with all the other good ideas that did not work out as contemplated. Get rid of it. Competent attorneys should be, and are, fully able to explain to the court in customary briefings with lodged relevant evidence why they are, or the other side is not, entitled to summary judgment or adjudication. That's what lawyers do – brief issues and tee them up for resolution by the courts! It really is just that simple.

So, I say, repeal the separate statement requirement for summary judgment/adjudication motions in California! We have lived long enough with this onerous, expensive beast. I think you would hear an immediate, loud, collective sigh of relief from both Bar and Bench were that to happen. ♦

COVER STORY - BEWARE THE REPTILE CONTINUED FROM PAGE 1

in the book, the next generation behind us, basically X and Y generation are desensitized. The vast majority of their interactions occur on line, not face to face, and the various avenues of media bombard them all day long with tragedy and grief. So appealing to their sympathy and emotions does not work anymore.

The reptile strategy is aimed at teaching Plaintiffs attorney how to reach the "reptile brain" at every different stage of litigation beginning with discovery, through depositions, voir dire, opening statement, and trial. Where I have gotten bitten by the reptile a few times is at the deposition stage.

So how do the lawyers do it? In deposition Plaintiffs lawyers trap defense witnesses by first getting the witness to agree to a variety of very broad based "safety rules". They start out with a few very easy rules with which it is easy to agree. Then they take those general safety rules becoming ever more specific to the facts of your case. They will trap your witness in committing to the validity of a safety rule and then show how the defendants conduct in that situation violated this safety rule. According to Keenan and Ball, the reptile hates hypocrisy as much as they desire to avoid danger. So, your witness is trapped by an agreement to one or more safety rules, which creates a clear contradiction between a rule and a defendant's conduct in the specific case at hand. This stuff is particularly devastating at the time of trial.

So your witness is left with continually agreeing to the questions in order not to violate the safety rules to which they have already agreed, thereby essentially admitting liability. Or even worse, the witness will agree to the general rules but then deny the specifics later on, thereby making them look like a liar or a hypocrite. (Which Keenan and Ball contend the reptile hates as much as it hates danger.)

The crux of the tenor of the questions is intended to establish the following basic maxims: (quoted from article "Debunking and Redefining the Plaintiff's reptile theory" by Bill Kanasky):

- Safety is always top priority.
- Danger is never appropriate.
- Protection is always top priority.
- Reducing risk is always top priority.
- Sooner is always better.
- More is always better.

So let's see how the above maxims are put into play. In my case I represented an apartment owner of a low income property in the seedier areas of Las Vegas. The incident that gave rise to the liability in my case was a revenge killing by a known gang member of another tenant who had beaten up his girlfriend earlier in the day. The crux of the claim was failure to provide adequate security at the property. To make the facts of my case worse, there had been another shooting and death at my client's property 10 days earlier.

In my case the reptile set up questions went something like this:

You would agree that as a property owner and property manager, safety of your tenants should always be a top priority? This is an easy one. Right? Who is going to say that safety is not a top priority? (See above, safety is always a top priority)

You would agree as a property manager you should never needlessly endanger your tenants? (Danger is never appropriate.) Again this is a crucial question, who is going to disagree with this one? The book "Reptile" goes to great length talking about how to use the language "needlessly endanger" works because it allows an out. How can anyone not agree that needlessly endangering anyone is not a good idea, Right?

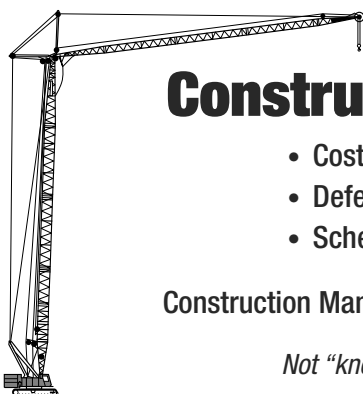
You would agree that gang activity is a danger any community? You would agree that you knew of gang activity in your community? You

would agree that it is important to keep gangs out of your apartment complex? (Protection is always a top priority.) You are aware that guns in the wrong hands needlessly endanger the community? (Reducing Risk is always a top Priority.) You are aware that many gang members carry guns? You were aware of gang activity in your community? You would agree that you should do everything within your power to reduce the risk of gang activity in your community? (See above More is better) You would agree that one way to keep gangs out of your apartment complex is to provide adequate security? You would agree that you had an opportunity to provide security after the last shooting 10 days earlier? (Sooner is always better.) You agree that by failing to provide security needlessly endangers your tenants? (Reducing Risk is Always a Top Priority.) You would agree that you did not keep any security at your apartment complex?

It goes on and on, but you can see how it works. In my case the witness catches on and tries to explain that they are a non-profit company with a mission statement to enhance the lives of their tenants. They had only a certain amount of money and they chose to spend on building a community rec. center.

Oh boy, that made it even worse. You mean not only did my client have the opportunity, notice, and money to provide security but they chose not to? My poor client was falling all over himself to get out of the box he had been pinned into and I was sick to my stomach.

The defense community needs to stay ahead of the curve. Watch out for the reptile and make sure you prepare your witnesses and cases to ensure that this does not happen to you. All of us hate to write that letter that says, "I know I said this case was not worth much but things have changed and let me explain why." **BEWARE THE REPTILE. ♦**



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California Civil Law Update

By Monty McIntyre
ADR SERVICES, INC.

U.S. SUPREME COURT

Civil Rights

Johnson v. City of Shelby, Mississippi _ U.S. _ (2014): The U.S. Supreme Court reversed the summary judgment in a case by police officers alleging violation of their due process rights. No heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke 42 U.S.C. §1983 expressly in order to state a claim. (November 10, 2014.)

Civil Procedure

Dart Cherokee Operating Basin Co., LLC v. Owens _ U.S. _ : The defendant's notice of removal of a putative class action from state court to federal court did not need to contain evidentiary submissions regarding the amount in controversy in order to satisfy the requirement of 28 U.S.C. section 1456 that defendant must provide a "short and plain" statement regarding the grounds for removal. (December 15, 2014.)

Employment

Mendiola v. CPS Security Solutions, Inc. (2015) _ Cal.4th _ , 2015 WL 107082: The California Supreme Court affirmed in part and reversed in part the decision of the Court of Appeal. Wage Order 4 does not permit the exclusion of sleep time from compensable hours worked in 24- hour shifts covered by Wage Order 4. On-call time and sleep time constituted hours worked within the meaning of Wage Order 4 and was subject to the wage order's minimum wage and overtime provisions. (January 8, 2015.)

Evidence

Warger v. Shauers _ U.S. _ (2014): Federal Rule of Evidence 606(b), which provides that certain juror testimony regarding what occurred in a jury room is inadmissible "[d]uring an inquiry into the validity of a verdict," precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during voir dire. (December 9, 2014.)

CALIFORNIA SUPREME COURT

Arbitration

Riverside County Sheriff's Department v. Stiglitz (Drinkwater) (2014) _ Cal.4th _ , 2014 WL 6725771: The California Supreme

Court affirmed the Court of Appeal's ruling reversing the trial court order granting a writ of mandate. When hearing an administrative appeal from discipline imposed on a correctional officer, an arbitrator may rule upon a discovery motion for officer personnel records, commonly referred to as a *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); Evidence Code, sections 1043, 1045.) Evidence Code section 1043 expressly provides that *Pitchess* motions may be filed with an appropriate "administrative body." The language reflects a legislative intent that administrative hearing officers be allowed to rule on these motions. (December 1, 2014.)

Medical Malpractice

Rashidi v. Moser (2014) _ Cal.4th _ , 2014 WL 7014000: The California Supreme Court reversed the portion of the Court of Appeal's decision giving defendant Dr. Moser a setoff against noneconomic damages awarded at trial. MICRA does not authorize a posttrial reduction in the judgment for a pre-trial settlement. The \$250,000 noneconomic damages cap imposed by Code of Civil Procedure section 3333.2(b) applies only to judgments awarding noneconomic damages. Because Dr. Moser failed to establish any degree of fault on his codefendants' part during the trial, he was not entitled to a proportionate reduction in the capped award of noneconomic damages. (December 15, 2014.)

