



# THE UPDATE

## WINTER 2012

### To Summarily Adjudicate or Not Adjudicate: The Recent Amendments to Section 437c

By Heather Rosing and Bryan Vess

#### Preface

Heather Rosing is a certified legal malpractice specialist and shareholder with Klinedinst PC, where she serves as the Chairperson of the Professional Liability Department.

Bryan Vess is a San Diego attorney who helps people, businesses and government entities with business disputes. Mr. Vess operates his own firm, BRYAN C. VESS APC.

Ms. Rosing and Mr. Vess co-wrote this article in order to give two different perspectives on the changes to the summary judgment statute—Ms. Rosing giving a defense counsel's view and Mr. Vess a plaintiffs' counsel's view.

#### Overview of Changes

California's statutory summary judgment and adjudication provisions are found in Code of Civil Procedure section 437c. The statute was amended by the State Legislature effective January 1, 2012. The changes are significant.

Prior to the amendment, a party could move for summary adjudication of (1) one or more causes of action, (2) affirmative defenses, (3) claims for damages, or (4) issues of duty. In reality, this mainly translated into summary adjudication motions on certain causes of action, on punitive damages, or on straightforward affirmative defenses such as the statute of limitations.

The purpose of allowing such motions under the statute is to expedite litigation and eliminate needless trials. *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590. However, despite the stated purpose of the statute, parties interested in having the court determine major issues that, if resolved, would not dispose of an entire cause of action or an entire affirmative defense, could not look at 437c for a mechanism for judicial resolution of the issue. Before the recent amendment, the only option to adjudicate issues was through a motion *in limine*.

Now, with the adoption of these changes to Section 437c, parties can

move for summary adjudication of a legal issue or claim for damages<sup>1</sup> even if that issue does not completely dispose of a cause of action, an affirmative defense, or an issue of duty, according to specified procedures. The amendments establish the following procedure:

- (2) This motion may be brought only upon the stipulation of the parties whose claims or defenses are put at issue by the motion and a prior determination and order by the court that the motion will further the interests of judicial economy, by reducing the time to be consumed in trial, or significantly increase the ability of the parties to resolve the case by settlement.
- (3) Before a motion may be filed pursuant to this subdivision, the parties shall submit to the court a joint stipulation clearly setting forth the issue or issues to be adjudicated, with a declaration from each stipulating party demonstrating that a ruling on the motion will further the interests of judicial economy by reducing the time to be consumed in trial or significantly increasing the probability of settlement. Within 15 days of the court's receipt of the stipulation and declarations, unless the court has good cause for extending the time in which to make the determination, the court shall notify the submitting parties as to whether the motion may be filed. If the court elects not to allow the filing of the motion, the stipulating parties may request, and upon that request the court shall conduct, an informal conference with the stipulating parties to permit further evaluation of the proposed stipulation; but no further papers may be filed by the parties in support of the proposed motion.
- (4) Any motion for summary adjudication brought under this subdivision shall contain the following language, or its substantial equivalent, in the notice of motion:  
"This motion is made pursuant to subdivision (s) of Section 437c of the

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# PRESIDENT'S MESSAGE



All:

My time to serve as the President of the SDDL has all too quickly drawn to a close. I'd like to say thanks to the many friends and colleagues who have made 2012 yet another successful year for our organization.

First, to our members, a heartfelt thanks. I cannot count how many members of the SDDL have become new, or better, friends of mine this past year. And so many of you have contributed through participating in the past year's dozens of events. Between the social events, the CLE programs, our golf tournament, participating in the publication of our quarterly newsletter, and our monthly board meetings, it has been a whirlwind of a year. I enjoyed every minute of it.

I also must thank our board. Each in their own way, the members of this year's SDDL board surpassed my expectations. Our board meetings were, without exception, enjoyable departures from the routine of practice. I am confident those who continue to serve on the board this year, along with our new members, will have the same enjoyable experience under the able leadership of the SDDL's next President, Victoria Stairs. Victoria has been tireless in her efforts, this year, and the SDDL is lucky to have her as its next President. Good luck, President Stairs, and good luck to the 2012 board.

