SAN DIEGO DEFENSE LAWYERS

THE UPDATE

WINTER 2017

Sub Rosa – Is Disclosure Required?

By Kyle Pederson
TYSON & MENDES

Introduction

One of the most common issues presented early in litigation for insurance firms is under what circumstances defense counsel is required to disclose surveillance. Often times, before a case is referred to an attorney, surveillance of the claimant has already been performed. Is this surveillance discoverable? Is it covered under the work-product doctrine or the attorney-client privilege? As is almost always the case in the world of law, it depends!

General Discovery Rule

Under California law, "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) For discovery purposes, information is relevant if it " might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement...." (Weil & Brown, Cal.Practice Guide: Civil Procedure Before Trial (Rutter 1994) Discovery, ¶ 8:66.1, p. 8C–1.) Admissibility is *not* the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 301.) These rules are applied liberally in favor of discovery (*Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790), and (contrary to popular belief), fishing expeditions are permissible in some cases. (*Greyhound Corp. v. Superior Court (*1961) 56 Cal.2d 355, 385 although fishing may be improper or abused in some cases, that "is not of itself an indictment of the fishing expedition per se "].)

The purpose of surveillance is to attack a plaintiff's credibility by capturing plaintiff engaged in an unexpected activity or an exaggeration of claimed injuries. Therefore, surveillance is surely relevant. The issue then becomes whether this surveillance needs to be produced in discovery, or in other words, whether the surveillance is covered under the work product doctrine or the attorney client privilege.

Work Product Doctrine

California's work-product doctrine is intended to further two fundamental interests: "It is the policy of the state to do both of the following: (a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020.)

The Discovery Act refers only to the

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IN THIS ISSUE

President's Message

By Stephen T. Sigler
NEIL DYMOTT

The year has come to an end, and I want to thank our members for making it such a huge success. In September we held the 17th Annual San Diego Defense Lawyer's Golf Tournament and Juvenile Diabetes Research Foundation Benefit. Thank you for the great turnout. We forget how spoiled we are to live in San Diego, but a day spent in Coronado walking a beautiful golf course along the beach really has a way of reminding you how lucky we are. As in past years, our lawyers, clients and of course our sponsors really helped to make this year's event both memorable and fun. Ben Cramer gets a special thank you for making the event run so smoothly and I know many of our golfers have already started asking for a possible return to Coronado next year.

Since our last Update, we also held our Annual Tailgate and Padres Game. Mission Brewery provided a great venue right next to the Padres and a good time was had by all. In addition to our members who went to the Padres game, we were also able to donate a number of tickets to the South Bay Boys and Girls Club.

In October, we held our annual SDDL's Annual Mock Trial Competition. Congratulations to California Western School of Law for repeating as champions again this year. Thank you to our presenting sponsor, Judicate West, and thank you to everyone who volunteered to be judges at the competition. Year in and year out, without fail, you make the time to show up, listen and provide the students with valuable feedback. The Mock Trial competition would not be possible without the generosity of our members. Thank you.

Our members support is also greatly appreciated with our ongoing Lunch and Learn and Evening MCLE programs. We have had some strong turnouts for our recent events and we have a number of presentations still to come. This is always focal issue for SDDL. Thank you to Elizabeth Skane, Administrative Law Judge A. Michael Cutri, Dr. Andrew R. Robbins/Christopher W. Todd, Kate Kowalewski, Kelly D. Gemelli, Bill Wilson/Colin Harrison, Matthew S. Levinson, Jon Landerville/David Daren, Dawn Phleger, Hon. Linda Quinn, Ret., Hon. Herbert B. Hoffman, Ret. And Robert W. Frank. Each of these individuals took time away from their practices to speak with our members for nothing more than our speaker memento and our thanks. ◆

Don't Forget to Get Your Tickets!
San Diego Defense Lawyers'
23rd Annual Installation Dinner
January 28, 2017

Purchase Online at:
www.sddl.org/events/
sddlinstallationdinner2017info.htm

MEMBERSHIP INFORMATION

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: sddl.org

THE UPDATE

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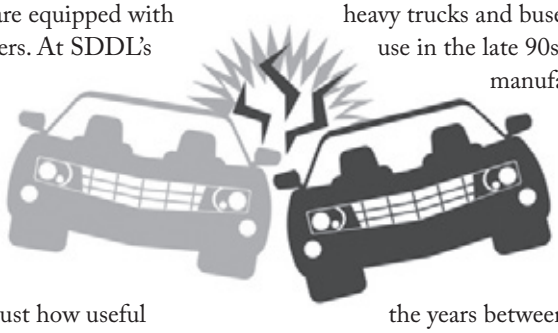
LUNCH AND LEARN

Automotive Event Data Recorder Systems & Uses:

A TECHNICAL AND LEGAL DISCUSSION

By E. Kenneth Purviance
HUGHES & NUNN

Most of us realize that these days automobiles are equipped with mini-computers. At SDDL's September Lunch and Learn, Jon B. Landerville and David J. Daren of Momentum Engineering Corporation provided a look into just how useful data from these mini-computers can be in reconstructing automobile accident. Both gentlemen are accomplished accident reconstruction experts. Mr. Landerville holds a Bachelor of Science in Mechanical Engineering from C.S.U. Long Beach and a Masters in Mechanical Engineering from U.S.C. Mr. Daren holds an B.S.M.E. from the University of Alberta. Each expert has worked in the accident reconstruction field for over 25 years, and between them, have conducted over 5,000 forensic engineering investigations.



Mr. Daren explained that modern automobiles, some motorcycles and some light trucks and buses are equipped with one or more "EDRs," i.e. Event Data Recorders. These systems may be incorporated into Airbag Control Modules ("ACMs"), the Powertrain Control Modules, or Rollover Sensors. They record data in split second increments for a few seconds before and after events which are either significant enough to "wake-up" vehicle sensors but not severe enough to require airbag deployment, or which are so significant that airbags are actually deployed. Velocity changes, information about speed, pressure on the throttle, braking, seat belt deployment, engine revolutions, steering input, ABS activity, and more, may be recorded.

Heavy trucks and buses may be equipped with Engine Control Modules (ECMs) that record similar data. The ECMs used in some heavy trucks and buses first came into use in the late 90s and vary between manufacturers.

General Motors began recording crash data in ACMs in 2000; other manufacturers followed suit in the years between 2005 and 2010.

Federal regulations have been issued for vehicles manufactured since 2012. The regulations apply to passenger cars and certain light trucks and busses, and require that the vehicles be equipped with EDRs which record multiple events and specified types of data, including pre-crash data. Some motorcycles, including some Hondas, Kawasakis, Cam-Am Spyders, and Ninjas, began using EDRs more recently, i.e. from 2013 forward.

Unfortunately, under some circumstances, data can be lost. Data recorded when airbags in automobiles are deployed will typically but not always be locked into memory. Data recorded from non-deployment incidents typically is not locked into memory and may be lost, depending upon the manufacturer and the system used, either when the ignition is next turned on or when newer events are recorded.

The take-aways here are that data from EDRs and ACMs can provide information instrumental to reconstructing vehicle accidents and that the data should be downloaded as soon as possible after the accident to make sure it is not lost. More detailed information about data retrieval from autos and trucks is available at www.cdr-system.com/resources/coverage.html and www.heavytruckedr.com. ◆

Bottom Line

Title of Case: Carla Slater v. Pridmore Brothers Construction, Inc., et al.

Court & Case Number: Napa County Superior Court; Case No. 26-64500

Judge: Judge Diane M. Price

Plaintiff's Counsel: Roger A. Dreyer and Joshua T. Edlow of Dreyer Babich Buccola Wood Campora, LLP

Defense Counsel: Robert Tyson, Esq. and James E. Sell, Esq. of Tyson Mendes, LLP

Type of Case/Causes of Action: Personal Injury Action / Motor Vehicle Negligence. Plaintiff claimed several injuries to her back and neck as a result of swerving off the road and into an embankment in order to avoid a piece of 3-5' x 4" plastic PVC pipe that fell off of a vehicle being operated by defendant. At trial, Plaintiff claimed she sustained a herniated disc at L5 – S1 in the accident that led to a spinal fusion in April 2015. Plaintiff also claimed she injured her neck at C4-C5 and was treated with steroid injections.

Plaintiff asked the jury for $6,000,000 This included past medical expenses of $356,451.71, future medical expenses of $1,150,000, past non-economic damages of $1,000,000 and future non-economic damages of $3,500,000.

Plaintiff's Settlement Demand: Plaintiff's last demand before trial was $4,000,000.

Defendant's Settlement Offer: Defendants' CCP 998 offer was for $400,001.

Trial Type: Jury/Bench

Jury Trial Length: 3 Weeks

Verdict: The jury determined plaintiff's damages to equal $389,130.43. The verdict was then reduced by 40% based on the jury's finding of comparative fault on the part of the plaintiff. After apportionment, plaintiff's award was $233,478.25. ◆

"Discriminatory Intent" Not Required For Disability Discrimination Liability

By Regina Silva, Esq.
TYSON & MENDES

In *Wallace v. County of Stanislaus* (2016) 199 Cal.Rptr.3d 462, a sheriff's deputy brought a disability discrimination case against a County based on the County's removing the sheriff's deputy from his job as a bailiff, and placing him on an unpaid leave of absence based on an assessment the sheriff's deputy could not safely perform his job duties as a bailiff. On appeal, the appellate court reversed the trial court's decision to issue a jury instruction defining discriminatory animus in the context of an employer's intent to discriminate against a disabled employee, finding it was not necessary to prove intent to discriminate.

In *Wallace*, sheriff's deputy Wallace worked for the County of Stanislaus since 1997. Throughout his employment, Wallace filed numerous worker's compensation claims for alleged injuries that took place on the job. Wallace was provided various accommodations, such as being re-assigned to light duty, during the periods of time in which he could not perform the essential functions of his position.

In 2009, Wallace received a permanent work restriction related to a permanent disability rating he received for his left knee. After engaging in an interactive process with Wallace, the County determined it could accommodate Wallace by placing him to work as a bailiff in the courts.

In January 2011, Wallace's work restrictions changed again, and a medical report was issued describing a number of "preclusions" or limitations to Wallace's ability to perform his job functions. The County interpreted these preclusions to mean Wallace could not safety perform the essential functions of his job and concluded the only alternative available was to keep Wallace on an unpaid leave of absence. During a meeting, Wallace asserted he could continue to perform his job functions as a bailiff, and asked to be returned to this position. The County refused indicating it needed to follow the medical report. After Wallace's fitness for duty evaluation was completed in early 2013, which cleared him to full duty as a Deputy Sheriff, Wallace was returned to his position as Deputy Sheriff.

Discrimination Claims

Wallace sued the County alleging claims for disability discrimination, failure to accommodate, and failure to engage in the interactive process.

During trial, the court modified California Civil Jury Instruction 2540 to include a requirement the County regarded or treated Wallace "as having a disability in order to discriminate." The jury found the County treated Wallace as disabled, Wallace was able to perform his essential job functions with or without reasonable accommodation, and the County failed to prove Wallace could not safety perform his job functions. However, the jury concluded the County did not regard or treat Wallace as disabled "in order to discriminate." Judgment was entered in favor of the County.

On appeal, Wallace argued the trial court did not properly instruct the jury as to disability discrimination.

The Court of Appeal held that in disability discrimination cases, courts should not apply the *McDonnell Douglas* burden-shifting test, which shifts the burden of proof from employee to employer and back where there is circumstantial evidence of discrimination. The appellate court relied on the California Supreme Court's decision in *Harris v. City of Santa Monica* (2003) 56 Cal.4th 203, which held an employer discriminates against an employee because of a disability when the disability is a *substantial motivating reason* for the employer's decision to subject the employee to an adverse employment action. Hence, an employee need not prove the employer had a discriminatory animus when it takes an adverse employment action against the employee.

The Court of Appeal concluded the law does not require an employee with an actual or perceived disability to prove the employer's adverse action was motivated by some form of animus or ill will towards the employee. In addition, the Court noted even if the employer had a good faith mistaken belief as to whether or not the employee could perform his essential job functions, the financial consequences of that mistake should be absorbed by the employer (not employee).

Finding the instructional error was prejudicial, the Court remanded Wallace's claim for disability discrimination back to the trial court for a retrial regarding the amount of damages resulting from the County's decision to place Wallace on an unpaid leave of absence from 2011 to 2013, when Wallace returned to his job duties as a deputy sheriff.

What does this mean?

Employers cannot rely on mistaken belief as a defense to disability discrimination claims. Nor should employers refuse to engage in any further discussion or analysis after receiving a medical report or other documentation indicating an employee cannot perform their essential job functions, when the employee claims that he/she can actually perform their job duties. At a minimum, when faced with conflicting information, the employer should conduct a further analysis to get to the bottom of whether or not the employee can perform their essential job functions. ◆

Beware of the Business E-Mail Compromise Scam!