CALIFORNIA COURTS OF APPEAL

Appeal

Conservatorship of Townsend (2014) _ Cal. App.4th _ , 2014 WL 6406740: The Court of Appeal dismissed the appeal because it was not timely filed within 60 days, and the filing of a motion to vacate the judgment with the temporary judge, instead of with the clerk of the court as required by the Code of Civil Procedure and the Rules of Court, failed to extend the time for filing the appeal. (C.A. 2nd, November 17, 2014.)

Pacific Corporate Group Holdings, LLC v. Keck (2014) _ Cal.App.4th _ , 2014 WL 7012380: The Court of Appeal affirmed the trial court's order granting Keck's motion for an additur or, in the alternative, a new trial on damages, and the order denying Pacific Corporate Group Holdings, LLC's (PCGH) motion for a new trial. Because the trial court's order granting a new trial on damages resulted in a vacatur of the underlying judgment, the Court of Appeal lacked appellate jurisdiction to consider

PCGH's appeals from the judgment, the trial court's order denying its motion for new trial, and the trial court's order denying PCGH's and Keck's motions for attorney fees. The case was remanded to the trial court with directions to conduct a new trial on damages. (C.A. 4th, December 12, 2014.)

Arbitration

Garden Fresh Restaurant Corporation v. Superior Court (Moreno) (2014) _ Cal.App.4th _ , 2014 WL 6306143: The Court of Appeal granted a writ petition after the trial court granted a motion to compel arbitration but left it to the arbitrator to decide whether an individual or a class action would proceed in arbitration. Where an arbitration agreement is silent on the issue whether class and/or representative arbitration is available, the court, not the arbitrator, should determine whether the agreement contemplates bilateral arbitration only, or whether the agreement also contemplates that class and/or representative claims may be pursued in the arbitration. (C.A. 4th, November 17, 2014.)

Willis v. Prime Healthcare Services, Inc. (2014) _ Cal.App.4th _ , 2014 WL 6065825: The Court of Appeal reversed the trial court's denial of a motion to compel arbitration in a class action alleging California Labor Code violations for failure to pay minimum wages, failure to pay all wages owed upon termination, and civil penalties for inaccurate wage statements. The arbitration clause was in the individual agreement, not the collective bargaining agreement. The Court of Appeal concluded the decision in *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332 did not permit it to refuse to enforce the arbitration clause in the individual agreement which was subject to the Federal Arbitration Act. (C.A. 2nd, November 14, 2014.)

Bunker Hill Park Limited v. U.S. Bank National Association (2014) _ Cal.App.4th _ , 2014 WL 6684796: The Court of Appeal reversed the trial court ruling denying a petition to compel arbitration regarding a disagreement over whether subleases would automatically terminate if the underlying lease between Bunker Hill and U.S. Bank terminated. The trial court denied the petition on the basis that the parties' disagreement had not ripened into a justiciable controversy meriting declaratory relief. The Court of Appeal disagreed. While ripeness is required in a judicial forum, the same restriction does not necessarily apply in an arbitral forum. Arbitration is a creature of contract, and the subject arbitration agreement was broad enough to provide for the arbitration of this dispute. The trial court

was directed to grant the motion to compel arbitration. (C.A. 2nd, November 26, 2014.)

Safari Associates v. Superior Court (Tarlov) (2014) _ Cal.App.4th _ , 2014 WL 6778396: The Court of Appeal reversed the trial court's order "correcting" an arbitration award of attorney fees. The arbitration provision in this case expressly provided that the arbitrator was empowered to award attorney fees to the prevailing party. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error. The definition of "prevailing party" contained in the Agreement was not a contractual limitation on arbitral powers of any kind. Because the trial court erred in correcting the award, a writ of mandate was granted directing the trial court to vacate its order and to conduct further proceedings on Safari's petition to confirm and enter judgment on the arbitration award. (C.A. 4th, December 2, 2014.)

Judge v. Nijjar Realty, Inc. (2014) _ Cal. App.4th _ , 2014 WL 7176531: The Court of Appeal dismissed an appeal from an order vacating an interim arbitration award. The interim award only determined that the class and representative claims were subject to arbitration. It did not rule on the merits of those claims. Because the order from which plaintiff appealed did not vacate a final arbitration award, it was not appealable. (C.A. 2nd, December 17, 2014.)

Wells Fargo Bank v. The Best Service Co., Inc. (2014) _ Cal.App.4th _ , 2014 WL 7175092: The Court of Appeal dismissed an appeal from the trial court's order denying a stay pending an arbitration. The moving party did not concurrently file a petition to compel arbitration. The denial of the stay motion, unaccompanied by a petition to compel arbitration or a pending arbitration, the trial court's order was a nonappealable interlocutory order. (C.A. 2nd, December 17, 2014.)

Ruiz v. Moss Bros. Auto Group, Inc. (2014) _ Cal.App.4th _ , 2014 WL 7335221: The Court of Appeal affirmed the trial court's denial of a petition to compel arbitration. The Court of Appeal concluded that Moss Bros. did not present sufficient evidence to support a finding that an electronic signature on its proffered arbitration agreement was the act of Ruiz. (See Civil Code section 1633.9; Evidence Code section 1400.) (C.A. 4th, December 23, 2014.)

Bower v. Inter-Con Security Systems, Inc. (2014) _ Cal.App.4th _ , 2014 WL 7447677: The Court of Appeal affirmed the trial court's denial of a petition to compel arbitration of a putative class action alleging failure to provide meal and rest breaks and other claims. The Court of Appeal observed that the rules regarding waiver of arbitration are similar under both Federal law and California law. The trial court properly ruled that Inter-Con waived its right to compel arbitration by engaging in class-wide discovery, and properly inferred from Inter-Con's actions that it made a tactical decision to resolve the matter on a class-wide basis in the judicial forum when the class size appeared to be small. (C.A. 1st, December 31, 2014.)

Montano v. The Wet Seal Retail, Inc. (2015) _ Cal.App.4th _ , 2015 WL 84677: The Court of Appeal affirmed the trial court rulings denying defendant's petition to compel arbitration and granting plaintiff's motion to compel discovery responses. The trial court properly ruled that plaintiff could not waive her PAGA claims (see *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348), and therefore the arbitration agreement's nonseverability provision made the entire agreement void and unenforceable. The trial court was not barred by Code of Civil Procedure section 1281.4 from ruling on the discovery motion, because that motion was decided after the petition to compel arbitration was denied. (C.A. 2nd, January 7, 2015.)

Attorney Fees

David S. Kartan Law Corporation v. Dougherty (2014) _ Cal.App.4th _ , 2014 WL 6065707: The Court of Appeal reversed the trial court's order awarding plaintiff \$1,161,565 in attorney fees and \$6,266.56 in costs as the prevailing party. The Court of Appeal found that because the arbitration panel and trial court both concluded that defendant had fully paid all fees owing to plaintiff, defendant was the prevailing party under Civil Code section 1717 and Code of Civil Procedure section 1032. (C.A. 2nd, November 14, 2014.)

Laffitte v. Robert Half International Inc. (2014) _ Cal.App.4th _ , 2014 WL 5470463: The Court of Appeal affirmed the class action settlement including attorney fees of approximately \$6.3 million. The trial court's method for calculating the attorney fees was proper, and the award was reasonable. Although the lodestar method is the primary method for calculating attorney fees, the percentage approach may be proper where there is a common fund. (C.A. 2nd, Filed October 29, 2014, published November 21, 2014.)

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2014) _ Cal.App.4th _ , 2014 WL 6488418: The Court of Appeal affirmed in part and reversed in part the trial court's rulings denying attorney fees to the prevailing defendants. The trial court properly denied defendants' attorney fees under the repurchase contract but improperly denied fees under the later option agreement. Because both parties shared in drafting the illegal repurchase agreement, the parties were in pari delicto, the repurchase agreement was entirely void and unenforceable, and the trial court properly denied defendants' motion to enforce the attorney fee clause in that agreement. However, defendants' successful novation defense entitled them to attorney fees as provided for in the later option agreement. (C.A. 1st, November 20, 2014.)

Civil Procedure

Squires v. City of Eureka (2014) _ Cal. App.4th _ , 2014 WL 6066117: The Court of Appeal affirmed the trial court's orders granting an Anti-SLAPP motion against plaintiffs' complaint alleging multiple causes of action against the City. Plaintiffs' causes of action arose from protected activity, and plaintiffs failed to demonstrate a probability of prevailing on the merits. (C.A. 1st, filed October 17, 2014, published November 14, 2014.)