Next, to our sponsors. Each of the SDDL events is made possible by the continuing generosity of our many sponsors. And while there is not space here to name them all, perusal of the Update demonstrates the breadth of sponsorship the SDDL enjoys. As we all know, recent times have posed new challenges in our economy. Despite this, the SDDL was fortunate to be well-supported by a variety of local sponsors. Thank you. Each of our events was made better through your support and involvement.

Finally, to our adversaries in practice and to the judiciary, my collegial appreciation. Many of the SDDL's events this year were attended - or co-sponsored - by our friends from across the aisle. Without their capable but good-spirited competition, practicing law as we do here in San Diego would not be possible. Likewise, many members of the judiciary offered their wisdom as SDDL speakers this year. With their busy schedules and the unreasonable expectations placed on our government employees in this day and age, it is important for this organization to extend its gratitude to those who, day in and day out, are entrusted to make life-changing decisions as jurists here in San Diego but who took time out to participate in our events. We appreciate you.

As a final note, I want to say congratulations to our legal community in general. With each year of practice, I continue to be amazed at the ability of San Diego to retain a level of professionalism in its bar that far exceeds other cities and towns in California. San Diego is a unique place to live and practice. We are a fortunate lot; congratulations to us.

It was a great honor to serve as your President this year. Thank you all, again.

Jim

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## Membership Information:

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$145/year. The dues year runs from January to December 31, 2011. Applications can be downloaded at: [www.sddl.org](http://www.sddl.org)

## The Update

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

All views, opinions, statements and conclusions expressed in this magazine are those of the authors and do not necessarily reflect the opinion and/or policy of San Diego Defense Lawyers or its leadership.

The SDDL welcomes the submission of articles by our members on topics of general interest to its membership. Please submit material to:

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### Please SAVE THE DATE

for the San Diego Defense Lawyers Annual Installation Dinner at the New Children's Museum. This year promises to be the most unique, fun (open bar all night) and delicious Installation Dinner yet. Come out to meet and mingle with your fellow defense attorneys. The Board of Directors cannot wait to see you all there. Please contact me if you have any questions!

· SAVE THE DATE ·  
FOR THE  
SAN DIEGO DEFENSE LAWYERS  
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AT  
the new children's museum  
HONORING  
ROBERT F. TYSON, JR., ESQ.  
ON  
SATURDAY, JANUARY 28, 2012 AT 6:00PM

**Bottom line**

**Case Title:** De La Torre vs. Douglas Motz Insurance Agency

**Case Number:** CASE NO. 37-2008-00081030-CU-IC-CTL

**Judge:** Lisa Foster

**Plaintiff's Counsel:** Robert Hamparyan and Laura Sasaki, The Gomez firm.

Doug Galt of Wools and Peers for Defendant and Cross Complainant Century Surety Insurance

**Defendant's Counsel:** Elizabeth Skane and Kent Thaeler of Skane Wilcox LLP for Douglas Motz and Douglas Motz Insurance

**Type of Incident/Causes of Action:**

Plaintiffs in this case are the owners of a Mexican food restaurant located in the City of Coachella, near Palm Springs, California. On December 14, 2007 a fire occurred at the property which caused considerable damage. The insurance agent for the plaintiffs was Douglas Motz. Mr. Motz had provided a series of annual insurance policies which provided coverage for the property between 2002 and 2007. The policy in effect on the date of the fire was issued by Defendant Century Surety. Century Surety denied coverage for the claim under a protective safeguards endorsement which precluded coverage. The Protective Safeguards Endorsement required Plaintiffs to provide a fire suppression system over all cooking areas. Plaintiffs had two cooking areas, one in the front which had a fire suppression system and one in the back which did not. The fire was a grease fire which originated in the back kitchen.

Plaintiffs sued Century Surety for insurance bad faith. Plaintiffs sued Doug Motz and his agency for negligence and for fraud and concealment. Plaintiffs allege that Mr. Motz underinsured the property with respect to business interruption losses. They also claimed that Mr. Motz failed to advise them of a change on the policy in 2006 adding the Protective Safeguards endorsement to the policy. Finally, Plaintiffs claimed that Mr. Motz forged their signatures to a number of documents including a restaurant questionnaire which was submitted in the application process. Century Surety also filed a cross complaint against Mr. Motz and his agency containing causes of action for negligence, and intentional misrepresentation. After the close of Plaintiffs evidence, Century Surety amended their complaint to add a cause of action for negligent misrepresentation.