By Elaine F. Harwell
SELMAN BREITMAN LLP

A colleague recently relayed a story where his client, a homeowner working with a contractor to remodel his home, received an e-mail purportedly from the contractor requesting payment on an outstanding invoice be directed to a bank in China. The homeowner complied only to later discover that the contractor's e-mail had been compromised and that he was now out tens of thousands of dollars as the account where the money was delivered closed shortly after the transaction. How could this happen? Turns out, this scenario is much more common than one might imagine.

This summer, the FBI warned that the "Business E-mail Compromise" (BEC) scam continues to grow, evolve, and target businesses of all sizes. As reported by the FBI, the scam had hit more than 22,000 victims for a combined exposed dollar loss of over $3 Billion since October 2013, when it began compiling statistics.

The BEC is a smart, sophisticated scam targeting businesses working with foreign suppliers and/or businesses that regularly perform wire transfer payments. The scam is typically carried out by compromising legitimate business e-mail accounts (often executives) through social engineering or computer intrusion techniques to conduct unauthorized transfers of funds. Not long ago, e-mail scams were fairly easy to spot: think Nigerian prince with horrible grammar. Now, the methods are extremely sophisticated: the perpetrators research their victims to learn key protocols, they learn counterparties' or agents' names (such as an attorney the business works with frequently), they learn payment methods, they target the employees responsible for wire transfers, and they often use social engineering techniques to lend additional legitimacy.

The FBI also reports the scheme has evolved into a means to obtain confidential information, leading to data breaches:

> "The entity in the business organization responsible for W-2s or maintaining [Personally Identifiable Information], such as the human resources department, bookkeeping, or auditing section, have frequently been identified as the targeted recipient of the fraudulent request for W-2 and/or PII. Some of these incidents are isolated and some occur prior to a fraudulent wire transfer request. Victims report they have fallen for this new BEC scenario, even if they were able to successfully identify and avoid the traditional BEC incident."

Employees are the primary targets for the BEC scheme. So what can you do to avoid becoming a victim?

- Always verify requested changes. Verify changes in vendor payment requests or any other requested changes for transfers. Do not just click "reply," confirm the requested changes via a separate channel, like a phone call;
- Use company domain emails. Be wary of using free, web-based e-mail accounts which are more susceptible to hacking;
- E-mails directing payment should get special attention and scrutiny;
- Be wary of e-mails requesting secrecy or urgent action;
- Create intrusion detection system rules that flag e-mails with extensions that are similar to the company e-mail but not exactly the same. For example, .co instead of .com;
- Know your vendors and customers. Beware of any significant changes;
- Establish protocols for wire transfers and data privacy. Train your employees on those protocols. ◆

Elaine F. Harwell is a Certified Information Privacy Professional (CIPP/US) through the International Association of Privacy Professionals and chair of Selman Breitman, LLP's Cyber Law Department.

On the Move

◆ NEW LAW FIRM: DUNN DESANTIS WALT & KENDRICK LLP

K. Elizabeth Dunn and Kevin DeSantis, formerly of Butz Dunn & DeSantis, APC, along with Christopher Walt of Walt & Associates and John Kendrick, Jr., formerly of Irvine-based Kendrick, Jackson & Kearl, PLC, have formed the new firm of Dunn DeSantis Walt & Kendrick, LLP. They are joined by partners James McFaul and David Cardone, both of whom were shareholders of the former Butz Dunn & DeSantis firm. The new firm began operations on September 1, 2016. With offices in San Diego, La Jolla and Irvine, the firm provides advisement, transaction and litigation services to its clients in California and across the U.S.

◆ Casey M. Sweda and Raquel E. Howard Join Farmer Case & Fedor

Farmer Case & Fedor is proud to announce that Casey M. Sweda and Raquel E. Howard have joined the firm as associates. Ms. Sweda is a 2009 graduate of USD School of Law, while Ms. Howard is a 2012 graduate of Cal. Western School of Law. Both bring with them past defense experience, and their focus practice areas include all aspects of insurance defense litigation.

◆ Tamara Glaser Joins Tyson & Mendes

Tyson & Mendes LLP is pleased to announce their newest California attorney, Tamara Glaser, who will head the firm's Southern California Medical Malpractice Group. Formerly a Partner with the San Diego defense firm of Neil Dymott, Ms. Glaser is a trial lawyer with more than 23 years' experience providing exceptional client service. She will be a Senior Counsel responsible for the healthcare practice group at the firm. Ms. Glaser represents physicians, hospitals, and other healthcare providers in elder abuse, medical negligence, and fraud cases. She also advises clients regarding Medical/Osteopathic Board, Nursing Board, and Pharmacy Board disciplinary and licensure matters. ◆

Court of Appeal Rejects Primary Carrier's "Other Insurance" Position

By Patrick Mendes and David Ramirez
TYSON & MENDES

In the recent case, *Certain Underwriters at Lloyds, London v. Arch Specialty Insurance* (April 11, 2016, 2016 WL 1436362) the Court of Appeal of California for the Third Appellate District had occasion to consider the application of other insurance clauses in the context of successive primary general liability insurance policies.

Facts of Case

Arch Specialty Insurance ("Arch") issued a commercial general liability policy to Framecon, Inc. ("Framecon") for the one year period from October 28, 2002 to October 28, 2003. Certain Underwriters at Lloyds ("Underwriters") issued a commercial general liability policy to Framecon for a two year period from October 28, 2000 to October 28, 2001 and from October 28, 2001 to October 28, 2002. These two insurers were Framecon's only general liability policies for the subject three year period.

Framecon was named as a cross-defendant by KB Homes in a series of constructive defect lawsuits involving its work on a housing development. The lawsuits alleged progressive property damage occurring during all three policy periods.

While Underwriters agreed to provide Framecon and an additional insured, KB Homes with a defense, Arch took the position that its defense obligations were excess over Underwriters and even if the policy afforded coverage for the claim, Arch would not pay for a defense. Arch stated that based on the coverage terms of Arch's "insuring agreement," "*in the event Framecon is already being afforded a defense in this matter by another insurer, even if coverage were found to apply, [Arch's] policy would be excess with regard to defense of … Framecon*."

Arch further noted the intent of Arch's policy to be "excess" to any other insurance providing a defense under the excess provision of the "Conditions" section of Arch's insurance policy. Arch sent a similar letter to KB Home, invoking the "other insurance" provisions to deny a defense.

Additionally, the subject Arch policy contained an excess other insurance clause which stating:

> "This insurance is excess over any other insurance, and over deductibles or self-insured amounts applicable to the loss, damage, or injury, whether such other insurance is primary, excess, contingent or contributing and whether an insured is a named insured or additional insured under said policy.
>
> When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or suit that any other insurer has a duty to defend."

Based on its "other insurance" provisions, Arch did not provide a defense to Framecon or KB Home. Arch did not contest an indemnity obligation under the policy, and in fact, paid a proportional share of the underlying settlement, and it funded its allocable share to settle other similar claims. It nevertheless maintained that in light of its policy's "other insurance" provisions, it had no defense obligations since Underwriters was providing a defense.

Underwriters subsequently brought an equitable contribution claim against Arch. At the trial court level, Arch was granted summary judgment based on the court's finding that the other insurance clause relieved it of a duty to defend, reasoning the Arch policy's other insurance clause was not a prohibited escape clause because it was contained in the policy's insuring agreement.

Ruling

On appeal, the Appellate Court observed the purpose of "other insurance" clauses is to prevent multiple recovery by insureds in cases of overlapping policies providing coverage for the same loss, but that public policy disfavors "escape clauses" regardless of their location in the insurance policy. The Appellate Court further observed this modern trend in California requires equitable contributions on a pro rata basis from all primary insurers, regardless of their respective other insurance clauses.

Arch argued general case law, and California jurisprudence disfavoring excess only clauses in primary policies, should be disregarded because the language concerning its defense obligations was in its policy's insuring agreement rather than as a condition. The Appellate Court was not persuaded by this argument, noting California case law disfavoring escape or excess other insurance clauses is not premised on whether the language is stated as a condition or as a term of coverage, but instead speaks to a more general public policy concern.

It did not help Arch's position that while the appeal was pending, the Fourth Appellate District published the case of *Underwriters of Interest Subscribing to Policy Number A15274001 v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721, which held unenforceable an "other insurance" clause purporting to relieve a primary insurer of its duty to defend, despite clearly having a duty to indemnify. ProBuilders contributed toward the indemnification costs in the construction defect case against the insured contractor but resisted defense costs, based on its other-insurance clause that ProBuilders had the "duty to defend … against any suit seeking … damages [to which the insurance applied] provided that no other insurance affording a defense against such a suit is available to you."

The Appellate Court further noted:

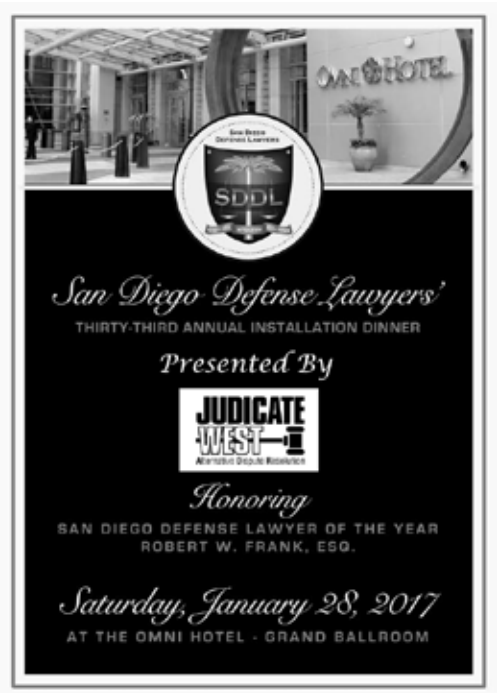
> "The courts have repeatedly addressed—and rejected—arguments by insurers that an 'other insurance' clause in their insuring agreement permitted them to evade their obligations by shifting the

entire burden associated with defending and indemnifying a mutual insured onto a co-insurer.... [W]hen 'the 'other insurance' clause ... is written into an otherwise primary policy, the courts have considered this type of 'other insurance' clause as an 'escape' clause, a clause which attempts to have coverage, paid for with the insured's premiums, evaporate in the presence of other insurance. [Citations.] Escape clauses are discouraged and generally not given effect in actions where the insurance company who paid the liability is seeking equitable contribution from the carrier who is seeking to avoid the risk it was paid to cover.' Numerous courts have therefore rejected 'other insurance' clauses as a basis for avoiding contribution. [Citations.]." *Underwriters of Interest, supra*, 241 Cal. App.4th at p. 731.

As the Appellate Court explained:

"Here too, Arch's policy made Arch liable for defense costs, but then purported to extinguish that obligation when other insurance afforded a defense ('We have the . . . duty to defend you . . . provided that no other insurance' is available.) Here too, enforcing Arch's clause would result in imposing on Underwriters the burden of shouldering a portion of defense costs attributable to claims arising from a time when Arch was the only insurer. Here too, the 'other insurance' provision was an escape clause that must be disregarded."

The Appellate Court found it would be unfair to burden Underwriters with the entirety of the defense simply because of the "other insurance" clause in the Arch policy. As such, the Appellate Court held Arch was required to contribute to the insured's defense on a prorated basis. ◆



Can Surgical Device Personal Injury Plaintiffs Avoid Federal Preemption Through Alleging A False Advertising Claim?

By Jacob Felderman
TYSON & MENDES

The surgically implanted medical device industry is highly regulated by the Food and Drug Administration (FDA). Because federal law so prevalently occupies this arena, most state-law based tort actions are preempted.

In an effort to circumvent this preemption, however, state law plaintiffs are now making false advertising claims against medical device manufacturers based on alleged violation of California's Unfair Competition Law. This article examines whether these creative theories survive preemption.

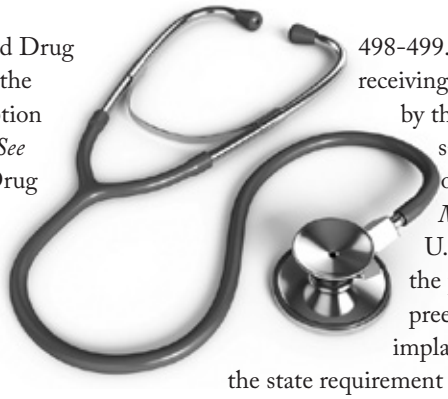
Brief Background on Federal Preemption

According the United States Constitution, federal law is the "supreme law of the land." If a state and federal law conflict, the federal law will "preempt" the state law. When federal preemption occurs, the state law has no effect. (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 76 [relying on *Maryland v. Louisiana* (1981) 451 U.S. 725, 746].)