Ben-Shahar v. Pickart (2014) _ Cal.App.4th _ , 2014 WL 6613616: The Court of Appeal affirmed the trial court's denial of defendants' anti-SLAPP motion to strike, and reversed and remanded the trial court's denial of plaintiff's request for attorney fees. Plaintiff's complaint was not directed at a protected activity because it was directed at defendants' acts constituting a purported breach of settlement agreements based on their conduct in failing to occupy plaintiff's apartment in a timely fashion as required by the Santa Monica Rent Control Ordinance. The Court of Appeal remanded for further consideration the issue of whether plaintiff was entitled to attorney fees on the basis that defendants' motion was frivolous or solely intended to cause unnecessary delay. (C.A. 2nd, filed October 31, 2014, published November 24, 2014.)

Drell v. Cohen (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court rulings denying defendants' anti-SLAPP motion and plaintiff's request for fees. Defendants represented a party in a personal injury case and then withdrew. Plaintiff was the subsequent lawyer who negotiated a

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 9

settlement. Plaintiff filed a complaint seeking declaratory relief regarding defendants' claimed attorney lien rights in the personal injury settlement. The trial court properly concluded the gravamen of the complaint was not protected activity. Plaintiff failed to cross-appeal the denial of his fee motion. Plaintiff's fees on appeal were denied because the Court of Appeal did not conclude the motion was frivolous or brought for the purpose of delay. (C.A. 2nd, December 5, 2014.)

Ardon v. City of Los Angeles (2014) _ Cal. App.4th _ , 2014 WL 6968719: The Court of Appeal affirmed the trial court's order denying the City's motions to compel plaintiff's counsel to return three privileged documents inadvertently produced in response to a Public Records Act (PRA) request, and to disqualify plaintiff's counsel. The Court of Appeal concluded that, under Government Code section 6254.5, disclosures pursuant to the PRA that are made inadvertently, by mistake or through excusable neglect are not exempted from the provisions of section 6254.5 that waive any privilege that would otherwise attach to the production. Plaintiff counsel's exercise of her statutory and constitutional rights to petition her government regarding a matter of public importance was entirely within the scope of permitted professional conduct, and there was no basis to disqualify her or any members of her law firm under

Rule of Professional Conduct 2-100. (C.A. 2nd, December 10, 2014.)

City and County of San Francisco v. Cobra Solutions, Inc. (2014) _ Cal.App.4th _ , 2014 WL 7146019: The Court of Appeal affirmed the trial court's order denying Cobra's motion in limine to exclude evidence "tainted" by the City Attorney's office because the motion was untimely. In 2003, the trial court granted Cobra's motion to disqualify the City Attorney from representing the City. In 2012, Cobra filed a motion in limine to exclude evidence "tainted" by the involvement of the City Attorney from 2003 to 2006 when independent counsel was hired to represent the City. The trial court properly denied the motion in limine. (C.A. 1st, December 15, 2014.)

Lennar Homes of California, Inc. v. Stephens (2014) _ Cal.App.4th _ , 2014 WL 7184219: The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion to strike. Lennar sued to enforce an indemnity agreement with home purchasers and seeking to recover fees and costs related to defending a class action brought by one of the defendants, and later joined by another defendant. The trial court properly ruled the cause of action was based upon protected activity. Moreover, Lennar could not demonstrate a probability of success. The indemnity agreement was unenforceable because it was procedurally and substantively unconscionable. (C.A. 4th, December 18, 2014.)

Petersen v. Bank of America (2014) _ Cal. pp.4th _ , 2014 WL 6990664: The Court of Appeal reversed the trial court's order sustaining a demurrer, without leave to amend, to plaintiff's third amended complaint for misjoinder of parties. Nine hundred sixty five (965) plaintiffs alleged that Countrywide Financial Corporation (later absorbed by Bank of America) in the mid-2000s improperly changed the normal game plan of a home mortgage lender from making a profitable loan that is paid back over time to a new game plan by which it would make profits by originating loans, then tranching them (chopping them up into little bits and pieces) and selling them on the secondary market to investors who would assume the risk the borrowers could not repay. The Court of Appeal concluded there were sufficient common questions of law and fact to satisfy Code of Civil Procedure section 378, including whether a mortgage lender had a duty to its borrowers not to encourage "high ball," dishonest appraisals and whether Countrywide had a deliberate strategy of placing borrowers into loans it "knew" they couldn't afford. (C.A. 4th, December 11, 2014.)

Hardy v. America's Best Home Loans (2014) _ Cal.App.4th _ , 2014 WL 7247385: The Court of Appeal reversed the trial court's order granting a motion for judgment on the pleadings. Because only California law claims were alleged in the current state court action, California law applied when ruling on the effect of a prior federal court



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dismissal of an action alleging both federal and state law claims. Under California law, collateral estoppel did not bar the state court action because the prior dismissal for failure to prosecute was not a final decision on the merits. (C.A. 5th, December 22, 2014.)

Mesa Shopping Center-East, LLC v. O Hill (2014) _ Cal.App.4th _, 2014 WL 7335226: The Court of Appeal reversed the trial court's order denying defendant's motion to vacate the plaintiff's dismissal of the action without prejudice. Because the court action and an arbitration proceeding were not separate proceedings, Code of Civil Procedure section 581 did not allow plaintiffs to dismiss the court action after the arbitrator had issued an interim award in favor of the defendants. The case was remanded for the trial court to rule on attorney fees. (C.A. 4th, December 23, 2014.)

Belle Terre Ranch, Inc. v. Wilson (2015) _ Cal. App.4th _, 2015 WL 167245: The Court of Appeal affirmed the trial court judgment for plaintiff in a boundary dispute action but reversed the award of attorney fees to plaintiff under Code of Civil Procedure section 1021.9. To recover fees under section 1021.9, there must be some tangible harm done to real or personal property as a result of the trespass. (C.A. 1st, January 13, 2015.)

Burdick v. Superior Court (Sanderson) (2015) _ Cal.App.4th _, 2015 WL 182297: The Court of Appeal reversed the trial court's order denying a motion to quash service of summons in a defamation action. Posting defamatory statements about a person on a Facebook page, while knowing that person resides in the forum state, is insufficient in itself to create the minimum contacts necessary to support specific personal jurisdiction in a lawsuit arising out of that posting. (C.A. 4th, January 14, 2015.) *Gonsalves v. Li* (2015) _ Cal. App.4th _, 2015 WL 164606: The Court of Appeal ruled the trial court erred in admitting request for admission evidence, and found that plaintiff's counsel committed misconduct on two occasions. The judgment was vacated, and the case was remanded for a new trial. Denials of requests for admission are not ordinarily admissible in trial. (C.A. 5th, January 13, 2015.)

J.B.B. Investment Partners, Ltd. v. Fair (2014) _ Cal.App.4th _, 2014 WL 7421609: The Court of Appeal reversed the trial court's ruling granting a motion for a judgment under Code of Civil Procedure section 664.6. A settlement agreement cannot be enforced under section 664.6 unless it is signed by all of the parties. Defendant Fair's printed name at

the end of an email, on the document sought to be enforced as a settlement, was neither an electric signature as required by the California Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.), nor did it constitute a signature under contract law. (C.A.1st, filed December 5, 2014, published December 30, 2014.)

Save Westwood Village v. Lusk (2015) _ Cal. App.4th _, 2015 WL 7263935: The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion to strike an action opposing the proposed construction of a conference center and guest center at UCLA. The trial court properly concluded the anti-SLAPP exception in Code of Civil Procedure section 425.17 did not apply to the claims against the Luskins or the UCLA Foundation. The trial court properly ruled the claims against the Luskins and the UCLA Foundation arose from protected activity. Appellants could not demonstrate a probability of prevailing because they had voluntarily dismissed the Luskins and the UCLA Foundation when the first amended complaint was filed. (C.A. 2nd, filed December 22, 2014, published January 15, 2014.)

Stofer v. Shapell Industries, Inc. (2015) _ Cal. App.4th _ : The Court of Appeal reversed the trial court's order granting summary judgment on a fraudulent concealment cause of action, and reversed the trial court's ruling regarding when the cause of action for design or construction defects accrued and who owned it. The summary judgment should have been denied because there were triable issues of material fact regarding whether Shapell fraudulently concealed information about the property's soil conditions. Because the material facts regarding accrual turned on disputed facts and required credibility determinations, a jury was required to make these factual findings before the trial court could decide whether the facts, as determined by the jury, established ownership of the causes of action as an issue of law. (C.A. 1st, January 15, 2015.)