**Settlement Demand:** \$2 million from the Plaintiffs. \$600,000: demand from Century Surety.

**Settlement Offer:** \$200,000

**Trial Type:** Jury/Judge: Jury

**Trial Length:** 10 weeks

**Verdict/Ruling:** On the Plaintiffs claim, the jury found Mr. Motz underinsured the Plaintiffs property and awarded \$22,00 in business interruption losses reduced by a 25% allocation of fault to the Plaintiffs. The jury found no fraud or concealment by Mr.

*Continued on page 4*

**BROWN BAG PROGRAMS****“Women in the Law: Challenges, Benefits, and Trying to Find Balance”**

*By Alexandra (Sasha) Selfridge*

All attorneys, but women especially, face challenges with finding work/life balance. What can we do as employees to achieve that balance? What can we do as employers to promote that balance? The SDDL Brownbag Seminar in November, “Women in the Law: Challenges, Benefits, And Trying to Find Balance” sought to help us answer those questions. Klinedinst partner Heather Rosing recently offered some insights on this important topic.

In preparation for her presentation, Ms. Rosing conducted survey of four women: (1) a seasoned governmental employee with teenage children; (2) a big firm partner who is single and very involved in the community; (3) an in-house attorney with three small children; and (4) a younger/newer attorney with a new baby on a part-time schedule. Based on her interviews of the four female attorneys, Ms. Rosing identified some common themes and advice:

- Accept that you cannot do it all. Learn to delegate and rely on others, such as a spouse or other family members. Remember: Things will not fall apart in your absence!
- Figure out what is important to you and prioritize accordingly – it is okay to say “no” to things.
- Don’t expect perfect contentment; accept that perfect life balance is not possible.
- Do not give into guilt. Be in the moment: If you are with your family, enjoy that time; if you are at work, enjoy that time as well. Do not agonize over where you are not – be present.
- Manage expectations in the workplace on the assumption that the employer and client will want to maximize your time, attention, and energy. Employers and clients will want as much as you can possibly give, so set the expectation.
- Manage perception in the workplace. There can be a stigma regarding working part-time or being an “attorney mom.” We have to work to change those perceptions.

One possible way to achieve balance for some attorneys that was discussed was part-time employment. Of the attorneys who attended the seminar, none worked part-time. It is well-established, however, that part-time attorneys tend to be extremely effective for firms. (See “Balancing Act,” a cover story in the September/October 2003 issue of *Diversity & the Bar Magazine* by Cathy Hoffman of Arnold & Porter.) At the same time, it can be difficult for smaller firms to bring in enough income if employees elect a part-time schedule. Employers also have the option of establishing “balanced hours schedules” for employees. These are individually tailored, reduced hours schedules designed to meet the needs of the attorney, the law firm, and the firm’s clients. (For additional ideas, see the Project for Attorney Retention - <http://www.attorneyretention.org/>)

During the questions portion of the seminar, it became clear that there is no “one-size-fits-all” solution. Ms. Rosing took three weeks off and hired a nanny after she had her first child. At another firm, an attorney works half-time and is always available electronically. Yet another attorney worked nights and weekends, hired a nanny three days per week, was able to stay home with her children two days per week, and technically maintained a full-time schedule.

There are a number of creative ways to achieve balance in our field. By thinking about our individual goals and priorities, we can find a solution that works for us.

*Ms. Rosing is a Shareholder and Chief Financial Officer at Klinedinst. She is the Chairperson of Klinedinst’s Professional Liability Department. Ms. Rosing is a certified Legal Malpractice Law Specialist. She was recently elected to serve on the State Bar of California’s Board of Directors. Last, but not least, she is also a new mother.*

*Continued from page 3*

Motz. On Century Surety's claim against Mr. Motz the jury found no fraud or intentional misrepresentation. They found negligent misrepresentation and awarded damages in the amount of \$38,000. As to Plaintiffs claim against Century Surety who made no settlement offer at all at any time, the jury awarded compensatory damages of \$380,000 and bad faith damages of \$1.5 million.