When determining whether federal preemption exists, courts look to Congress's purpose in drafting the legislation in question. (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485.) Congress may communicate its intent to preempt state law explicitly or impliedly. Even if Congress explicitly indicates a preemptive intent, however, the ultimate inquiry is whether there is an actual conflict between state and federal law. (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287.) An actual conflict arises when: 1) compliance with both the state and federal law would be impossible, or 2) state law obstructs the congressional purpose. (*Id*. at 286.)

Federal Preemption for Medical Devices

In 1906, the U.S. Congress passed the Food and Drug Act prohibiting interstate transport of "adulterated" food and drugs. Congress vested the Food and Drug Administration (FDA) with the authority to regulate prescription and nonprescription drugs. (*See generally* the Federal Food, Drug and Cosmetic Act [FDCA], 21 U.S.C. § 301 et seq.) The FDCA prohibits states from establishing any drug requirements "different from or in addition to, or that is otherwise not identical with" its requirements. (21 U.S.C. § 379r(a)(2).)



The Medical Device Amendments of 1976 (MDA) extended federal preemption to any state law requirements "different from, or in addition to" medical device regulations established by the FDA. (21 U.S.C. § 360k(a)(1).) Notably, the MDA limits federal preemption to state laws relating to the "safety," "effectiveness," or "any other matter included in a requirement applicable to the device." (21 U.S.C. § 360k(a)(2).)

Medical devices are divided into three categories based on the amount of regulatory control the device receives. Class I devices (e.g. tongue depressors and examination gloves) pose little threat to public health and safety, and are subject only to general manufacturing controls and labeling requirements. (21 U.S.C. § 360(a)(1)(A).) Class 2 devices (e.g. oxygen masks and powered wheelchairs) are also subject to performance standards and post-market surveillance measures. (21 U.S.C. § 360c(a)(1)(B).) Class 3 devices (e.g. pacemakers and most implants) undergo a stringent premarket approval process and must adhere to FDA requirements governing nearly every aspect of the device's production and sale. (*See Stengel v. Medtronic* (9th Cir. 2013) 704 F.3d 1224, 1226-1227.)

Medical device preemption occurs when: 1) the FDA has established specific requirements applicable to a particular device, and 2) state requirements impose a conflicting or additional requirement on the device. (*Medtronic v. Lohr* (1996) 518 U.S. 470, 498-499.) Any Class 3 device receiving premarketing approval by the FDA automatically satisfies the first prong of the test. (*Riegel v. Medtronic* (2008) 552 U.S. 312, 322.) Thus, the primary inquiry for preemption of surgically-implanted devices is whether the state requirement imposes a conflicting or different requirement. (*Medtronic, supra*.)

Which State-Based Causes of Action Are Preempted?

Class 3 medical devices (i.e. most surgical implants) undergo a rigorous approval process focusing on safety and effectiveness. A state tort claim requiring the device to be safer, more effective, or less effective than the mode approved by the FDA is preempted. (*McGuan v. Endovascular Technologies* (2010) 182 Cal. App. 4th 974, 983.)

Federal preemption of Class 3 devices defeats common law causes of action for strict liability, breach of implied warranty, negligence in design, negligence in testing, negligence in distribution, negligence in labeling, negligence in marketing, and negligence in sale. (*Riegel v. Medtronic* (2008) 552 U.S. 312, 320; and *see also McGuan v. Endovascular Tech.* (2012) 182 Cal.App.4th 974 [preempting fraud and failure to warn claims].) Preemption has also been extended to tort claims for manufacturing defect, failure to warn, negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment. (*De La Paz v. Bayer Healthcare* (2016) 2016 WL 392972.)

The *De La Paz* case involved personal injury stemming from surgical insertion of a female contraceptive device in plaintiff's fallopian tubes. The device was categorized as Class 3, and so underwent premarket approval of its design, manufacturing process, and labelling requirements. (*Id*. at 1-2.) Pursuant to this

process, the device's safety and effectiveness was determined, in part by "weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use." (*Id*. at 1-2 citing 21 U.S.C. § 360c.)

The plaintiff in *De La Plaz* argued her manufacturing defect claim should survive preemption because manufacturing irregularities noted in the FDA's premarket analysis caused her injuries. The court, however, determined any such state claim based on adulteration of defendant's medical devices would exist solely by virtue of the MDA requirements, and so were preempted. (*Id*. at 7.) The court preempted plaintiff's design defect claim on similar grounds. (*Id*.) The court dismissed plaintiff's breach of implied warranty of merchantability claim as preempted because "merchantability" addressed whether the device was fit for ordinary use, which bears directly on its safety and effectiveness. (*Id*. at 10.) Plaintiff's claim for violation of express warranty of merchantability was preempted because the FDA required all express claims asserted by the manufacturer. (*Id*. at 10.) Finally, claims for misrepresentation and fraud were preempted based on identical reasoning. (*Id*. at 11.)1 In short, federal law preempts the vast majority of state-related surgical implant tort claims.

Does Federal Law Preempt a Claim for Violation of California's Unfair Competition Law (UCL, Bus. & Prof. C. §§ 17200 et seq.)?

In an effort to circumvent preemption, creative plaintiffs have alleged causes of action beyond the standard products liability theories discussed above. For example, plaintiffs have filed suit under California's Unfair Competition Law (UCL) (codified at Bus. & Prof. C. § 7200 et seq). To establish a UCL claim, plaintiffs must demonstrate a deceptive or unlawful business practice - this includes untrue or misleading advertising. (*Id*.) As a result, products liability UCL claims are based on alleged false representations related to the safety and efficacy of the device.

In the California case of *McGuan v. Endovascular Tech., supra,* the court examined whether a plaintiff's claim for fraudulent concealment was preempted. Specifically, plaintiff alleged the manufacturer actively concealed its knowledge of design flaws from the public. The court determined that, in order for the plaintiff to prevail on this cause, a jury would have to find the warnings (which were required by the FDA) were inadequate. Because this finding would impose "requirements" "different from, or in addition to" those imposed by the FDA, such a claim would be preempted. (*Id*. at 984 *citing to Riegel, supra*, 552 U.S. at p. 329.) Similarly, a UCL false advertising claim would require a jury to determine that the FDA labelling/advertising requirements were inadequate. Arguably then, the UCL claim would be preempted for the same reason fraudulent concealment is preempted.

The U.S. District Court for the Southern District of Texas addressed this issue and made a similar finding. In *Deleon v. Johnson & Johnson* (2011) 2011 WL 2618957, plaintiff made standard products liability claims, as well as a "deceptive trade practices" claim against a manufacturer based on injuries sustained from a medical implant that had received FDA premarket approval. (*Id*. at 1.) Plaintiff's deceptive trade practice claim was based on Texas's Deceptive Trade Practices Act (DTPA). Texas's DTPA, like California's UCL, prohibits false, misleading, or deceptive acts in advertisement. (See generally TX Bus & Com § 17.41 et seq.) Since a finding of violation of the DTPA would effectively impose requirements "different or in addition to" FDA requirements, the court held this cause of action was preempted. By the same reasoning, California UCL theories should be preempted.

Enterprising plaintiffs might also try to skirt preemption by alleging a cause of action for violation of the false advertising section of the UCL (i.e. Bus. & Prof. C. § 17500 et seq). Violation of this code section, however, is also based on alleged false representations related to the safety and efficacy of the medical device. As a result, it would be preempted for the same reason violation of the UCL would be.

Who Enforces the MDA?

The FDA has exclusive authority to enforce the Medical Devices Act (MDA). (*Buckman v. Plaintiff's Legal Committee* (N.D. Tex. 2001) 531 U.S. 341, 349, fn. 4.) Class 3 medical device defendants have successfully relied on this fact to argue the FDA impliedly (as opposed to explicitly) preempts this area. (*See e.g. De La Paz, supra*.)

What Claims May Private Plaintiffs Bring?

The U.S. Supreme Court in *Riegel, supra*, held medical device preemption occurs when a state law imposes requirements "different from, or in addition to" FDA premarket approval. Courts have acknowledged a very narrow exception may exist when the plaintiff makes a state law claim imposing a duty "parallel" to the federal requirements.

To be "parallel," the imposed duties must be "identical" to those imposed by federal law. (*Medtronic, supra,* at 495.) For the duties to be genuinely equivalent, a manufacturer must not be able to be held liable under the state law without having violated the federal law as well. (*McGuan, supra,* at 983.) The complaint must allege a specific and pre-existing state-law tort theory that makes the predicate federal regulatory violation actionable while imposing no different or additional duties on the manufacturer. Further, the actionable violation must be the causally linked to the alleged deviation from a federal requirement. (*De La Paz, supra*, at 6.) In light of these stringent requirements, there are very few "parallel requirement" exceptions to federal preemption.

Conclusion

Federal law preempts the vast majority of products liability claims based on surgical medical devices. Admittedly, there are limited preemption exceptions for "parallel" state claims. False advertising claims, however, do not survive preemption. ◆

32nd Annual Red Boudreau Trial Lawyers Dinner

More than 400 members of the San Diego Legal Community attended the 32nd Annual Red Boudreau Trial Lawyers Dinner on September 24, 2014 at the U.S. Grant. The San Diego Defense Lawyers, American Board of Trial Advocates, Consumer Attorneys of San Diego and Lawyers' Club of San Diego jointly presented the dinner. The event was presented by Lawyers' Mutual Insurance Company and successfully raised more than $45,000 for St. Vincent de Paul Village, one of Father Joe's Villages.

Father Joe's Villages is the largest homeless services provider in San Diego. Working with an average of 150 homeless children per day, their programs and daily activities foster cognitive, social, physical, and emotional growth.

The Red Boudreau Trial Lawyers Dinner is named for respected San Diego attorney Maurice "Red" Boudreau, a founding board member of St. Vincent de Paul Village, and longtime friend of Father Joe Carroll. The annual dinner to honor Red began in 1985, two years after his death.

Since 1990, the Red Boudreau Trial Lawyers Dinner has honored each year one San Diego trial lawyer who exemplifies the highest standards of civility, integrity and professionalism with the Daniel T. Broderick III Award. Taken from the world too soon, Dan Broderick embodied those noble attributes.

This year, the prestigious Daniel T. Broderick, III Award for Civility, Integrity, and Professionalism was presented to William L. Low of Higgs Fletcher and Mack. The program was emceed by John Gomez with remarks by Brian Rawers, Victoria Stairs, Deacon Jim Vargas and Alan Brubaker. Dan Lawton presented humorous interlude. A good time was had by all. ◆

California Civil Law Update

By Monty McIntyre
ADR SERVICES, INC.

CALIFORNIA COURTS OF APPEAL

Arbitration

Nguyen v. Applied Medical Resources Corporation (2016) _ Cal.App.5th _ , 2016 WL 6070989: The Court of Appeal treated an appeal of the trial court's order granting defendant's motion to compel arbitration as a writ petition. It denied in part and granted in part the writ petition. The portion reversed was the trial court's order striking all class and representative claims except for the representative Private Attorney General Act claim. Based on the recent case of *Sandquist v. Lebo Automotive Inc.* (2016) 1 Cal.5th 233 (Sandquist), the Court of Appeal concluded that the trial court erred in dismissing the class claims because whether the arbitration provision contemplated class arbitration was a question for the arbitrator to decide. (C.A. 4th, filed October 4, 2016, published October 14, 2016.)

Attorneys

Goglin v. BMW of North America (2016) _ Cal.App.5th _ , 2016 WL 6135482: The Court of Appeal affirmed the trial court's award of attorney fees and costs of $185,000 after plaintiff successfully settled her claims under the Song-Beverly Consumer Warranty Act (Civil Code, section 1790 et seq.) and other consumer protection statutes. The Court of Appeal held that plaintiff's rejection of defendants' earlier settlement offers because of unfavorable extraneous settlement terms was not unreasonable. Plaintiff was unwilling to agree to a general release and confidentiality due to statutory and case law supporting her position. The Court of Appeal also ruled that the trial court did not abuse its discretion in basing the fee award on an hourly rate of $575. (C.A. 4th, October 21, 2016.)

Robinson v. U-Haul Company of California (2016) _ Cal.App.5th _ , 2010 WL 4113578: The Court of Appeal affirmed the trial court's order granting an injunction prohibiting defendant from initiating or threatening to initiate judicial proceedings to enforce a noncompetition covenant in California and an $800,000 attorney fee award to plaintiff as a private attorney general on his unfair competition law cause of action (Business and Professions Code section 17200, et seq.). The Court of Appeal concluded the injunction was properly entered and the trial court did not abuse its discretion in allowing plaintiff to file a late motion for attorney fees. (C.A. 1st, October 18, 2016.)

Walker v. Apple, Inc. (2016) _ Cal.App.5th _ , 2016 WL 5404080: In a putative class action by plaintiffs against their former employer, the Court of Appeal affirmed the trial court's order disqualifying plaintiffs' counsel Hogue & Belong (the Firm). Automatic disqualification was required on the basis the Firm had a conflict of interest arising from its concurrent representation of the putative class in this case and the certified class in another wage-and-hour class action pending against Apple (*Felczer v. Apple, Inc.* (Super. Ct. San Diego County No. 37-2011-00102573-CU-OE-CTL)(Felczer)). The trial court properly concluded that to advance the interests of its clients in this case, the Firm would need to cross-examine a client in the *Felczer class* (the Walkers' store manager) in a manner adverse to that client. (C.A. 4th, filed September 28, 2016, published October 28, 2016.)