Class Action

In re Walgreen Company Overtime Cases (2014) _ Cal.App.4th _, 2014 WL 5863193: The Court of Appeal affirmed the trial court's denial of a class certification motion in a meal break case. Because the trial court applied the proper criteria and analysis to analyze the motion, the deferential abuse of discretion standard of review applied. Plaintiff's motion was properly denied because plaintiff's proffered proof in the form of expert opinion, emails and declarations was inadequate. (C.A. 2nd, filed October 23, 2014, published November 13, 2014.)

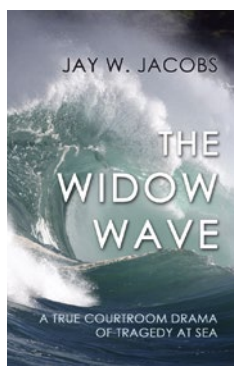
Martinez v. Joe's Crab Shack Holdings (2014) _ Cal.App.4th _, 2014 WL 5804110: The Court of Appeal reversed the trial court's denial of class certification after considering the recent decision of *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (Duran). Based upon the decisions in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531, and *Duran*, classwide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof. By refocusing its analysis on the policies and practices of the employer and the effect those policies and practices have on the putative class, as well as narrowing the class if appropriate, the Court of Appeal concluded that the trial court might find class analysis a more efficient and effective means of resolving plaintiffs' overtime claim. (C.A. 2nd, November 10, 2014.)

Hale v. Sharp Healthcare (2014) _ Cal. App.4th _, 2014 WL 2463652: The Court of Appeal affirmed the trial court's order decertifying a class action. Plaintiff brought a class action against Sharp Healthcare and Sharp Grossmont Hospital (together Sharp) contending Sharp unfairly charged uninsured patients more for emergency services than the fees it accepted from patients covered by private insurance or government plans. The trial court certified the class. After engaging in discovery, Sharp moved to decertify the class arguing a class action was inappropriate based on lack of ascertainability and lack of predominantly common issues. The trial court properly found there was no reasonable means to ascertain the members of class without individual inquiries of more than 120,000 patient records. Continued class treatment was not appropriate because individualized issues, rather than common issues, predominated, particularly with respect to whether or not class members were entitled to recover damages. (C.A. 4th, filed November 19, 2014, published December 5, 2014.)

Consumer Protection

Flannery v. VW Credit, Inc. (2014) _ Cal. App.4th _, 2014 WL 7174376: The Court of Appeal reversed the trial court's order sustaining a demurrer, without leave to amend, applying the doctrine of substantial compliance. Although the doctrine of substantial compliance has been employed when doing so avoids injustice and is consistent with the purposes of a particular statute, those considerations were not present here because VW failed to provide consumers with notice of their right to an appraisal upon

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The Widow Wave

BOOK REVIEW BY DAVID WADE

"You probably had a few lectures about 'full and fair discovery' in law school. That's a nice topic for professors and legal theorists in the faculty lounge, but not for a lawyer in trial. You keep in mind that when it comes to a trial you are a gladiator, and your client's interests come first, last, and always. It's a sacred trust. You and your client's case converge, becoming inseparable."

Jay W. Jacobs, the author of *The Widow Wave*, is a trial lawyer who salts his book with eye-brow-raising nuggets like the above quoted advice imparted to him by his Dad. This true trial story by the man who tried the case minces no words in describing the agony, exhilaration, stress, and utter exhaustion of trial work. If you try lawsuits, you will run into yourself on virtually every page of this book. Jacobs' narrative propels the reader along the time line of a single trial that originates in a catastrophic storm northeast of Hawaii out of which ocean swells pulsate 1,400 miles toward San Francisco, arriving just in time to meet the 34-foot private fishing boat, Aloha, as it is entering the Pacific Ocean through the Bonita Channel on a Salmon fishing trip. The vessel disappeared to the bottom of the sea without a trace, and all five aboard went with it. *The Widow Wave* wraps up 263 pages later as the courtroom door closes behind the last verdict-rendering juror.

Mr. Jacobs's prose nicely narrates the developing events. It does not intrude on the mind of the reader and never once interferes with a solid telling of the story. His writing style fits the book very comfortably. I still read books the old-fashioned way, and I did not want to put this one down. Never did I sense a lull in the action. Turning each page was a compelling search for what would happen next.

All the elements of a great trial story are here, too. The solo practitioner must face off with one of the most renowned and successful advocates at the California bar. The opposition's impeccably detailed preparation, perfect knowledge of the rules of evidence and disdain toward the author sets the battleground for the gladiators in the courtroom. Both sides must face the ultimate fact of the case that no one knows what happened to the Aloha; no one knows why it sank or, for that matter, where it sank. With no eyewitnesses to what actually occurred, the only reality for the jury in determining

whether the deceased, highly experienced captain negligently drove his vessel into an angry sea that morning must come from the opposing theories of the parties told through circumstantial evidence and expert testimony. The courtroom in essence has to become an alternate reality.

The author has a keen knack for subtly drawing out the personalities of the key players: the occasionally irascible trial judge; the expert witness who decides on the day of trial to wear a shiny green polyester suit; the lawyer whose witness has just reassessed the facts and given testimony from the stand never before discussed with trial counsel; the lay witnesses who go to great lengths to avoid service of a trial subpoena and resent having to be at the courthouse; the always conservatively attired client who appears on the first day of trial overly jeweled and sharply dressed. Mr. Jacobs also expertly draws the reader into the minds of the experts, the facts on which they rely, and the theories they develop. In a fascinating way, he brings us along with him as he learns from his experts about how waves are formed, grow, crest and disappear and how they are affected by tides and the encounter with sand bars that get in their way.

But at its heart, this is a story about the anatomy of a trial: it is about handling juries, stopping legal grandstanding, reversing course when a bad answer rings out from the witness stand; turning exhibits that hurt the case into winners at closing argument; amplifying your opponent's mistakes and turning them into solid gains; losing evidentiary battles; trying to manage the presentation of evidence to keep the attention of the jurors; and applying the basic rules of evidence to a gamut of circumstances from how to convince the judge to admit documentary hearsay to how to keep the court from striking your expert witness in the face of a competency objection. The amazing feat accomplished by Mr. Jacobs is that this book never turns pedantic when

delving into these trial maneuvers; they are tightly packed into the wonderfully woven tapestry of an exciting trial involving real people engaged in a living dramatic struggle.

The author's skillful presentation of mundane trial issues as part of a dramatic and compelling story caused me, more than once, to sit back and admire the development of his narrative. For example, arguments over jury instructions can hardly be considered the stuff of great literary significance. Yet, a major and recurring theme throughout *The Widow Wave* builds on Mr. Jacob's trial strategy to subvert his opponent's quest to convince the court to give a potentially game changing jury instruction. Putting aside whether he succeeds or fails in achieving the goal as the story moves to its climax, the wonder of it all is that he pulled me along with an unrelenting desire to know whether the instruction would be given. From my perspective, this was a book that ended way too soon. I wanted some more things to happen in the trial. It was fun second-guessing the trial strategies. I wondered why some objections were sustained or overruled, and I was amazed at why some objections were never made. Just as importantly, this story reconfirms for me the great principle I have been taught to stand by: that our adversary jury system is the best in the world for resolving disputes.

In short, this book is a great excursion into a real trial wrapped into all the trappings of real trial lawyers who, even though they are at the height of their professional acumen, still agonize over decisions they must make during trial and the impact they will have on the sacred trust to protect the client's interests. No work of fiction can ever beat that.

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On the Move

◆ BALESTRERI POTOCKI & HOLMES NAMES MATTHEW STOHL AS MEMBER

The law firm of Balestreri Potocki & Holmes is pleased to announce that Matthew Stohl has been named a Member of the firm. He joined the firm as an associate in 2006 and attained Senior Attorney status in 2013.



Stohl's practice focuses on the representation of property owners, developers, general contractors, design professionals, and subcontractors in business litigation, construction law, premises liability, and real estate matters.

He received his University of San Diego School of Law in 2001. He also holds an undergraduate degree in Political Science and Psychology from Southern Methodist University.