### **Bottom line**

**Case Title:** Sun Colony vs. KB Framers

**Case Number:** Case No. A527543

**Judge:** Timothy Williams

**Plaintiff's Counsel:** Robert Carlson, Koeller Nebeker Carlson and Haluck for Plaintiffs Sun Colony and AIG

**Defendant's Counsel:** Elizabeth Skane, Skane Wilcox LLP and Teddy Parker of Parker Nelson for GBS.

Rusty Graf of Feldman Graf, Seetal Tejura of Alverson Taylor, and Lara Hoover of Stutz Artiano Shinoff and Holtz for KB Framers.

### **Type of Incident/Causes of Action:**

This was a construction defect case/insurance subrogation action venued in Clark County Nevada involving 575 single-family residences in a project comprised of 2001 built between 1999 and 2005. The Siena project is an age-restricted community within the master planned development of Summerlin developed by Plaintiff Sun Colony. Defendant, General Building Systems, was the truss manufacturer for the project and manufactured and supplied the trusses to KB Framers, the framing subcontractor who installed the trusses. The main issue in this case involved large quantities of ceiling cracks. Plaintiff's expert testified the cracks are largely perpendicular to the direction of the trusses, along drywall panel joints and the cracks occur in ceilings supported by trusses adjacent to the bottom chord splices plates. He attributed the drywall cracking to a movement in the trusses due to the use of wet lumber in the manufacturing process. In order to keep the homes out of litigation, co-Plaintiff AIG, the excess insurer for the original builder (and the developer) paid two repair contractors, SC Wright Construction and McCormick Construction \$5.1 million to repair the drywall cracking in each of the approximately 575 homes. Plaintiffs Sun Colony and its excess insurer AIG sued GBS and KB Framers to recover the monies paid.

**Settlement Demand:** \$2.9 million jointly to KB and GBS.

**Settlement Offer:** \$380,000 from GBS via offer of judgement.

**Trial Type:** Jury/Judge : Jury

**Trial Length:** 14 weeks

**Verdict/Ruling:** GBS was dismissed by the Plaintiffs in exchange for a waiver of costs after the close of evidence, the day before closing arguments. As to KB Framers, the total verdict was approximately \$5.75 million after the addition of attorney's fees and interest.

## San Diego Defense Lawyers Hosts 21<sup>st</sup> Annual Mock Trial Competition

*The author, Dave Roper, is an SDDL board member in practice with Lorber, Greenfield & Polito, LLP*

When the San Diego Defense lawyers sponsored its first Mock Trial Competition twenty-one years ago, it was strictly a home town affair, a chance for teams from two local law schools, USD and California Western School of Law, to put their students' fledgling courtroom skills to the test. Since that first competition, the SDDL Mock Trial Competition has grown in size and stature, drawing more teams than ever from all across the nation.

This year's competition, which took place October 13-15, attracted twenty-two teams from thirteen law schools including American University, Berkeley, Brooklyn Law, Cal. Western, Duquesne, Georgetown, Hastings, LaVerne, Southern Methodist, Texas Tech, Thomas Jefferson and USD. Each team, which remained anonymous throughout the competition, consisted of four students, two students acting as trial advocates while the other two acted as their witnesses. In each round preliminary round their roles were reversed. The teams worked from an identical civil case fact pattern, but were not told until the first night of the competition whether they would start by representing the plaintiff or the defendant. The next night, not only did the students' roles switch, but so did their client, the defense side switching with the plaintiff's side.

Each preliminary round trial was judged by a panel of three volunteer judges made up of local attorneys who gave their time to make this competition a success. SDDL was particularly gratified by the outpouring of volunteer support from the San Diego legal community without which the competition could not exist. Each night of the preliminary rounds held at the County Courthouse, thirty-three experienced attorneys played the roles of judge and jury giving the competitors not only a realistic forum to exhibit their trial skills, but invaluable critiques of their performance. Following the preliminary rounds a reception for teams, coaches and volunteer judges, with abundant food and drink, was held at the Westin Hotel where the the teams which qualified for the semi-final round were announced. Those teams were Cal. Western Team 1, Cal. Western Team 2, Southern Methodist and Texas Tech.