Attorney Fees

Alki Partners v. DB Fund Services (2016) _ Cal.App.5th _ , 2016 WL 6156327: The Court of Appeal affirmed the trial court's order granting summary judgment for defendant but reversed the trial court's order awarding defendant attorney fees in an action by plaintiffs alleging breach of contract in the administration of a hedge fund. The summary judgment was affirmed because the undisputed material facts established the administrator did not breach the applicable contract. The attorney fee award, however, was reversed because the contractual language relied upon was a third party indemnity provision that did not create a right to prevailing party attorney fees in litigation between the parties to the contract. (C.A. 4th, October 24, 2016.)

Humboldt County Adult Protective Services v. Superior Court (2016) _ Cal.App.5th _ , 2016 WL 6208628: The Court of Appeal reversed the trial court's order denying appellant's motion for attorney fees. The Court of Appeal concluded that, on the record before it, respondent Humboldt County Adult Protective Services (Humboldt) had no reasonable cause under the Health Care Decisions Law (Probate Code section 4600 et seq.) to file an ex parte application seeking to revoke a patient's written advance care directive by removing his wife (appellant) as his designated agent for health care decisions and compel medical treatment. Because respondent Humboldt had no reasonable cause to proceed, the Court of Appeal reversed and remanded for a determination and award of reasonable fees to appellant. (C.A. 1st, October 24, 2016.)

Millview County Water District v. State Water Resources Control Board (2016) _ Cal. App.5th _ , 2016 WL 5407695: In a water rights case where plaintiffs had won a mandate proceeding challenging a proposed cease and desist order (CDO), the Court of Appeal reversed the portion of the trial court's order awarding attorney fees for an appeal, and affirmed the rest of the trial court's order denying attorney fees for the rest of the litigation. The entry of the CDO would have rendered worthless the water district's purchase of water rights for which it paid a minimum of $500,000, and the plaintiffs selling the water rights would have made only $500,000 instead of $2.1 million. Plaintiffs failed to provide the trial court with substantial evidence to support a finding the costs of the litigation transcended their personal financial stakes, a finding necessary to support an award of attorney fees under Code of Civil Procedure section 1021.5. (C.A. 1st, filed September 28, 2016, published October 26, 2016.)

Civil Procedure

Anderson v. Fitness International (2016) _ Cal.App.5th _ , 2016 WL 6302109: In a personal injury action arising from a slip and fall in a fitness club shower, the Court of Appeal affirmed the trial court's order granting summary judgment to defendant. Defendant's assertion of a release of liability as a complete defense to the negligence cause of action was sufficient to shift the burden to plaintiff to produce evidence showing that a triable issue of one or more material facts existed to preclude summary judgment. Plaintiff failed to do so. (C.A. 2nd, October 27, 2016.)

Contreras v. Dowling (2016) _ Cal.App.5th _ , 2016 WL 6248437: The Court of Appeal reversed the trial court's order denying an anti-SLAPP motion to strike and an award of sanctions against defendant. Plaintiff's cause of action against defendant arose out of protected activity because the only actions defendant was alleged to have taken were communicative acts by an attorney representing clients in pending or threatened litigation. Such acts are unquestionably protected by Code of Civil Procedure section 425.16, and bare allegations of aiding and abetting or conspiracy did not suffice to remove these acts from the protection of the statute. Moreover, plaintiff could not demonstrate a probability of prevailing on the merits of her cause of action because defendant's communicative acts fell within the scope of the litigation privilege in Civil Code section 47(b). (C.A. 1st, October 26, 2016.)

Drexler v. Petersen (2016) _ Cal.App.5th _ , 2016 WL 6407973: See summary below under Medical Malpractice. *Goonewardene v. ADP, LLC* (2016) _ Cal.App.5th _ , 2016 WL 6554981: In an employment action alleging wrongful termination, violations of the Labor Code, breach of contract, negligent misrepresentation and negligence, the Court of Appeal affirmed in part and reversed in part the trial court's order sustaining a demurrer without leave to amend to the fifth amended complaint. The Court of Appeal ruled that the proposed complaint stated claims against defendants for breach of contract, negligent misrepresentation and negligence, and reversed and remanded with instructions to permit plaintiff to file a complaint against defendants asserting those claims. (C.A. 2nd., November 4, 2016.)

Huang v. The Bicycle Casino (2016) _ Cal. App.5th _ , 2016 WL 6092412 : The Court of Appeal reversed the trial court's order granting summary judgment for defendant in a personal injury case arising from a casino patron being injured while trying to board a shuttle bus to the casino. The Court of Appeal held that the trial court erred in holding defendant was not a common carrier as a matter of law, as there was a triable issue of material fact on this point. The Court of Appeal also concluded that, even if defendant were a private carrier owing only a duty of ordinary care, there was no basis for establishing a "no duty" ruling in this case. (C.A. 2nd, October 19, 2016.)

Industrial Waste & Debris Box Service v. Murphy (2016) _ Cal.App.5th _ , 2016 WL 6311624: The Court of Appeal reversed the trial court's order denying an anti-SLAPP motion to strike a complaint alleging defamation in a report prepared by defendants for a competitor of plaintiff that questioned the accuracy of statements in plaintiff's public reports about the percentages of the waste materials it collected that were recycled and thereby diverted from landfills. The trial court properly concluded that the action arose from protected activity, but it erred in finding that plaintiff had demonstrated a probability of success on the merits because plaintiff failed to provide evidence sufficient to support a finding that defendants' estimates were substantially false. (C.A. 1st, October 28, 2016.)

Nava v. Saddleback Memorial Medical Center (2016) _ Cal.App.5th _ , 2016 WL 5338541: The Court of Appeal affirmed the trial court's order granting summary judgment to defendants on the basis that plaintiff complaint that was filed more than one year after the alleged negligence was untimely under Code of Civil Procedure section 340.5. Based upon the recent California Supreme Court decision in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, section 340.5 applied because the injury during the transfer of plaintiff in the hospital on a gurney was integrally related to his medical treatment or diagnosis and therefore occurred in the rendering of professional services. (C.A. 4th, filed September 23, 2016, published October 18. 2016.)

Soto v. Motel 6 Operating, L.P. (2016) _ Cal.App.5th _ , 2016 WL 6123927: The Court of Appeal affirmed the trial court's order sustaining a demurrer without leave to amend in an action by a former employee, in her individual capacity and also on behalf of all aggrieved workers under the Private Attorney General Act of 2004 (PAGA, Labor Code section 2698 et seq.), against a former employer alleging that defendant violated Labor Code section 226 (a)1 by failing to include the monetary amount of accrued vacation pay in its employees' wage statements. Section 226(a) does not require employers to include the monetary value of accrued paid vacation time in employee wage statements unless and until a payment is due at the termination of the employment relationship. (C.A. 4th, October 20, 2016.)

Strasner v. Touchstone Wireless Repair and Logistics (2016) _ Cal.App.5th _ , 2016 WL 6555013: In an action where plaintiff alleged damages arising from the non-consented to posting of a private photograph to plaintiff's Facebook account by an employee of one of the out-of-state defendants, the Court of Appeal affirmed the trial court's order granting a motion by defendants to quash the summons and amended complaint due to lack of personal jurisdiction. (C.A. 4th, November 4, 2016.)

Verio Healthcare v. Superior Court (2016) _ Cal.App.5th _ , 2016 WL 5929943: The Court of Appeal denied a writ petition challenging the trial court's order denying a motion to stay a civil action for nine months, pursuant to Code of Civil Procedure sections 595 and 1954.1, because defendant's counsel was a member of the California Legislature. The trial court acted within its discretion by impliedly concluding the requested stay would abridge a right to invoke a provisional remedy, an express exception to the legislative directive making mandatory the granting of a continuance. In addition, the Court of Appeal

ruled that sections 595 and 1054.1, despite the 1968 amendment of those sections, remain directory (not mandatory) in nature, and those statutes "are to be applied subject to the discretion of the court as to whether or not its process and order of business should be delayed." (*Thurmond v. Superior Court* (1967) 66 Cal.2d 836, 839-840.)(C.A. 4th, October 12, 2016.)

Debt Collection

Mealing v. Diane Harkey for Board of Equalization 2014 (2016) _ Cal.App.5th _ , 2016 WL 6212457: The Court of Appeal affirmed the trial court's order denying an ex parte application by a judgment creditor requesting an order under Code of Civil Procedure section 708.240(a) to prohibit defendant from making any payments to Diane Harkey to repay a loan she made to defendant. Under section 708.240(a), a judgment creditor may apply for an order restraining a third party who is indebted to a judgment debtor from making any payments to the judgment debtor. The trial court properly denied the application because Diane Harkey was not a judgment debtor, the judgment was against her husband Dan Harkey. (C.A. 4th, October 24, 2016.)

Education

Anderson Union High School District v. Shasta Secondary Home School (2016) _ Cal. App.5th _ , 2016 WL 6069487: The Court of Appeal reversed the trial court's judgment for defendant in an action seeking an injunction and declaratory relief. The Court of Appeal concluded that the comprehensive statutory scheme governing charter schools does not permit a charter school to locate a resource center outside the geographic boundaries of the authorizing school district but within the same county. (C.A. 3rd, October 17, 2016.)

Employment

Cameron v. Sacramento Co. Employees' Retirement System (2016) _ Cal.App.5th _ , 2016 WL 6472100: The Court of Appeal affirmed the trial court's judgment denying a writ petition seeking to overturn defendant's denial of plaintiff's application for a service-connected retirement. The Court of Appeal ruled that plaintiff's application was untimely under Government Code section 31722 because he failed to show he was continuously disabled, within the meaning of Government Code sections 31722 and 31641(a), between the discontinuance of his service and the time he filed his application for service-connected disability retirement. (C.A. 3rd, November 2, 2016.)

Wal Mart Stores v. United Food & Commercial Workers (2016) _ Cal.App.5th _ , 2016 WL 5957279: The Court of Appeal, on rehearing, affirmed the trial court's permanent injunction barring defendant from conducting demonstrations inside stores owned by plaintiff. The Court of Appeal concluded that the National Labor Relations Act (29 U.S.C. section 151, et seq.) did not preempt plaintiff's trespass action. (C.A. 2nd, October 14, 2016.)

Equity (Fiduciary Duty)

ZF Micro Devices v. TAT Capital Partners (2016) _ Cal.App.5th _ , 2016 WL 6520137: The Court of Appeal reversed the judgment for TAT Capital Partners (TAT) after a jury found that ZF Micro Devices' (ZF) cross-complaint was barred by the four-year statute of limitations for breach of fiduciary duty. The Court of Appeal concluded that the tolling doctrine applies to both permissive and compulsory cross-complaints and therefore applied to ZF's permissive cross-complaint. ZF's cross-complaint related back to the date that TAT filed its complaint. The cross-complaint having been timely filed, the court erred in submitting TAT's statute of limitations defense to the jury, and the judgment for TAT was reversed. (C.A. 6th, November 3, 2016.)

Evidence

Agricultural Labor Relations Board v. Superior Court (2016) _ Cal.App.5th _ , 2016 WL 6236427: The Court of Appeal granted a writ petition seeking to overturn the trial court's order compelling petitioner to disclose the communications between the board and its general counsel regarding approval of a proceeding for injunctive relief against Gerawan Farming, Inc. (Gerawan). The trial court erred in ordering disclosure of the communications between the board and general counsel relating to the decision to seek injunctive relief against Gerawan because those communications were protected by the attorney-client privilege. (C.A. 3rd, October 25, 2016.)

Government

Building Industry Association v. City of San Ramon (2016) _ Cal.App.5th _ , 2016 WL 5940916: The Court of Appeal affirmed the trial court's summary judgment for defendant in an action by plaintiff challenging defendant's approval of a tax within a communities facilities district to raise revenue to pay for services furnished to a new development. The Court of Appeal concluded that the tax will provide "additional services" to meet increased demand for existing services resulting from the development and therefore meets the requirements of the California Mello-Roos Act; the tax is a special (and not a general) tax because it is imposed for specific purposes and not for general governmental purposes, and therefore meets the requirements of the California Constitution; and the property owners' constitutional and statutory rights are not burdened by an ordinance explaining that the city services funded by a special tax will not be provided by the city if the tax is repealed. (C.A. 1st, October 13, 2016.)

California Public Records Research v. County of Yolo (2016) _ Cal.App.5th _ , 2016 WL 5957282: The Court of Appeal affirmed the trial court's order granting summary judgment to respondent regarding a writ petition challenging fees charged to copy documents and also denying petitioner's motion for fees under Code of Civil Procedure section 1021.5. (C.A. 3rd, October 14, 2016.)