Stohl is a frequent speaker on issues concerning general contractors, subcontractors, and design professionals. He resides in San Diego and is an avid runner and cross-fitter. ◆

◆ SHEILA TREXLER IS THE 2015 PRESIDENT OF SAN DIEGO CHAPTER OF CAL-ABOTA

SDDL congratulates Sheila Trexler as the 2015 President of the San Diego Chapter of CAL-ABOTA. Sheila Trexler is a past San Diego Defense Lawyer of the Year and has been a shareholder at Neil, Dymott, Frank, McFall & Trexler APLC since 1993. Ms. Trexler's expertise includes medical and hospital malpractice and elder abuse matters. The American Board of Trial Advocates, known as ABOTA, is an invitation only organization of the finest lawyers and judges in America. ABOTA is an organization of attorneys representing both plaintiffs and defendants in civil cases. All of the attorneys who belong to ABOTA have earned great distinction at trial. ABOTA was created in 1958 to defend and preserve the rights granted to all Americans by the 7th Amendment to the Constitution, particularly the right to trial by jury. ABOTA also promotes professional education aimed at elevating standards of legal professionalism, integrity, honor and courtesy. ◆

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 11

early termination of their automobile leases in the language prescribed by Civil Code section 2987. (C.A. 4th, December 17, 2014.)

Lewis v. Jinon Corporation (2015) _ Cal. App.4th _ , 2015 WL 154166: The Court of Appeal affirmed the trial court's order sustaining a demurrer, without leave to amend, to a putative class action alleging violation of the Song-Beverly Credit Card Act of 1971. The prohibition against recordation of personal identifying information (a date of birth) in connection with a credit card transaction does not apply to the purchase of an alcoholic beverage under the plain language of Civil Code section 1747.08, subdivisions (a) and (c) (4). (C.A. 2nd, January 13, 2015.)

Construction

Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc. (2014) _ Cal. App.4th _ , 2014 WL 7250115: The Court of Appeal affirmed the trial court's denial of the contractor's motion for preliminary injunction regarding retention funds. A public entity owner that has entered into an agreement providing for a retention may unilaterally determine, before any judicial determination has been made, that a contractor has defaulted on its obligations under the construction agreement and draw on funds or securities held in a retention account. (C.A. 1st, December 22, 2014.)

Contracts

California Bank & Trust v. Del Ponti (2014) _ Cal. App.4th _ : The Court of Appeal affirmed the trial court's judgment for defendant guarantors. A guarantor's waiver of defenses is limited to legal and statutory defenses expressly set out in the agreement. A waiver of statutory defenses is not deemed to waive all defenses, especially equitable defenses, such as unclean hands, where to enforce the guaranty would allow a lender to profit by its own fraudulent conduct. (C.A. 4th, December 9, 2014.)

U.S. Bank National Association v. Yashouafar (2014) _ Cal. App.4th _ , 2014 WL 7175222: The Court of Appeal reversed the trial court's ruling regarding the prepayment obligation. The Court of Appeal concluded the documents should be interpreted so that the prepayment obligation only accrued upon payment and not on acceleration of the note. (C.A. 2nd, December 17, 2014.)

Employment

Diego v. Pilgrim United Church of Christ (2014) _ Cal. App.4th _ , 2014 WL 6602601:

The Court of Appeal reversed the trial court's summary judgment for defendant. Plaintiff adequately stated a cause of action for wrongful termination in violation of public policy. Public policy precluded defendant from retaliating against plaintiff based on defendant's mistaken belief that plaintiff had disclosed information to the Community Care Licensing Division of the California Department of Social Services regarding defendant's alleged violation of, or noncompliance with, state regulations applicable to preschools. (C.A. 4th, November 21, 2014.)

Ferrick v. Santa Clara University (2014) _ Cal. App.4th _ , 2014 WL 6748938: The Court of Appeal reversed the trial court's order sustaining a demurrer without leave to amend. The complaint adequately stated a cause of action for wrongful termination in violation of public policy, but on a very narrow basis. (C.A. 6th, December 1, 2014.)

West Hollywood Community Health and Fitness Center v. California Unemployment Insurance Appeals Board (2014) _ Cal. App.4th _ : The Court of Appeal reversed the trial court's ruling granting a motion to strike by defendant. An employer may obtain judicial review of a decision from the California Unemployment Insurance Appeals Board finding that an applicant for unemployment benefits was an employee, not an independent contractor. (C.A. 2nd, December 5, 2014.)

Duarte v. California State Teachers' Retirement System (2014) _ Cal. App.4th _ , 2014 WL 7139652: The Court of Appeal affirmed the trial court's denial of a petition for writ of administrative mandamus. The application for disability benefits had to be denied after Duarte refused to complete the independent medical evaluation ordered by the California State Teachers' Retirement System under Education Code section 24103(b). (C.A. 4th, filed November 18, 2014, published December 15, 14.)

Los Angeles Police Protective League v. City of Los Angeles (2014) _ Cal. App.4th _ , 2014 WL 6908020: The Court of Appeal affirmed the trial court judgment denying a petition for writ of mandate. The Public Safety Officers Procedural Bill of Rights Act (Government Code, section 3300 et seq.) does not afford officers the right to an administrative appeal of a transfer of assignment, which does not affect compensation or other specified rights, solely because the transfer may lead to negative employment consequences, or upon the officer's belief to that effect. As the statute specifically requires, the transfer must be for

purposes of punishment. (C.A. 2nd, December 9, 2014.)

Swanson v. Morongo Unified School District (2014) _ Cal. App.4th _ , 2014 WL 6694138: The Court of Appeal reversed the trial court's order granting summary judgment for defendant. Plaintiff established a triable issue of material fact on her discrimination claim by presenting evidence supporting her theory the District changed her teaching assignments and failed to provide her the resources needed to succeed so it would have a basis for not renewing her contract. On the failure to accommodate claim, the District did not meet its initial summary judgment burden because it failed to show the second grade assignment Swanson sought was not a reasonable accommodation, or that the fifth grade or kindergarten assignments the District offered were reasonable accommodations. (C.A. 4th, filed on November 26, 2014, published on December 23, 2014.)

Satyadi v. West Contra Costa Healthcare District (2014) _ Cal. App.4th _ , 2014 WL 7449256: The Court of Appeal reversed the trial court's order sustaining a demurrer to plaintiff's retaliation complaint for failure to exhaust administrative remedies. Amended Labor Code sections 244(a) and 98.7(g), which merely clarified existing law, applied to this case and required reversal of the trial court's judgment. (C.A. 1st, December 31, 2014.)

Evidence (Attorney-Client Privilege)

Palmer v. Superior Court (Mireskandari) (2014) _ Cal. App.4th _ , 2014 WL 6662053: The Court of Appeal granted in part a writ petition challenging the trial court's order compelling production of in-firm attorney communications. When an attorney representing a current client seeks legal advice from an in-house attorney concerning a dispute with the client, the attorney-client privilege may apply to their confidential communications. Adoption of the so-called "fiduciary" and "current client" exceptions to the attorney-client privilege is contrary to California law because California courts are not at liberty to create implied exceptions to the attorney-client privilege. (C.A. 2nd, November 25, 2014.)

Insurance

Elliott v. Geico Indemnity Company (2014) _ Cal. App.4th _ , 2014 WL 6466952: The Court of Appeal affirmed the trial court's summary judgment in favor of Geico in a wrongful death action because plaintiff recovered more than Geico's \$100,000 underinsured policy limit. Plaintiff's husband was killed when his motorcycle was struck by a drunk driver

returning home from her job at a restaurant and bar. The driver's carrier paid \$15,000, and the bar and restaurant's carrier paid \$250,000 to settle the claim. The drunk driver had consumed alcohol during her work before the accident. The Court of Appeal found the Geico policy unambiguously allowed Geico to deduct from the underinsured motorist coverage limits "the amount paid to the insured by or for any person or organization that may be held legally liable for the injury." Geico owed nothing after it properly deducted the \$265,000 in settlement payments from the underinsured motorist coverage limits. (C.A. 3rd, November 19, 2014.)