The semi-finals took place on the campus of USD Law School, which has graciously hosted the event for many years. The two Cal. Western teams were matched against the two Texas teams with Judge Michael Orfield and mediator Michael Saydah acting as presiding judges. When the dust settled, the only two teams still standing were both from Cal. Western! For the final round, which immediately followed, the presiding judge was local legal legend Thomas Sharkey.

In the end, the winner of the competition, known to that point only as "Team R" was Cal. Western Team 2 which consisted of Allexandria Verdian, Rachel Weisz, Lindsey Willard and Andrea Pella. The runners up were Chris Montoya, Marrianna Laliur, Scott Fishman and Michelle Ryle. Cal. Western has a right to be very proud of their mock trial program for turning out two such highly skilled teams.

Perhaps the most difficult moment, at least for those of us running the competition, occurred on the first night when it was revealed that one of the teams expected to compete was not able to make it to San Diego for the competition. This left an uneven number of teams rendering the team matchups and elimination process impossible. However, disaster was averted by the intervention of four brave student coaches from Brooklyn Law who, on the spot, volunteered to throw together a team to compete. Without any preparation, using only their own wits and nerve, these young students were putting on their first trial within fifteen minutes of diving into the competition. These Brooklyn Law students, Diana Mahoney, Lucas Christensen, Emily Farquharson and Fanny Lam certainly earned the respect and gratitude of everyone involved.

**Bottom line**

**Title of Case:** Atlas Allied v. San Diego Community College and Nolte Associates Inc.

**Case No.** 37-2010-00091274-CV-CO-CTL

**Judge:** Honorable Joel Pressman

**Type of Action:** Construction Claim of Delays and Extras on underground pipe line project. The contractor claimed that the School District breached its contract and breached an implied warranty of the correctness of the plans and that Nolte, the civil engineer of record on the project, was negligent in its preparation of the plans and specifications and misrepresented the soils conditions and the depths of existing utilities. The contractor claimed that as a result, it encountered differing site conditions which caused it extras and delay damages using the Measured Mile and Eichleay methods of calculation.

**Type of Trial:** Bench (after the parties' waived jury after voir dire and selection of jury)

**Trial Length:** 9 days

**Verdict:** Defense Award. As to Nolte, Motion for Judgment granted following plaintiff's case in chief. The court ruled Nolte had no duty to plaintiff under the facts of the case, did not breach any duty and that it did not misrepresent anything to the plaintiff. As to the District, the court entered a Statement of Decision granting Judgment in favor of the District and against the plaintiff finding no breach of contract or breach of implied warranty.

**Attorneys for plaintiff:** Richard Soll, Mahoney & Soll

**Attorneys for defendants:** William Pate and Christina Cameron, Stutz Artiano Shinoff & Holtz for San Diego Community College; Karen Holmes of Balestreri Pendleton & Potocki for Nolte Associates Inc.

*Continued on page 8*

**Meet Your New Board Member****Gabriel Benrubi**

Gabriel Benrubi is a shareholder of Belsky & Associates. He is a California native, born in 1957. He graduated *cum laude* from California Western School of Law (J.D. 1983) and was admitted to the California Bar in 1983. For over 20 years, Mr. Benrubi has devoted his practice primarily to the defense of healthcare providers, medical groups, hospitals and HMO's. Mr. Benrubi's trial and appellate experience includes the defense of medical malpractice actions, California Medical Board proceedings, insurance coverage, maritime, general liability and commercial cases. Mr. Benrubi previously served in the U.S. Navy Judge Advocate General's Corps and dedicates a portion of his practice to servicing active duty and retired military members in the community. Mr. Benrubi is an active member of the San Diego County Bar Association, American Bar Association, Association of Southern California Defense Counsel and San Diego Defense Lawyers.