City of Bakersfield v. West Park Home Owners Assn. and Friends (2016) _ Cal.App.5th _ , 2016 WL 6408001: The Court of Appeal affirmed in part and reversed in part the trial court's judgment validating plaintiff's

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Your Path to Resolution

Richard has taken the leadership skills he honed while President of the SDCBA in 2015, along with his reputation for integrity and nearly 30 years of legal experience, into his new role as a full-time mediator. As a panel member exclusively with West Coast Resolution Group, Richard can help you resolve your toughest cases, from insurance bad faith to personal injury, employment, class actions or business matters.

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SATURDAY, JANUARY 28, 2017

OMNI HOTEL - GRAND BALLROOM

BLACK TIE OPTIONAL
HOSTED BAR & HORS D'OEUVRES 6:00 P.M.
DINNER/PROGRAM 7:30 P.M.
$150.00 PER PERSON
$1,400.00 PER TABLE OF 10

VALET PARKING AVAILABLE

SDDL

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 13:

proposed plan to finance road improvement projects through a public benefit corporation and pay the debt from revenues held in special funds. Although the overall financing scheme was valid, the Court of Appeal ruled that plaintiff could not use gas tax revenues as part of the financing. (C.A. 5th, October 31, 2016.)

D'Egidio v. City of Santa Clarita (2016) _ Cal.App.5th _ , 2016 WL 6208627: The Court of Appeal affirmed the trial court's order that concluded, in light of the entire statutory scheme, that Business & Professions Code section 5270 does not preempt county- or city-enacted limitations on billboards in unincorporated areas that are stricter than the limitations set forth in the Outdoor Advertising Act (Business & Professions Code section 5200 et seq.). (C.A. 2nd, October 24, 2016.)

San Diegans For Open Government v. City of Oceanside (2016) _ Cal.App.5th _ , 2016 WL 6236428: The Court of Appeal affirmed the trial court's judgment for defendant in an action (a complaint and a writ petition) by plaintiff alleging that defendant violated the Brown Act (Government Code, section 54950.5 et seq.) in publishing a city council agenda where a development agreement would be considered. The agenda stated that the council would consider: the developer' s agreement to guarantee development of the subject property as "a full service resort"; an agreement "to provide a mechanism to share Transient Occupancy Tax (TOT)generated by the Project"; and a report, required by statute "documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy." The language of the agenda, considered as a whole, gave the public and press more than a clue the city planned to provide the project developer with a substantial and ongoing financial subsidy for the resort project. (C.A. 4th, October 25, 2016.)

State of California v. Superior Court (2016) _ Cal.App.5th _ : The Court of Appeal granted a writ petition and ordered the trial court to vacate its earlier order directing petitioner to produce unredacted records containing information derived from CHP 180 forms in the possession of the California Highway Patrol because the CHP 180 forms contained personal information exempt from disclosure under the California Public Records Act (CPRA) (Government Code, section 6250 et seq.), as set forth in *County of Los Angeles v. Superior Court* (2015) 242 Cal.App.4th 475. The trial court was ordered to enter a new order directing the State to produce all electronically stored data derived from CHP 180 forms in the possession of the CHP, redacting all personal information exempt from disclosure under the CPRA. (C.A. 2nd, October 13, 2016.)

Union of Medical Marijuana Patients v. City of San Diego (2016) _ Cal.App.5th _ , 2016 WL 5956980: The Court of Appeal affirmed the trial court's order denying a writ petition challenging respondent's enactment of an ordinance adopting regulations for the establishment and location of medical marijuana consumer cooperatives. The ordinance did not constitute a project within the meaning of California Environmental Quality Act and respondent was not required to conduct an environmental analysis before enacting the ordinance. (C.A. 4th, October 14, 2016.)

Insurance

Nickerson v. Stonebridge Life Ins. Co. (2016) _ Cal.App.5th _ , 2016 WL 6520112: The Court of Appeal affirmed the trial court's order conditionally granting defendant's motion for new trial if plaintiff did not accept a reduction of punitive damages from $19 million to $350,000 in an insurance bad faith case where the jury awarded $31,500 in additional damages under the policy and compensatory damages for emotional distress of $35,000. Because Defendant's reprehensible conduct resulted in only a relatively small economic damage award, and considering its $368 million net worth, a significant ratio of punitive to compensatory damages comported with due process and the trial court properly remitted the jury's award to the outside constitutional limit of a 10:1 ratio of punitive to compensatory damages. *Brandt* fees of $12,500 should have been included as compensatory damages, so the trial court was ordered to modify the judgment by reducing the punitive damage award from $19 million to $475,000. (C.A. 2nd, November 3, 2016.)

Judgments

Wolf Metals v. Rand Pacific Sales (2016) _ Cal.App.5th _ , 2016 WL 6216112: The Court of Appeal affirmed in part and reversed in part the trial court's order amending a default judgment to add appellants Donald Koh and South Gate Steel, Inc. (SGS) as additional judgment debtors on the basis that Koh was defendant's alter ego and that SGS was defendant's successor corporation. The Court of Appeal held that, under *Motores de Mexicali v. Superior Court* (1958) 51 Cal.2d 172, the default judgment could not be amended to add Koh as an alter ego to the judgment, but the judgment was properly amended to add SGS as a corporate successor. (C.A. 2nd, October 25, 2016.)

Legal Malpractice

Gotek Energy, Inc., v. SoCal IP Law Group (2016) _ Cal.App.5th _ , 2016 WL 5929908: The Court of Appeal affirmed the trial court's order granting summary judgment to defendant law firm and awarding defendant attorney fees of $140,000. The trial court properly granted summary judgment because the law suit was not filed within the one year statute of limitations. Defendant sent an email saying it must withdraw as counsel. The attorney-client relationship ended on November 8, 2012, when plaintiff wrote a letter to defendant firm asking it to deliver all client files to a new attorney. The malpractice law suit was filed more than one year after that date. The trial court also awarded defendant attorney fees because its engagement agreement has an attorney fee clause. (C.A. 2nd, October 12, 2016.)

Medical Malpractice

Drexler v. Petersen (2016) _ Cal.App.5th _ , 2016 WL 6407973: In a medical malpractice case alleging failure to timely diagnose and treat a brain tumor, the Court of Appeal reversed the trial court's summary judgment for defendants on the basis of the expiration of the statute of limitations under Code of Civil Procedure section 340.5. When the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the

misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one. (C.A. 2nd, October 31, 2016.)

Probate

Estate of Dayan (2016) _ Cal.App.5th _ , 2016 WL 6520113: The Court of Appeal affirmed the trial court's ruling that defendant owned a one-third interest in commercial real property and its ruling denying plaintiff's judgment on the pleadings motion claiming that defendant violated the will's no contest clause when he opposed a Probate Code section 850(a)(2) petition regarding the commercial real property. (C.A. 2nd, November 3, 2016.)

Real Property

Jamison v. Department of Transportation (2016) _ Cal.App.5th _ , 2016 WL 6092470: The Court of Appeal reversed the trial court's order granting an injunction enjoining defendant from removing an obstruction plaintiff had placed against a ditch culvert within a state highway right-of-way without an encroachment permit. The Court of Appeal concluded that the trial court erred in granting the injunction because no evidence supported an exception to the statutory bar prohibiting injunctions that prevent the execution of a public statute by public officers for public purposes. (C.A. 3rd, October 19, 2016.)

Nellie Gail Ranch Owners Association v. McMullin (2016) _ Cal.App.5th _ , 2016 WL 5719712: The Court of Appeal affirmed the trial court's judgment for plaintiff, following a bench trial, quieting title and compelling defendants to remove a retaining wall and other improvements they built without plaintiff's approval on more than 6,000 square feet of common area that plaintiff owned adjacent to defendants' property. (C.A. 4th, filed October 3, 2016, published October 27, 2016.)

Torts

A.M. v. Ventura Unified School District (2016) _ Cal.App.5th _ , 2016 WL 5936851: The Court of Appeal reversed the trial court's order granting summary judgment for defendants because plaintiff had failed to file a government tort claim against defendants in an action alleging childhood sexual abuse. The Court of Appeal reversed because Code of Civil Procedure section 340.1 provided the limitations period for plaintiff's claims of childhood sexual abuse and plaintiff was exempt from filing a government tort claim under Government Code section 905(m). (C.A. 2nd, October 12, 2016.)

Bigler-Engler v. Breg, Inc. (2016) _ Cal. App.5th _ , 2016 WL 6311108: In an action alleging medical malpractice and intentional torts arising from the use of a cold therapy device after orthopedic surgery, the Court of Appeal reversed in part and affirmed in part a judgment following a jury trial where the jury awarded $68,270.38 in economic compensatory damages and $5,127,950 in noneconomic compensatory damages to plaintiff, apportioned liability among the three defendants, and awarded punitive damages of $500,000 against defendant Dr. Chao (Chao) and $7 million against defendant Breg, Inc. (Breg). The Court of Appeal found the jury's verdict as to the intentional concealment claim against Breg and the strict products liability claim against defendant Oasis MSO, Inc. were not supported by the evidence, and this also required reversal of the punitive damage award against Breg. The Court of Appeal also ruled that the noneconomic damages and punitive damages as to Chao (whose stipulated net worth was $3,411,577) were excessive, and those awards were reversed and remanded for a new trial unless plaintiff accepts reductions in those awards to $1,300,000 and $150,000 respectively. This decision discusses a cornucopia of attorney conduct, damages, malpractice, tort and trial issues (C.A. 4th, October 28, 2016.)

Khosh v. Staples Construction (2016) _ Cal.App.5th _ , 2016 WL 6247658: In a personal injury action by an employee of a subcontractor against the general contractor, the Court of Appeal affirmed the trial court's order granting summary judgment for defendant. The trial court correctly granted the motion for summary judgment because plaintiff failed to present evidence that defendant affirmatively contributed to his injuries.

Minnegren v. Nozar (2016) _ Cal.App.5th _ , 2016 WL 6157895: The Court of Appeal affirmed the trial court's denial of a motion for new trial and a motion for a judgment notwithstanding the judgment after the jury returned a verdict for defendant in an auto accident case. Negligence is a question of fact, and the Court of Appeal affirmed the trial court's decision because there was evidence that defendant driver exercised at least some care and therefore might have acted reasonably even if his action ultimately led to the car collision. (C.A. 2nd, October 24, 2016.)

Moore v. Mercer (2016) _ Cal.App.5th _ , 2016 WL 6135335: The Court of Appeal affirmed most of the trial court's rulings regarding the reasonable value of medical services provided to an uninsured plaintiff, under *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), in a case where plaintiff sued for personal injuries arising from a car accident. The Court of Appeal, however, reversed the trial court's order imposing sanctions of $2,500 on defendant for filing an unsuccessful motion to compel a treating doctor to produce billing records, payment records, and records evidencing any agreements for the medical care of plaintiff related to her surgery. The Court of Appeal concluded that (1) *Howell* does not cap a plaintiff's damages to the amount a medical finance company pays health care providers for their accounts receivable and medical liens, and the reasoning of *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 remains sound; (2) *Howell* does not limit the trial court's discretion pursuant to Evidence Code section 352 to exclude evidence of the amount a medical finance company pays if the court decides, as it did here, that the evidence was minimally probative, if at all, and would necessitate an undue consumption of time to try collateral issues; (3) the terms of the agreement between a medical finance company and the plaintiff's providers may be relevant and discoverable, and therefore the sanctions imposed on the defendant were reversed; and (4) the trial court properly entered a directed verdict on causation in favor of plaintiff. (C.A. 3rd, October 21, 2016.)

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Pierson v. Helmerich & Payne International Drilling Co. (2016) _ Cal.App.5th _ , 2016 WL 5845771: The Court of Appeal affirmed the trial court's summary judgment for defendant employer in a personal injury case for a traffic accident caused by an oil rig worker driving home after work who was providing two other employees a ride to their employer-paid hotel. The Court of Appeal ruled that the undisputed facts established that the going and coming rule applied in this case. It could not be reasonably inferred from the undisputed facts that the employer impliedly required or requested the driver to provide transportation to his supervisor between the hotel and the jobsite. The supervisor's requests for such rides were personal in nature and are not reasonably imputed to the employer. The case was comparable with other cases in which the going and coming rule was applied to employees who made their own carpooling or ridesharing arrangements. (C.A. 5th, filed October 6, 2016, published October 25, 2016.)

Wang v. Nibbelink (2016) _ Cal.App.5th _ , 2016 WL 5940076: The Court of Appeal affirmed the trial court's summary judgment for defendants on the basis of recreational use immunity in Civil Code section 846. In a case of first impression, the Court of Appeal ruled that section 846 shields landowners from liability where recreational users of the land cause injury to persons outside the premises who are uninvolved in the recreational use of the land, even where the plaintiffs also allege that the landowners' neglect of their own property-based duties contributed to the injury. Plaintiff was injured when a horse ran away from a wagon train on defendants' land and trampled plaintiff as she and her husband got out of their car to go into a restaurant on an adjacent property. (C.A. 3rd, October 13, 2016.)