Graciano v. Mercury General Corporation (2014) _ Cal.App.4th _, 2014 WL 5860297: The Court of Appeal reversed a judgment for plaintiff for bad faith denial of a policy limit settlement demand, and directed the trial court to instead enter judgment in favor of defendants. Eleven days after the accident plaintiff's attorney sent a policy limit demand letter to the carrier with a ten-day time limit. The letter identified the incorrect driver of the car. The carrier initially determined the driver identified by counsel did not have coverage. However, on the tenth day after the demand letter, the carrier confirmed another insured person was the driver, they had \$50,000 of coverage, and approved a policy limit settlement offer. The adjuster was not able to get plaintiff's counsel on the phone that day to orally convey the offer, was not able to fax the offer to counsel because counsel had turned off her fax machine, and mailed the policy limit offer to counsel. The Court of Appeal concluded there was no evidence to support the verdict that the carrier acted in bad faith by unreasonably failing to settle the claim. (C.A. 4th, filed October 17, 2014, published November 12, 2014.)

Stephens & Stephens XII, LLC v. Fireman's Fund Insurance Co. (2014) _ Cal.App.4th _, 2014 WL 6679263: The Court of Appeal reversed the trial court's judgment notwithstanding the verdict for defendant. The trial court concluded that neither plaintiff's award for the cost of repairing the still unrepaired building, nor the award for loss of business income, were covered under the policy. The Court of Appeal ruled that plaintiff was entitled to a conditional judgment awarding repair costs if the repairs are actually made, and it also upheld the award for lost business income because it was properly construed as an award for compensable lost rent. Finally, the Court of Appeal concluded there were insufficient grounds to proceed with a new trial. (C.A. 1st, November 24, 2014.)

Medical Malpractice

Blevin v. Coastal Surgical Institute (2015) _ Cal.App.4th _, 2015 WL 138218. The Court of Appeal affirmed the jury verdict for plaintiff that was reduced by the trial court to \$285,114. Insurance Code section 11583, which provides that the applicable statute of limitations is tolled when an advance or partial payment is made to an injured and unrepresented person without notifying him of the applicable limitations period, applies to the one-year statute of limitations for medical malpractice actions. (C.A. 2nd, January 12, 2015.)

Real Property (Leases)

Grand Prospect Partners, L.P. v. Ross Dress For Less, Inc. (2015) _ Cal.App.4th _, 2015 WL 161160: The Court of Appeal reversed part of a jury verdict for plaintiff landlord awarding it \$672,100 for unpaid rent and \$3.1 million in other damages from the lease termination. The lease provisions conditioned Ross' obligation to open a store and pay rent on Mervyn's operating a store in the shopping center on the commencement date of the lease, and also granted Ross the option to terminate the lease if Mervyn's ceased operations and was not replaced by an acceptable retailer within 12 months. The opening cotenancy condition was not satisfied because Mervyn's filed for bankruptcy and closed its store in 2008. As authorized by the lease, Ross took possession of the space, never opened for business, never paid rent, and terminated the lease after the 12-month cure period expired. The Court of Appeal concluded that the rent abatement provision was an unenforceable penalty, but the termination provision was not. The judgment was modified to award damages for only the unpaid rent of \$672,100. (C.A. 5th, January 12, 2015.)

Torts

Scott v. C. R. Bard, Inc. (2014) _ Cal.App.4th _, 2014 WL 6475366: The Court of Appeal affirmed the judgment for plaintiff for defendant's negligence in manufacturing and selling polypropylene mesh kits to treat women with pelvic organ prolapse. The Court of Appeal concluded that the trial court properly gave three jury instructions on negligence regarding negligent design, the basic standard of care, and the standard of care for a product designer. (C.A. 5th, November 19, 2014.)

Izell v. Union Carbide Corporation (2014) _ Cal.App.4th _, 2014 WL 6604052: The Court of Appeal affirmed the trial court judgment for plaintiff of \$6 million in compensatory damages (after reduction by the trial court) and \$18 million in punitive damages for plaintiff's exposure to asbestos and subsequent diagnosis with mesothelioma. The Court

of Appeal concluded the evidence was sufficient to support the verdict, as well as the compensatory and punitive damage awards. (C.A. 2nd, November 21, 2014.)

Regent Alliance Ltd. v. Rabizadeh (2014) _ Cal.App.4th _, 2014 WL 6661557: The Court of Appeal reversed the trial court's summary judgment for defendants in an action for conversion. The trial court granted the motion because it concluded defendants had purchased the goods for value and in good faith, without actual or constructive notice that the goods had been converted. The Court of Appeal reversed because bona fide purchasers of converted goods are ordinarily liable for conversion. The trial court was directed to enter a new order denying the motions. (C.A. 2nd, November 25, 2014.)

Annocki v. Peterson Enterprises, LLC (2014) _ Cal.App.4th _, 2014 WL 6852964: The Court of Appeal reversed the trial court's order sustaining a demurrer, without leave to amend plaintiffs' complaint alleging negligence against a restaurant for failing to warn patrons about the dangerous condition of the Pacific Coast Highway. Plaintiffs made a sufficient showing of additional facts that may be alleged to establish that, although defendants did not and could not control conditions on the highway, defendants had a duty to warn patrons leaving the restaurant that only a right turn could safely be made from the restaurant's exits. (C.A. 2nd, filed November 14, 2014, published December 5, 2014.)

J. P. v. Carlsbad Unified School District (2014) _ Cal.App.4th _, 2014 WL 7012111: The Court of Appeal affirmed the trial court judgment for plaintiffs in an action for the molestation of two minors by an elementary school teacher. The trial court properly applied the doctrine of equitable estoppel regarding the filing of government tort claims against the school district. (C.A. 4th, filed November 19, 2014, published December 12, 2014.)

State Ready Mix, Inc. v. Moffatt & Nichol (2015) _ Cal.App.4th _, 2015 WL 109869: The Court of Appeal upheld the trial court's order sustaining a demurrer, without leave to amend, to a cross-complaint for indemnity and contribution. State was sued for preparing a bad batch of concrete used to construct a pier. State cross-complained against the civil engineer. The cross-complaint was barred by the economic loss rule. (Aas v. Superior Court (2000) 24 Cal.4th 627, 643.) State could not seek equitable indemnity or contribution for damages caused by the breach of its own contract. (Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group (2006) 143 Cal. App.4th 1036, 1041-1044.) (C.A. 2nd, January 8, 2015.) ♦

Insurance Law Update

By James M. Roth

THE ROTH LAW FIRM, APC

As we conclude 2014 and move into 2015, the courts have reinforced the maxim the good facts do, indeed, make good case law.

A FORM ACCOMPANYING A POLICY EXPLAINING UNDERINSURED MOTORIST COVERAGE AND NOT IDENTIFIED IN THE POLICY DECLARATIONS DOES NOT MODIFY UNAMBIGUOUS POLICY TERMS.

In the case styled *Elliott v. Geico Indemnity Company* (2014) 231 Cal.App.4th 789; 180 Cal.Rptr.3d 331, the Court of Appeal, Third District, held that a form purporting to explain an insurance policy's uninsured/underinsured motorist ("UM/UND") coverage, which was provided to the insured with the policy, was not a part of the policy and thus was not binding to the extent that it described coverage exceeding the coverage provided in the policy itself.

Christina Elliott's ("Elliott") husband was riding his motorcycle when he was struck and killed by an oncoming truck, driven by a drunk driver, Lesa Shaffer ("Shaffer"). At the time of the accident, Shaffer was returning home from her job at a local restaurant/bar, Peterson's Corner. Elliott sued Shaffer and Peterson's Corner for wrongful death. She recovered the \$15,000 automobile policy limit from Shaffer's insurer and \$250,000 from Peterson Corner's general liability insurer. Elliott then sought UM/UND benefits under her Geico Indemnity Company ("Geico") motorcycle policy. The Geico policy had a \$100,000 UM/UND coverage limit. Elliott's claim was for \$85,000, which represented the difference between the recovery on Shaffer's policy and the underinsured motorist coverage limit of \$100,000. Geico denied the claim on the ground that the policy language unambiguously allowed it to reduce the available limits by Elliott's recovery from Peterson's Corner as well as from Shaffer. The policy language on which Geico relied allowed a deduction from the underinsured motorist coverage limits for amounts paid to the insured "by or for any person or organization that may be held legally liable for the injury." Since Elliott recovered \$265,000 (\$15,000 from Shaffer and \$250,000 from Peterson's Corner), an amount greater than the \$100,000 underinsured motorist coverage, Geico claimed she was not entitled policy benefits.

Elliott sued Geico for breach of contract

and bad faith. She argued that a document she received with the policy purporting to explain UM/UND benefits entitled her to coverage. The document provided that the UM/UND portion of the Geico's policy "pays the difference between [her UM/UND] limits and the at fault driver's Bodily Injury limits based on the amount of [Elliott's husband's] injuries." Based on this language, Elliott maintained Geico could deduct only the \$15,000 recovered from Shaffer, who was the person "at fault" for the accident.

In rejecting Elliott's argument, the appellate court explained that the 20-page policy included the following declaration: "By accepting this policy, you agree that: [¶] ... [¶] c) this policy, along with the application and Declaration sheet, embodies all agreements relating to this insurance." The two-page declaration sheet identified a single endorsement and set forth the coverages, policy limits, and deductibles contained in the policy. The endorsement listed on the declaration sheet was found on a single page immediately following the 20-page policy and amended the policy to include towing coverage. By accepting the policy, Elliott agreed these documents, along with her application, would constitute the entirety of her contract with Geico relating to the subject insurance. The UM/UND form relied upon by Elliott was not one of the documents listed in the policy as part of the insurance contract, but was added to provide a description of the policy in compliance with various provisions of the Vehicle Code. Based upon the above, the appellate court concluded that the UM/UND form was not part of the Geico policy.

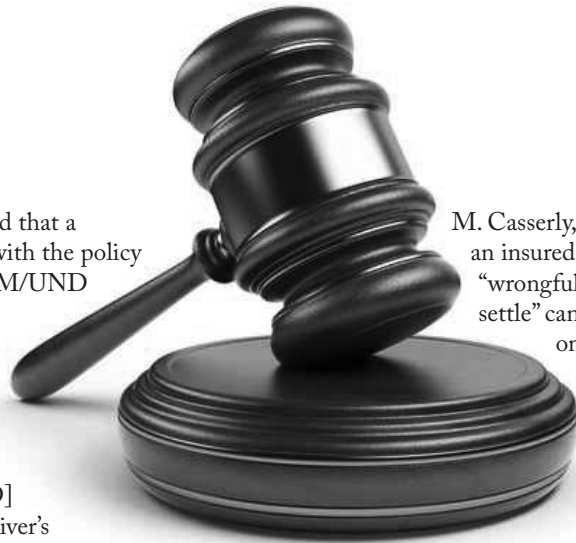
A DEFECTIVE POLICY LIMIT DEMAND PRECLUDES LIABILITY FOR BAD FAITH FOR AN INSURER'S FAILURE TO SETTLE.

In the case styled *Graciano v. CAIC General Corporation* (2014) 231 Cal.App.4th 414; 179 Cal.Rptr.3d 717, Justice Alex McDonald (along with the concurrences of Presiding Justice Richard Huffman and Justice Terry O'Rourke) for the Court of Appeal, Fourth District, Division 1, reversed Judge Timothy

M. Casserly, holding that an insured's claim for "wrongful refusal to settle" cannot be based on his or her insurer's failure to initiate settlement overtures with the injured third party, but instead

requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits.

California Automobile Insurance Company ("CAIC") first learned of the car accident out of which this bad faith suit arose from its insured, Saul Ayala ("Saul") three days after the accident. Based on the information provided by Saul, CAIC's adjuster determined that Saul's liability would likely exceed policy limits. CAIC opened a claim file based on a policy that was in force on the date of loss, although it did not know at that point the name of the claimant. CAIC learned the name of the claimant, Sonia Graciano ("Graciano") three days later, when counsel for Graciano called CAIC's Texas call center to report the loss. The attorney did not, however, provide CAIC with the information needed to link Graciano with the file set up based on Saul's report of the accident three days earlier. The attorney gave the number for a canceled policy that had been issued to Saul's father, which had also insured the vehicle and which was listed in the police report. The attorney also misstated the driver's name, all of which resulted in a second claim file being opened in a different claim unit. Shortly thereafter, Graciano's attorney sent a policy limits demand letter, again listing the number of the canceled policy. The demand letter also identified Saul's father as the named insured and demanded the policy limit to settle all claims for injuries "arising out of an event in which your above-referenced insured and/or their vehicle struck [Graciano]." The letter stated that the offer to settle within policy limits would expire in ten days and would not be renewed. CAIC received the police report the day before it received the demand letter. Although the police report correctly identified Saul as the driver, it listed the cancelled policy issued to Saul's father rather than Saul's



policy. Consequently, CAIC's investigation focused on whether Saul might have coverage under his father's policy. CAIC asked for an extension of time to complete its investigation, but Graciano's counsel refused to extend the deadline beyond the ten-day limit. CAIC therefore denied coverage the day before the offer was set to expire on the ground that the policy was not in force at the time of the accident. However, the next day, while the offer was still in effect, CAIC's adjuster figured out the errors and attempted to settle for the limit of Saul's policy. Specifically, the adjuster left a voice mail for the attorney stating CAIC's willingness to settle. The adjuster also attempted to send the attorney faxes but her fax machine was switched off. Finally, CAIC sent her a letter offering to pay the policy limits, conditioned on releases of all claims and satisfaction of any emergency healthcare liens. That offer was rejected.

After obtaining a \$2 million judgment and an assignment of Saul's rights, Graciano sued CAIC for the bad faith failure to settle. The jury returned a verdict in Graciano's favor. CAIC appealed.

An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof that the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure. A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. However, when a liability insurer timely tenders its "full policy limits" in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law.

Applying the statement of the law, above, the appellate court explained that an insured's claim for "wrongful refusal to settle" cannot be based on his or her insurer's failure to initiate settlement overtures with the injured third party, but instead requires proof that the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. Based upon the

sequence of events giving rise to this suit, the appellate court concluded that there was no substantial evidence Graciano ever offered to settle her claims against Saul for an amount within Saul's policy limits.

EQUITABLE CONTRIBUTION AMONG GENERAL LIABILITY INSURERS WILL NOT APPLY WHEN THE POLICY TO WHICH THE INDEMNIFICATION CLAIM IS MADE ONLY AGREED TO COVER LIABILITY ARISING FROM THE NAMED OR ADDITIONAL INSURED'S ACTS OR OMISSIONS AND THE INJURY RESULTED EXCLUSIVELY FROM THE NEGLIGENT ACTS OR OMISSIONS OF A PARTY NOT A NAMED INSURED.

In the case styled *National Fire Ins. Co. of Hartford v. Travelers Property Cas. Co.* (January 23, 2015) 2015 WL 350558, District Judge Cynthia Bashant of the United States District Court, S.D. California, held that equitable contribution among general liability insurers will not apply when the policy to which the indemnification claim is made only agreed to cover liability arising from the named or additional insured's acts or omissions and the injury resulted exclusively from the negligent acts or omissions of a party not a named insured.

National Fire Insurance Company of Hartford ("Hartford") filed a Complaint against Travelers Property Casualty Company of America ("Travelers"), alleging that Travelers owed an equitable contribution to the settlement paid and attorneys' fees accrued by Hartford during Hartford's coverage of a personal injury claim. Hartford's insured, Coastline, owned and operated a Wendy's franchise. SSA, Travelers's insured, was a Distributor to Coastline. SSA's employee, Tony Muro, injured himself when he slipped and fell while making a delivery to Coastline's Wendy's restaurant. Hartford, as Coastline's commercial general liability insurer, defended the action and then settled it. During the suit, Coastline tendered the defense and indemnity of the action to SSA, on behalf of Coastline and Hartford, pursuant to a Distributorship Agreement. Travelers reviewed the tender and the policy and determined it owed no coverage because Coastline "is not named, nor does it qualify as an Additional Insured." As a result, after Hartford settled the underlying suit, Hartford filed this suit against Travelers alleging Hartford was owed an equitable contribution to the indemnity and defense, pursuant to the Distributorship Agreement.

Under SSA's policy with Travelers, "Additional Insureds" and "Named Insureds" were entitled to differing coverage. "Additional Insureds" were defined as "any persons or entity with whom you have agreed in a written contract, executed prior to loss to name as an additional insured, but only for the limits agreed to in such contract or the limits of insurance of this policy, whichever is less." A "Named Insured" was defined as "any and all past, present or hereafter formed or acquired subsidiary companies, firms, corporations, limited liability corporations, joint ventures or organizations which are owned, financially controlled, under management control; or for which you are obligated to provide insurance."