Alereza v. Chicago Title Company (2016) _ Cal.App.5th _ , 2016 WL 6775982: The Court of Appeal affirmed the trial court's order granting a nonsuit to defendant. Standard of review: de novo. Defendant did not owe a duty of care to Alereza because he was not a party to the escrow, not mentioned in the escrow instructions as a third party beneficiary, and did not sustain his losses as a direct result of the escrow company's negligence. (C.A. 3rd, filed November 16, 2016, published December 9, 2016.)

Bigler-Engler v. Breg, Inc. (2017) _ Cal. App.5th _ , 2017 WL 65411: In an action alleging medical malpractice and intentional torts arising from the use of a cold therapy device after orthopedic surgery, the Court of Appeal granted a rehearing, depublished its earlier opinion dated October 28, 2016, and issued a new opinion. In this new opinion, the Court of Appeal came to the same conclusions as the original decision on most issues. However, it concluded that its original discussion of the interplay between MICRA and Proposition 51 was incorrect and ruled that a Proposition 51 apportionment should be applied first before determining whether the $250,000 MICRA cap needs to be applied. Defendant Oasis MSO, Inc. (Oasis) was liable for $130,000 after the Proposition 51 apportionment. Because this was below the MICRA $250,000 cap, that cap did not apply. Plaintiff's 998 offer was ineffective because it failed to include an acceptance provision. The jury awarded $68,270.38 in economic compensatory damages and $5,127,950 in noneconomic compensatory damages to plaintiff, apportioned liability among the three defendants, and awarded punitive damages of $500,000 against defendant Dr. Chao (Chao) and $7 million against defendant Breg, Inc. (Breg). However, the jury's verdict findings of intentional concealment against Breg and strict products liability against defendant Oasis were not supported by the evidence. This required reversal of the punitive damage award against Breg. The Court of Appeal also ruled that the noneconomic damages and punitive damages as to Chao (whose stipulated net worth was $3,411,577) were excessive, and those awards were reversed and remanded for a new trial unless plaintiff accepts reductions in those awards to $1,300,000 and $150,000. The decision discusses a plethora of attorney conduct, damages, malpractice, tort and trial issues (C.A. 4th, January 6, 2017.)

Gonzales v. City of Atwater (2016) _ Cal. App.5th _ , 2016 WL 7242559: The Court of Appeal reversed the trial court's denial of a motion for judgment notwithstanding the verdict after plaintiffs obtained a jury verdict of $3.2 million in a wrongful death case against defendant City of Atwater (City) because the jury found an intersection was a dangerous condition under Government Code section 835. The Court of Appeal ruled that the design immunity defense under Government Code section 830.6 shielded the City from liability and reversed the judgment against the City. (C.A. 5th, December 15, 2016.)

Kase v. Metalclad Insulation Corporation (2016) _ Cal.App.5th _ , 2016 WL 6892215: The Court of Appeal affirmed the trial court's order granting summary judgment for defendant in an asbestos case. Regarding the design defect claims, the Court of Appeal ruled that the Navy's procurement of asbestos insulation for its nuclear submarines came within the ambit of the government contractor defense in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500. The Court of Appeal also

affirmed the summary judgment on the failure to warn claims on the basis that the evidence was insufficient to raise a triable issue as to causation. (C.A. 1st, November 23, 2016.)

Lee v. West Kern Water District (2016) _ Cal.App.5th _ , 2016 WL 6212461: The Court of Appeal reversed the trial court's order granting a motion for new trial, and affirmed its order denying a motion for judgment notwithstanding the verdict in an action where plaintiff obtained a verdict of $360,000 for assault and intentional infliction of emotional distress arising from a mock robbery staged by co-employees at plaintiff's workplace. A central issue was whether or not the workers' compensation exclusivity rule applied. The trial court erred when it granted the motion for new trial on the basis that it had given the jury an improper instruction on the workers' compensation exclusivity rule. The Court of Appeal found the jury instructions were not erroneous. (C.A. 5th, filed October 24, 2016, published November 15, 2016.)

Taxes

In re Transient Occupancy Tax Cases (2016) _ Cal.5th _ , 2016 WL 7187624: The California Supreme Court affirmed the Court of Appeal's ruling that had affirmed the trial court's order granting a writ of mandate in favor of defendant online travel companies (OTC) regarding the City of San Diego's transient occupancy tax. The OTCs are not liable for the tax because the ordinance imposes tax on rent "charged by the Operator" and OTCs are not operators or managing agents of the hotels. Moreover, the markup the OTCs charge for their services is not part of the rent subject to the tax. (December 12, 2016.)

Swart Enterprises v. Franchise Tax Board (2017) _ Cal.App.5th _ , 2017 WL 118040: In a case where plaintiff sought a refund of $1,106.71 (the minimum franchise tax of $800 plus interest and penalties) the Court of Appeal affirmed the trial court's order granting summary judgment for plaintiff. Standard of review: de novo. The California franchise tax does not apply to an out-of-state corporation whose sole connection with California is a 0.2 percent ownership interest in a manager-managed California limited liability company (LLC) investment fund. Passively holding a 0.2 percent ownership interest, with no right of control over the business affairs of the LLC, does not constitute "doing business" in California within the meaning of Revenue and Taxation Code section 23101. (C.A. 5th, January 12, 2017.) ◆

Monty A. McIntyre is a full-time mediator, arbitrator, referee and special master at ADR Services, Inc., with 35 years of extensive civil trial experience representing both plaintiffs and defendants in a wide variety of business, insurance, real property and tort cases, and over 30 years of experience as an arbitrator and mediator. Mr. McIntyre handles cases in the following areas: business, commercial, construction, employment, insurance, professional liability, real property and torts.

Subcontractor Can Be Strictly Liable for Furnishing and Installing Harmful Products

By Danielle S. Ward, Esq.
BALESTRERI POTOCKI & HOLMES

In the decades following the seminal *Greenman v. Yuba Power Products*[1] case, California courts have expanded and contracted the application of strict liability. In 1991, a move from consumer products to construction emerged when strict liability was extended to developers of mass market homes.[2] By contrast, until recently, subcontractors and contractors providing services have generally not been held strictly liable for the products they install.

In January 2016, in a noteworthy move, the Second District Court of Appeal in *Hernandezcueva v. E.F. Brady Company, Inc.*, (2015) 243 Cal.App.4th 249, 253, held that a subcontractor could be held strictly liable for injuries sustained from exposure to asbestos laced drywall provided and installed by the subcontractor during construction decades earlier.

Plaintiff Joel Hernandezcueva worked as a janitor at the Fluor building complex in Irvine, California from 1992-1995. The complex was constructed in the mid-1970s, and Defendant E.F. Brady Company, Inc. (Brady) furnished and installed drywall that was later determined to contain asbestos. In 2011, Hernandezcueva was diagnosed with mesothelioma, and filed suit against Brady and others. The Complaint included various causes of action, including strict liability.

In the early 1970s, Brady contracted to select and install drywall at the Fluor complex. Decades later, when portions of the complex were remodeled, Hernandezcueva's role as janitor included cleaning up drywall debris and other materials where Brady had previously installed drywall. Hernandezcueva's experts tied his mesothelioma to exposure to asbestos during his employment at the Fluor complex.

Brady had been in the drywall and plaster business since the 1940s. In 1972 or 1973, Brady first learned that some of the materials its employees used contained asbestos, but never undertook any testing to confirm its presence. Brady was not aware that the products it used at the Fluor complex contained asbestos, and presented evidence that its work complied with the relevant building codes. Brady's expert also testified that it was not until 1980 that the link between asbestos and cancer was widely known.

At trial, following Hernandezcueva's case in chief, Brady filed a Motion for Non-suit on a number of Plaintiff's theories, including strict liability. Brady argued that it merely installed asbestos- containing products, which it had purchased from other companies. The trial court granted the motion leaving only Hernandezcueva's claims for negligence and punitive damages. Ultimately, the jury concluded that while Hernandezcueva had been exposed to asbestos, Brady had not been negligent. Accordingly, Judgment was entered in favor of Brady. Hernandezcueva appealed the granting of the non-suit.

The Court of Appeal surveyed the history of strict liability litigation. Distinguishing *Hernandezcueva* from prior cases where the Courts have refused to extend strict liability, the Court concluded that a reasonable jury could find that the subcontractor was not an occasional seller but, instead, reaped a great benefit from supplying the drywall materials that were essential to obtaining its work at the project. Crucial to the Court's analysis, was Brady's practice to provide drywall and related materials in all of its contracts. With respect to the Fluor complex, the Court noted that one quarter of Brady's contract price was for drywall materials, even though its profits were primarily borne out of its installation services.

Further motivated by public policy, the Court noted that Brady had an ongoing relationship with the drywall manufacturers and could have put pressure on them to increase the safety of their products. In fact, Brady met with the manufacturer during construction of the complex to determine an alternative after Brady determined that a certain compound material was ineffective.

Ultimately, the Court concluded that Brady was involved in the stream of commerce and its use of drywall product was "the primary objective or essence of the transaction." In reversing Brady's non-suit, the Court of Appeal further concluded that Brady was in a position to enhance product safety and bear the costs of compensating for injuries.

By contrast, in 1991, the Fifth District Court of Appeal refused to extend strict liability to a subcontractor. (*Monte Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681). The *Monte Vista* case formed the basis for E.F. Brady's motion for non-suit. There, Subcontractor Willey Tile installed soap dishes it had purchased from a manufacturer. The homeowner was injured when the soap dish broke under the weight of her hand. There, the Court of Appeal noted that, although the defendant had purchased and installed the products that ultimately caused injury to the plaintiff, it was not in the business of selling such products. Instead, the subcontractor had purchased the products and installed them in the plaintiff's home pursuant to a contract with the developer. In other words, the subcontractor had not purchased them with the purpose of reselling them.

The *Hernandezcueva* Court noted an important distinction between the provision of a soap dish that was merely incidental to the tiling work performed by Tilley, as compared to the provision of the drywall which was not only essential, but at the core of the work performed by E.F. Brady.

Earlier precedent out of the Second District Court of Appeal, while related to products liability may provide additional guidance on the circumstances that would point towards the application of strict liability to subcontractors and contractors. In 1979, the Second District Court of Appeal held that the doctrine of products liability does not apply as between parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it. (*Kaiser Steel Corporation v. Westinghouse Electric Corporation* (1976) 55 Cal.App.3d 737, 748). There, plaintiff Kaiser Steel filed suit against the manufacturer of an electric motor that failed causing the shutdown of its mill, resulting in significant losses to the plaintiff. The trial court granted the manufacturer-defendant's motion for non-suit under plaintiff's theory of strict products liability. The Court of Appeal affirmed the trial court's decision and noted that the plaintiff-purchaser and defendant-manufacturer were both commercial enterprises that had negotiated the terms of the transaction, including the measure and mode of recovery in the event of damages arising from defects. In other words, plaintiff did not simply pull the motor off the shelf. In essence, the Court concluded that all four elements of the doctrine were present. The bargained-for remedy and equal footing between the parties in Kaiser Steel is starkly different than the injured plaintiff who happened upon the asbestos products installed by defendant Brady in *Hernandezcueva.*

While the facts of *Hernandezcueva* are rather unique, marking an interplay between personal injury and construction, the case has the potential to create a rather wide application of strict liability to subcontractors whose work, is in large part, the provision of construction materials. It is not unusual, and oftentimes the norm for trades to furnish the materials they install as part of their contracts, and as such the extension of strict liability borne out of *Hernandezcueva* could have a large impact on the industry. ◆

1 Greenman v. Yuba Power Products (1963) 59 Cal.2d 57, 59-60.
2 Kriegler v. Eichler Homes, Inc. (1969) 269 Cal.App.2d 224.

Insurance Law Update

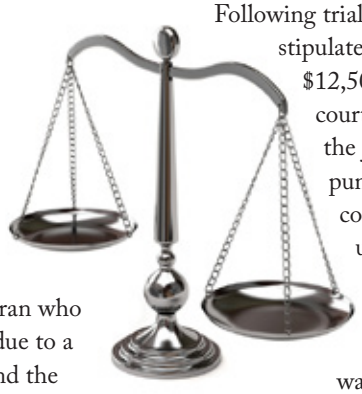
By Jim Roth
THE ROTH LAW FIRM

The past few months have seen both state and federal opinions addressing the scope of Brandt fees, the limitations imposed upon automobile insurers to consider diminution when covering a claim, the reliance by insurers upon the genuine dispute doctrine, reaffirmation that triable issues of fact will preclude an insurer's motion for summary judgment regarding its duty to provide coverage, inter-insurance disputes among primary and excess insurers, and reaffirmation that intentional conduct by an insured precludes coverage.