The District Court found that based on a reasonable reading of the language of the Distributor Agreement, Coastline seems to have intended to require SSA to secure general liability insurance for all causes of action, including but not limited to negligence, "occurring as a result of the use, delivery or other utilization of any product, or sold, delivered or transferred by Distributor pursuant to this Agreement." However, that Agreement may exclude liabilities "caused by the negligence, wrongful acts or omissions of Wendy's or its subsidiaries, affiliates" from indemnification. Ultimately, however, as SSA was not a party to the Muro suit, the District Court looked to Travelers's agreement with SSA to determine liability in this case. While SSA may have been obligated to provide coverage to Coastline for any personal injury, including those resulting from Coastline's negligence, SSA did not obtain any such insurance from Travelers.

Travelers' contract with SSA agreed to cover Additional Insureds, such as Coastline, "only for the limits agreed to in such contract or the limits of insurance of this policy, whichever is less." Because the Additional Insured provision explicitly extended Additional Insured coverage "only with respect to liability arising out of your acts or omissions [,]" coverage under this provision cannot extend to liability resulting from Coastline's negligence.

The District Court concluded that because Travelers only agreed to cover liability arising from SSA's acts or omissions and the injury in this case resulted exclusively from Coastline's negligent acts or omissions, Travelers owes no equitable contribution to the defense or to indemnify Coastline. ♦

15 Tips in a Defense Medical Records Review

By Barbara Haubrich
Hass, ACP/CAS

In every personal injury action, the plaintiff will have incurred an injury, whether physical or emotional. It is the job of a defense attorney to attack the validity of the injuries, damages, or causation of the injuries in order to lower the value of the plaintiff's claim.

One way for a defense attorney to accomplish this is to subpoena the medical records of the plaintiff relating to the injuries sustained in the incident. Upon receipt of the plaintiff's medical records, a thorough review of the records will be conducted to chronicle the injuries and treatment, and to look for any defenses that can be applied.

A thorough medical records review can ultimately result in legal defenses that can attack the injuries and damages claimed by a plaintiff. The records will contain the expected information, such as the physical complaints, findings, diagnosis, and prognosis. Providing a chronicle of the injuries and treatment is important so that the attorney is prepared to take the plaintiff's deposition. However, the ultimate goal is to find those nuggets of information that can be used to support a defense that the injury was pre-existing or that the incident did not cause the injuries claimed.

Below are 15 tips to help you provide a thorough defense medical records review:

1. Organize the Records: Organize the records before you start your review. Separate the records by medical provider, and then in chronological order. This will help confirm that you have obtained all of the medical records, and whether there are any missing records.

2. Tab Important Reports: Before you begin your review, grab a stack of note tabs. As you go through the medical records tab all of the important reports. In hospital records, you may find an emergency room report, medical history, discharge summary, surgical report, toxicology report, or radiology reports.

3. Take One Examination

at a Time: Reviewing volumes of medical records can be daunting. Don't let it overwhelm you! Review each medical provider separately, and then in chronological order. Take one examination at a time and provide the appropriate notes per medical visit. In the end, you will have accumulated a thorough summary of the medical treatment rendered to the plaintiff.

4. Check for any Missing Records: Once the records are organized, note whether there are any missing records. One way to do this is to compare the itemized bills from a medical provider to the actual medical records received. If there is a charge on the bill that you do not have records for, then you are most likely missing the records related to that charge. Another way to do this is to determine whether the plaintiff was referred for other treatment, such as physical therapy, diagnostics, or to a medical specialist that you do not have the records from. If there are missing records, it is important to immediately subpoena those records so that the attorney has all of the records prior to the plaintiff's deposition.

5. Note if the Treatment is Final or Still

Pending: It is important to note whether the treatment is final or whether the plaintiff is still treating with that medical provider. The reason this is important is because if the plaintiff is still treating with that provider, you will need to follow-up with a later subpoena to obtain the current records.

6. Note Any Missed Appointments: As you read through the records, the medical provider will note whether the plaintiff missed an appointment. If the records show consistent missed appointments, this is an indicator that the injury is not as severe as claimed.

7. Note Any Gaps in Treatment: Gaps in treatment are important to note. For example, if the incident occurred on June 1st, but the plaintiff did not seek initial treatment until



July 1st, that is significant in showing that the injury was not caused by the incident or that the injury is not as severe as claimed. Another example is that the plaintiff finished physical therapy on July 1st, but did not go back to the referring doctor for follow-up until the following year in February, but still complained of pain.

8. Discrepancies: Any discrepancies between the subjective complaints of the plaintiff and the objective findings upon examination are important to note. The doctor's report or handwritten notes may indicate that the plaintiff is a malingerer or outright lying.

9. Pre-Existing Injuries: Pay careful attention to a doctor's history of a patient, or any records obtained showing any treatment that occurred prior to the incident. Any pre-existing injuries or complaints to the same area of the body that the plaintiff failed to disclose in discovery is significant. This will show that the plaintiff is lying about the injuries sustained in the incident, or show that the incident did not cause the totality of the injuries claimed.

10. How the Incident Occurred: Emergency room records or a doctor will take a history from the plaintiff and include in that history how the injury occurred. Note any discrepancies in the medical records of how the incident occurred to what the plaintiff has testified to in a deposition or incident report. If there are discrepancies, this is worth including in the medical summary.

11. Re-Injury: There are times when a plaintiff will be involved in another incident that re-injures the same area of the body, and then fails to disclose it. Any re-injury to the same area of the body after the initial incident is significant to include in a medical summary.

12. Exacerbating Activity: Sometimes a plaintiff will participate in activities that may exacerbate a plaintiff's injuries. For example, if a plaintiff has a low back injury, but participates in barrel horse racing every weekend, is a significant activity that

Case Title: David Zimmermann v. Wawanesa General Insurance Co.

Case Number: BC 502865

Judge: Hon. Richard Rico

Plaintiff's Counsel: Steve Hoffman and Greg Byberg

Defendant's Counsel: Kenneth N. Greenfield (Law Offices of Kenneth N. Greenfield)

Type of incident/Causes of Action: Insurance Bad Faith arising from an Underinsured Motorist Coverage Claim

Settlement Demand: \$249,999 (Code Civ. Proc., § 998.)

Settlement Offer: \$1,001 (Code Civ. Proc., § 998.)

Trial Type: Jury

Trial Length: 6 days

Verdict: 12-0 Defense

could exacerbate an injury. Any activity by the plaintiff that exacerbated the initial complaints should be included in a medical summary.

13. Intoxication: Emergency room records may contain toxicology reports, or be included in other records, indicating that the plaintiff was under the influence of drugs or alcohol at the time of the incident.

14. Seatbelt: If the incident involved was a motor vehicle collision, pay attention to whether the plaintiff was wearing a seatbelt. This information can also be found in the police report. If the plaintiff was not wearing a seatbelt, an argument can be made that the injuries would have been reduced had the plaintiff been wearing a seatbelt.

15. Other Contributing Ailments: Look to see whether other medical conditions may have contributed to the incident. For example, if a client slipped and fell, but suffered from ongoing vertigo (dizziness), that would be significant to investigate as to whether that contributed to the fall.

Barbara Haubrich-Hass, The California Litigator, publishes a blog that delivers simple discussions and strategies for the California civil litigation professional. Barbara's discussions focus on practical paralegal and law office tasks. More information is available at www.thecalifornialitigator.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 course of the last year or so an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the *Update* is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the *Update*.

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

The 100% Club

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

The 10 law firms with the highest SDDL membership

- The Lorber, Greenfield & Polito, LLP – 29 members
- Neil, Dymott, Frank, McFall & Trexler, APLC – 19 members
- Tyson & Mendes LLP – 17 members
- Grimm Vranjes & Greer LLP – 16 members
- Balestreri Potocki & Holmes – 11 members
- Butz Dunn & DeSantis – 11 members
- Wilson Elser Moskowitz Edelman & Dicker LLP – 10 members
- Wingert, Grebing, Brubaker & Juskie, LLP – 9 members
- Farmer Case & Fedor – 9 members
- The Law Offices of Lincoln, Gustafson & Cercos, LLP – 9 members ♦



SDDL Board of Directors: (from left to right) Colin Harrison, Robert Mardian, Ben Cramer, Patrick Kearns, Dianna Bedri (Executive Director), Sasha Selfridge, Ken Purviance, Andrew Kleiner, Gabriel Benrubi, Eric Dietz and Stephen Sigler

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