BRANDT ATTORNEY FEES AWARDED BY A TRIAL COURT AS COMPENSATORY DAMAGES IN AN INSURANCE BAD FAITH CASE MAY BE CONSIDERED IN DETERMINING WHETHER THE DISPARITY BETWEEN COMPENSATORY DAMAGES AND PUNITIVE DAMAGES RENDERS THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY EXCESSIVE

In the case styled Nickerson v. Stonebridge Life Ins. Co. (2016) 63 Cal.4th 363, 203 Cal. Rptr.3d 23, the California Supreme Court held on June 9, 2016, that in determining whether a punitive damages award is unconstitutionally excessive, Brandt fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.

In this case, the issue before the Supreme Court concerned the proper calculation of the punitive-compensatory ratio when the parties agreed to have the trial court determine a component of the plaintiff's compensatory damages—here, the attorney fees plaintiff was compelled to expend to obtain the insurance benefits to which he was entitled to receive pursuant to the Brandt doctrine—after, rather than before, the jury rendered its punitive damages verdict. The Court of Appeal held that Brandt fees awarded in this manner must be excluded from the calculation in determining whether, and to what extent, the jury's punitive damages award exceeds constitutional limits. The Supreme Court conclude that the Court of Appeal erred.



Plaintiff was a disabled veteran who was confined to a wheelchair due to a spinal cord injury. While he and the wheelchair were being lowered from a van, plaintiff fell to the pavement, suffering a broken leg. He was taken by ambulance to the emergency room and then moved to a unit in a Veterans Administration hospital. At the time of the accident, plaintiff was insured under a policy issued by Stonebridge Life Ins. Co. and which paid plaintiff a daily benefit for medically necessary hospital stays. The insurer paid benefits for plaintiff's first 19 days in the hospital, but denied benefits for the remaining 90 days while Plaintiff was in the hospital. The insurer maintained that only the first 19 days qualified as "necessary treatment" within the meaning of the policy.

Plaintiff sued the insurer for breach of contract and bad faith. Finding that the policy clause limiting coverage to medically necessary treatment was unclear and inconspicuous and thus unenforceable, the trial court entered a directed verdict for Plaintiff in the amount of $31,500 in unpaid benefits on the breach of contract claim. A jury found for Plaintiff on the bad faith claim and awarded $35,000 in emotional distress damages and $19 million in punitive damages. Neither party presented evidence to the jury on the attorney fees Plaintiff incurred in recovering contract damages.

In California, such fees are recoverable as an element of compensatory damages for insurer bad faith under the California Supreme Court's landmark decision in Brandt v. Superior Court (1985) 37 Cal.3d 813, 817, 210 Cal.Rptr. 211. In Brandt, the California Supreme Court held that when an insurance company withholds policy benefits in bad faith, attorney fees reasonably incurred to compel payment of the benefits are recoverable as an element of a plaintiff's damages. Brandt fees, as they are known in California, do not include those attributable to the bringing of the bad faith action itself.

The parties stipulated before trial that if Plaintiff should prevail, the trial court could determine the amount of Brandt fees. Following trial, Plaintiff and the insurer stipulated that Plaintiff was entitled to $12,500 under Brandt, and the trial court awarded that amount. After the jury awarded $19 million in punitive damages, the trial court conditionally granted a new trial unless the Plaintiff accepted a reduction in the punitive award to $350,000—which, at ten times the bad faith damages, was the maximum that the trial court believed would pass constitutional boundaries. In calculating the 10 to 1 ratio, the court included in the compensatory damages denominator only the $35,000 in emotional distress damages awarded on the bad faith claim. The court rejected Plaintiff's contention that the denominator also should include the $12,500 in Brandt fees. Plaintiff refused to accept the reduced award and appealed. The insurer also appealed.

In our judicial system, compensatory damages are intended to redress the concrete loss that the Plaintiff has suffered by reason of the defendant's wrongful conduct, while punitive damages operate as "private fines" intended to punish the defendant and to deter future wrongdoing. When a punitive damages award is grossly excessive in violation of the due process clause, the appropriate order is for an absolute reduction in the award, rather than a conditional reduction with the alternative of a new trial, *i.e.*, a remittitur, since once a maximum constitutional award has been determined, a new trial on punitive damages would be futile.

To determine whether a jury's award of punitive damages is grossly excessive in violation of the due process clause, reviewing courts must consider, among other factors, whether the "measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff" by comparing the amount of compensatory damages to the amount of punitive damages, and absent special justification, ratios of punitive damages to compensatory damages that greatly exceed nine or 10 to one are presumed to be excessive and therefore unconstitutional.

The Supreme Court, for the first time, found that a plaintiff's compensatory damages may include the Brandt fees the plaintiff was compelled to expend to obtain the insurance benefits to which he was entitled, and that such attorney fees may be included

in the calculation of the ratio of punitive to compensatory damages to determine whether the punitive damages award is "grossly excessive" in violation of the due process clause, even when the fees are awarded by the trial court after the jury has rendered its verdict.

The Supreme Court found no reason to exclude the amount of Brandt fees from the constitutional calculation merely because they were determined, pursuant to the parties' stipulation, by the trial court after the jury rendered its punitive damages verdict. On the contrary, to exclude the fees from consideration would mean overlooking a substantial and mutually acknowledged component of the insured's harm. The effect would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair reviewing courts' full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds.

MOTOR VEHICLE INSURER DID NOT BREACH ITS INSURANCE POLICY WHEN IT ELECTED TO REPAIR AN INSURED DAMAGED VEHICLE, SINCE THE POLICY CONTAINED NO PROVISION REQUIRING IT TO PURSUE ITS INSURED'S DIMINISHED VALUE CLAIM

In the case styled James B. Copelan and Brian M. Lowenthal v. Infinity Insurance Company and Liberty Mutual Fire Insurance Company (2016) -- F.Supp.3d --, 2016 WL 3398408, the United States District Court for the Central District of California held on June 14, 2016, that a motor vehicle insurer did not breach its insurance policy, under California law, when it elected to repair an insured damaged vehicle, since the policy contained no provision requiring it to pursue its insured's diminished value claim.

Plaintiffs contended that their auto insurance policies entitled them to diminished value or stigma damages, rather than simply repair of their damaged automobiles. They alleged in their suit causes of action against their insurers for failing to provide diminished value damages.

Plaintiffs' entire case was premised on the idea that they were entitled to diminished value or stigma damages. However, Plaintiffs were unable to point to anywhere in their individual policies with their insurers that provided such an entitlement. Plaintiffs failed to cite any case law that established that diminished value or stigma damages were encompassed in the policies' insuring clause for "physical damage to tangible property." Rather, the Ninth Circuit has specifically held that the insertion of the word "physical" into the definition of "property damage" eliminated any possibility that intangible economic losses could constitute "property damage." Because neither insurers' policies covered third-party diminished value claims, the insurers' coverage was limited to repairing the damages to the vehicles.

A GENUINE DISPUTE REGARDING THE EXTENT OF DAMAGE TO A HOME AND REQUIRED REPAIRS PRECLUDED BAD FAITH LIABILITY ON PART OF THE INSURER

In the case styled Paslay v. State Farm General Insurance Company (2016) 248 Cal. App.4th 639, 203 Cal.Rptr.3d 785, the Court of Appeal, Second District, Division 4 held on June 27, 2016, that although triable issues of fact existed regarding whether the insurer breached the insurance contract by refusing to pay for repairs, a genuine dispute about coverage entitled the insurer to summary judgment on the insured's bad faith and elder abuse claims where the insureds prematurely commenced repairs precluding their insurer from adequately investigating the nature and cause of the loss.

The insureds, Clayton and Traute Paslay, sought coverage under their homeowners property insurance policy for water infiltration damage resulting from the failure of a roof drain during a rain storm. The insurer, State Farm, did not contest coverage for water infiltration damage, but for damage to the master bathroom and ceiling drywall that the insurer contended did not result from water infiltration related to the storm. The Paslays sued State Farm for breach of contract, insurance bad faith, and, since Traute Paslay was 80-years-old, elder abuse under the California Elder Abuse Act.

In general, the obligation imposed on an insurer under the covenant of good faith and fair dealing is not the requirement mandated by the terms of the policy itself; it is the obligation under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. In the context of a bad faith claim, an insurer's denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable. An insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith, even though it might be liable for breach of contract, because when there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. An insurer may obtain summary adjudication of a bad faith cause of action by establishing that its denial of coverage, even if ultimately erroneous and a breach of contract, was due to a genuine dispute with its insured. However, the genuine dispute doctrine does not relieve an insurer of its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A genuine dispute, precluding a finding of bad faith, exists only where the insurer's position is maintained in good faith and on reasonable grounds. Reasonable grounds for an insurer's position, precluding a bad faith claim under the genuine dispute doctrine, include reasonable reliance on experts hired to estimate repair benefits owed under the policy.

In this case, the Court found that the insurer had a genuine dispute regarding the extent of damage to Plaintiffs' home and required repairs because the insurer's expert promptly examined the master bathroom and drywall ceilings, assessed the extent and type of damage, and provided an estimate of cost of the appropriate repairs, but the Plaintiffs curtailed their insurer's ability to further investigate the damage by removing the damaged property before their insurer had an opportunity to conduct a full assessment.

AN EXCESS CARRIER WHO FUNDS AN EXCESS PRIMARY LIMITS SETTLEMENT MAY ASSERT A CLAIM FOR EQUITABLE SUBROGATION AND BAD FAITH AGAINST A PRIMARY INSURER WHO PREVIOUSLY UNREASONABLY REFUSED TO ACCEPT AND FUND A POLICY LIMITS SETTLEMENT DEMAND

In the case styled Ace American Insurance Company v. Fireman's Fund Insurance Company (2016) 2 Cal.App.5th 159, 206 Cal. Rptr.3d 176, the Court of Appeal, Second District, Division 4, held on August 5, 2016 that in an action between an excess and primary insurer alleging equitable subrogation

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and breach of the duty of good faith and fair dealing, an excess insurer which has settled and discharged the insured's liability may recover from the primary insurer an amount in excess of the primary insurer's policy limits if the excess insurer can prove the primary insurer's unreasonable refusal to settle within its policy limits resulted in loss to the excess insurer in an amount in excess of the policy limits of the primary insurer it would not otherwise have had.

A movie industry worker was seriously injured on a movie set. His employer had two primary insurance policies with Fireman's Fund Insurance Company, and an excess insurance policy with Ace American Insurance Company. The injured worker sued, Fireman's Fund defended the case, and the case eventually settled with the participation of and contributions from both insurers.

Ace American then sued Fireman's Fund for equitable subrogation, alleging that the injured worker initially offered to settle his case within the limits of the Fireman's Fund policies, and that Fireman's Fund unreasonably rejected those settlement offers. Ace American alleged that as a result, it was required to contribute to the eventual settlement, which exceeded the limits of the Fireman's Fund policies.

The question before the appellate court was whether Ace American stated viable causes of action for equitable subrogation and breach of the duty of good faith and fair dealing, or whether the lack of a judgment in the employment injury case bared Ace American's claims. The trial court concluded that because Ace American, the excess insurer, alleged it was required to contribute to the settlement of the underlying case due to the primary insurer's failure to reasonably settle the case within policy limits, the lack of an excess judgment against the insured in the underlying case did not bar an action for equitable subrogation and breach of the duty of good faith and fair dealing.

Parenthetically, the United States District Court for the Eastern District of California reached the same conclusion relative to the equitable subrogation claim between and excess and primary insured on May 3, 2016 in the unpublished decision styled RSUI Indemnity Company v. Discover P & C Insurance Co. (2016 WL 1745119).

AS A MATTER OF LAW, THE EXISTENCE OF TRIABLE ISSUES OF FACT AS TO JUST WHAT OCCURRED PRECLUDES AN INSURER'S MOTION FOR SUMMARY JUDGMENT REGARDING ITS DUTY TO PROVIDE COVERAGE

In the case styled Public Service Mutual Insurance Co. v. Liberty Surplus Insurance Corporation (2016), -- F.Supp.3d --, 2016 WL 4474603, the United States District Court for the Eastern District of California held on August 25, 2016, that the as a matter of law, the existence of triable issues of fact as to just what occurred precluded an insurer's Motion for Summary Judgment regarding its duty to provide coverage.

Plaintiff Public Service Mutual Insurance Company sought equitable indemnification from another insurance carrier, Liberty Surplus Insurance Corporation for amounts paid by Plaintiff for the defense and indemnification of its insureds, Fair Oaks Fountains, LLC ("FOF") and FPI Management Company ("FPI"). According to Plaintiff's complaint, Defendant was obligated to pay those amounts under its own policy, issued to Gala Construction, on grounds that both FOF and FPI were specifically designated as additional insureds under the Defendant's policy because, according to Plaintiff's complaint, the Defendant's policy was primary as to the underlying loss. That loss occurred when an injury occurred, allegedly as a result of Gala Construction's negligence, while Gala Construction effectuated repairs on an apartment complex owned by FOF and managed by FPI. Defendant filed a Motion for Summary Judgment.

In denying the motion, the District Court explained that the basis for Defendant's motion was that it owed no obligation whatsoever under its policy. According to Defendant, neither FOF nor FPI could qualify as insureds because any liability on their part could not have arisen from the "work," of Gala Construction so as to trigger coverage under Defendant's policy. In the absence of any such qualifying activity, Defendant maintained that it had no duty to defend or indemnify either entity. Given the many triable issues of fact as to just what occurred and what role Gala Construction played, however, the District Court concluded that no such determination could be made as a matter of law on summary judgment.

WHEN THERE IS NO CONTRACTUAL DUTY TO INDEMNIFY AN INSURED BECAUSE OF AN INSURED'S INTENTIONAL CONDUCT, THE INSURER CANNOT BE FOUND TO HAVE BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALINGS

In the ***unpublished*** case styled Douglas Bilyeu *et al.* v. State Farm General Insurance Company (2016), 2016 WL 4547658, the Court of Appeal, Second District, Division 2, held on September 1, 2016, that where there is no contractual duty to indemnify an insured arising from the insured's intentional conduct, the insurer cannot be found to have breached the implied covenant of good faith and fair dealings.

A homeowner struck his neighbor in the face, knocking him to the ground, breaking one of his ribs and causing a traumatic brain injury that resulted in permanent brain damage. The homeowner claimed he was acting in self-defense, but two juries—one criminal and one civil—rejected this defense. The homeowner's insurer agreed to defend him in the civil suit brought by the neighbor, but ultimately refused to indemnify him for the $6.3 million verdict. The homeowner assigned his rights against his insurer to the injured neighbor, who then sued the insurer for breach of the duty to indemnify, for bad faith denial of coverage, and for relief as a judgment creditor. The trial court granted summary judgment for the insurer.

In affirming the trial court, the Court of Appeal noted that the insured homeowner's conduct was not an "accident." The homeowner frankly admitted that he did precisely what he intended to do: he struck his neighbor in the face. This act was intentional. Although the homeowner asserted that he undertook this intentional act in self-defense or in defense of his daughter, two juries—the criminal jury that heard the assault charges against him and the civil jury that awarded the neighbor $6.3 million—specifically and necessarily found that the homeowner did not reasonably act in self-defense. These jury findings, said the appellate court, were binding upon it. And although neither jury made a finding as to whether the homeowner acted in self-defense unreasonably, the California Supreme Court has previously held that "an

Bottom Line

Title of Case: Robert Notman v. Millers Towing, Inc.

Court and Case Number: SDSC Case No. 37-2011-00071034-CU-BC-EC

Judge: Hon. Kevin Enright

Plaintiff's Counsel: Joseph Sciarretta and Anthony Sciarretta of Sciarretta Law

Defense Counsel: Colin Walshok of Wingert Grebing Brubaker & Juskie, LLP and Rob Mackey of Veatch Carlson, LLP

Type of Case/Causes of Action: Business Dispute/Breach of Contract

Plaintiff's Settlement Demand: $2,300,000

Defendant's Settlement Offer: $50,000

Trial Type: Jury/Bench

Trial Length: 8 days

Verdict: $139,342 ◆

insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into 'an accident' within [a] policy's coverage clause."

To prevail on a claim that an insurance company has breached the implied covenant of good faith and fair dealings, an insured must show (1) that benefits were due under the policy, and (2) that these benefits were withheld without proper cause. The threshold requirement that benefits be due under the policy reflects the fact that breach of the implied covenant is an "auxiliary" and "supplemental" claim that flows from a breach of the insured's primary right to receive the benefits of his insurance contract."

Based upon the above factual and legal analysis, the Court of Appeal concluded that State Farm had no contractual duty to indemnify the homeowner and that the neighbor's auxiliary bad faith denial of the claim under the implied covenant of good faith and fair dealings necessarily failed. It is well settled that where a breach of contract cannot be shown, there is no basis for a finding of breach of the covenant of good faith and fair dealings and without coverage there can be no liability for bad faith on the part of the insurer. ◆

COVER STORY CONTINUED FROM PAGE 1

"work product" of attorneys acting on a client's behalf. [CCP § 2018.010 et seq.] Work product includes *attorney's agents and consultants*: However, "work product" of an attorney's employees or agents (investigators, researchers, etc.) is treated as the "work product" of the attorney. [*See Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647-648 (disapproved on other grounds in *Coito v. Sup.Ct.* (State of Calif.) (2012) 54 C4th 480, 499)].

The "work product" of experts consulted by the attorney and who will not testify at trial is likewise treated as the attorney's "work product." [*Scotsman Mfg. v. Sup.Ct.* (1966) 242 CA2d 527, 530] (Compare: Experts who testify may be compelled to disclose all reports they have prepared; *see* ¶8:255 ff.)

While the waters are murky when it comes to an attorney retaining an investigator, California courts have made it clear if the surveillance was obtained prior to the retaining of counsel. A party's or insurer's consultations with an expert before hiring counsel are not protectable as "attorney work product." Nor can an attorney later "by retroactive adoption convert the independent work of another, already performed, into his own." (*Jasper Construction, Inc. v. Foothill Junior College Dist. of Santa Clara County* (1979) 91 CA3d 1, 16 (internal quotes omitted) (disapproved on other grounds in *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 C4th 739, 753)]

CCP section 2018.030 separates the two privileges writings are subject to, absolute and qualified. A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. (CCP section 2018.030.) All other work product of an attorney "…is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030(b).)

Surveillance

Under California Law, surveillance alone does not warrant absolute protection. (*Suezaki v. Superior Court*, (1962) 58 Cal. 2d 166, 177.) The *Suezaki* court reasoned that simply because the subject matter sought to be discovered is the 'work product' of the attorney, it is not privileged…but that is a factor that the trial court should consider, in its discretion, together with other relevant factors, in determining whether to deny or to grant discovery in whole or in part. Id. Therefore, surveillance falls under the qualified privilege, whose protection depends on the court's determination of whether the plaintiff will be unfairly prejudiced in preparing his or her claim or will suffer an injustice if the surveillance is not disclosed. (Code Civ. Proc, § 2018.030(b).)

Disclosure Required?

As to the specific question of whether failing to disclose surveillance materials unfairly prejudices or causes plaintiff to suffer injustice, the water is still murky. There is no bright line rule on when a party must disclose surveillance footage. However, in the example mentioned in the introduction, if surveillance is obtained by the carrier prior to being assigned to an attorney, the surveillance is not covered by the work product doctrine under *Rodriguez*.

An attorney who does not disclose the surveillance runs the risk of the surveillance not being permitted by the judge and prohibiting the footage being introduced as evidence at trial. Surveillance may also facilitate an early settlement if some particular footage is obtained which significantly damages plaintiff's case. Therefore, attorneys must weigh the advantages and disadvantages of producing the surveillance, under the circumstances of each case. ◆

Adding Another Curve in the Road to Settlement

By Leslie M. Price
TYSON & MENDES

It is time to once again update your standard settlement agreement for personal injury claims. Where does the time go? Carriers, self-insureds and their counsel will no doubt be adding another clause to what is typically an overly long standard agreement. Why, pray tell, would you want to do that?

The answer lies in the very recent First District Court of Appeal decision in *Karpinski v. Smitty's Bar, Inc.* (Filed April 12, 2016) 2016 WL 1445338. In a nutshell, the decision opens the door in litigated claims for plaintiffs to require payment of the full settlement amount even where there are unresolved liens. The door can be closed by inserting a clause in the settlement agreement making payment contingent on resolution of all liens. However, that may not be the best answer in all cases and almost certainly will not reduce the all-too-common post-settlement brouhaha over lien resolution.

The Settlement Agreement Should Address Resolution Of The Liens

In *Karpinski*, the parties settled their case at mediation on March 20, 2014. There were both Medicare (42 U.S.C. § 1395y(b)(2)(B)) and California Victims of Crime program (Government Code § 13963) liens on the settlement. Five weeks after mediation, Plaintiff Karpinski and his attorney signed a formal "Settlement Agreement and Release of All Claims." Done deal, right? Not this time.

Plaintiff's counsel insisted the settlement check be issued to him and his client alone before resolving the liens. They refused the carrier's offer to issue checks naming both Plaintiff and the lien holders. The carrier balked at making payment, no doubt concerned about the exposure to additional liability to the lien claimants should Mr. Karpinski or his attorney fail to honor their agreement to resolve the lien claims. Plaintiff countered by filed a motion for entry of judgment under Code of Civil Procedure Section 664.6.

Defendant opposed the motion arguing the liens should have been resolved before payment was required. The Trial Court disagreed, noting while the Settlement Agreement obligated Plaintiff and his counsel to resolve the liens, there was no requirement that he do so before receiving payment. Defendant appealed, contending "the trial court erred when it granted Karpinski's motion to enforce the settlement because satisfaction of the outstanding medical liens is a condition precedent to payment of the settlement and Karpinski has failed to resolve the liens."

Defendant argued it must protect the statutory liens as the statutes expressly make Defendant liable if Plaintiff and his attorney fail to uphold their end of the bargain. Understandable given paying "double" or amounts in excess of policy limits is a complete anathema to insurance carriers. The Court of Appeal noted Defendant did not raise the legal issue of conditions precedent in the Trial Court but addressed the issue anyway. The Court of Appeal first looked to the Settlement Agreement and confirmed it lacked any provisions which either expressly or impliedly required the liens be resolved before payment. The Court of Appeal next determined in this case only, under the circumstances, the Plaintiff was not obligated to honor the lien of the California Victims of Crime Board.

It Ain't Over Till It's Over

That finding left only the issue of the Medicare lien to be addressed. The Court acknowledged Medicare's right to pursue Defendant or its insurer directly if Plaintiff were to fail to honor the lien but noted no California case had addressed the issue of whether Plaintiff was obligated to resolve the lien before payment. Guidance was sought by reference to a Georgia case, *Hearn v. Dollar Rent A Car, Inc.* (Ga.Ct.App.2012) 726 S.E.2d 661, 668. There, the Hearn Court agreed with a Connecticut decision concluding there was no authority for private parties to assert the interests of Medicare by including their name on a settlement check without express authority to do so, and an insurer had met its obligation to Medicare simply be requiring Plaintiff to honor the lien in a settlement agreement. In affirming the judgment, the Court of Appeal pointed to the remedy provided by the indemnity clauses in the Settlement Agreement and concluded, if this was a concern, the agreement should have expressly required either Plaintiff resolve the liens before payment or the lien claimants be added as payees to the settlement checks.

Really? We recently heard something about naming the lien holder on the check as suggested by the *Karpinski* Court. In *County of Santa Clara v Javier Escobar* (2016) 244 Cal. App.4th 555, 198 Cal.Rptr.3d 646, the Sixth District Court of Appeal held the Defendant could not avoid being included in a lawsuit filed by the County Hospital lien holder under Government Code Section 23004.1 after judgment was entered by arguing it had issued a check to both the plaintiff and lien holder. "But it does not follow that the Legislature meant to permit judgment debtors like Fresh Express to wash their hands of the matter by simply turning the funds over to the injured plaintiff." *Id*. at p. 576. Interplead the disputed funds and maybe it is almost over? *Id*. at pages 576-577.

Conclusion

A "standard" settlement agreement or release of all claims in a personal injury matter should contain a clause making the resolution of all known liens a condition precedent to payment of the proceeds to the claimant. This is not to say the clause should be written in stone and cannot be, or should not be, removed during negotiations. For example, when there is a claim involving a catastrophic injury and a relatively low policy limit removal of the clause may be the better course if the claimant's attorney requires the clause be removed as a condition of settlement.

Even if this decision is later "de-published," it will not be surprising to hear argument the law requires payment of the settlement before the lien issues are resolved. The *Karpinski* decision makes it clear this is an issue to be negotiated and included in the release or settlement agreement if it is of concern. Defense counsel and claims adjusters cannot stick their heads in the sand and hope it will go away. Raise the issue up-front and address when and how the lien will be resolved in the final settlement agreement. Let the games continue. ◆

Farewell to the 2016 SDDL Officers and Board of Directors

2016 SDDL Board of Directors (from left to right): Ben Cramer, Gabriel Benrubi, Eric Deitz, Janice Walshok, Beth Obra-White, Stephen Sigler, Dianna Bedri Burke (Executive Director), Patrick Kearns, Ken Purviance, Vanessa Whirl, Robert Mardian and Colin Harrison

Best Wishes to the 2017 SDDL Board of Directors

At the Installation Dinner on January 28, 2017, the outgoing 2016 Officers and Board of Directors will pass the torch of leadership of the San Diego Defense Lawyers to the 2017 Officers and Board of Directors. Best wishes to the 2017 leadership team. They are:

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