**Scott Barber**

I have been an attorney since 1997, although I really started with Neil-Dymott in 1998 and was then with Grace Brandon Hollis and the Gordon & Rees LLP. I am currently Of Counsel with Wilson Getty LLP. Primarily, I defend skilled nursing facilities and assisted living facilities in elder abuse/neglect cases. I still have the occasional privilege of representing physicians in medical malpractice cases as well. I previously served on the SDDL Board of Directors in 2004 and 2005 and was the Secretary for 2005.

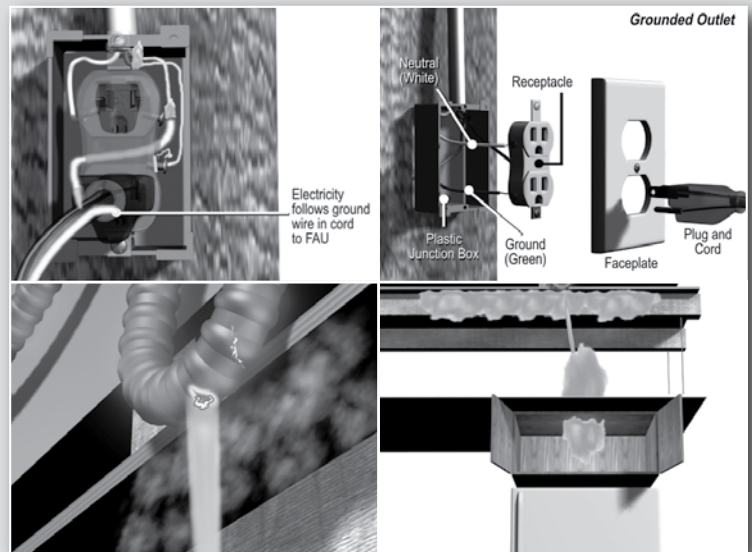
**Visual Evidence Archive: Demonstratives That Made a Difference**

**Practice Area:** Property Damage, Fire Causation

**Background:** Plaintiff homeowner experienced an electrical short that caused a house fire concurrently with the catastrophic Cedar Fire that downed a powerline a couple of miles away. Plaintiff alleged that the powerline failure caused a strong electrical surge that contributed to causing the house fire. The utility defendant countered that the two incidents were unrelated, that such a surge would have affected several hundred other homes, and that a short due to faulty wiring in the home was the proximate cause.

**A Demonstrative That Made a Difference:** A highly detailed animated tutorial was produced that demonstrated how a short circuit combined with an improperly wired generator caused a gas leak and fire. A breakthrough moment occurred during storyboard planning of the animation that enabled the defense expert to definitely tie the physical evidence to true causation.

**Outcome:** Complete defense jury verdict.



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## Summary *continued from page 1*

Code of Civil Procedure. The parties to this motion stipulate that the court shall hear the motion and that the resolution of this motion will either further the interests of judicial economy by reducing the time to be consumed in trial or significantly increase the ability of the parties to resolve the case by settlement.”

- (5) The notice of motion shall be signed by counsel for all parties, and by those parties in propria persona, to the motion.
- (6) The joint stipulation shall be served on all parties, if any, who are not parties to the motion specified in paragraph (1). If, within 10 days of the submission of the stipulation, any nonstipulating party files an objection to the determination of the issue, the court may consider the objection in determining whether or not to allow the motion to be filed.
- (7) A motion for summary adjudication brought pursuant to this subdivision may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.

### Cal.CodeCivProc.§437(c).

In summary, the courts may now summarily adjudicate issues upon stipulation of the parties, so long as “the interests of judicial economy” are met. In doing so, however, the courts are required to examine whether such summary adjudication will reduce the time to be consumed in trial or significantly increase the ability of the parties to resolve the case by way of settlement.

### Mr. Vess

Everyone knows that the plaintiffs’ attorney’s practice, generally remunerated on the contingency fee, is a gamble. Sometimes you win and are compensated; sometimes you lose, and go away empty-handed.

But the success is not driven only by the final outcome i.e., a “win” or a “loss.” Instead, success is also defined by the time and expense it takes to get to the result. This driver is difficult to control, as the sometimes intractable court system can seem oriented toward delay.

Over the years, one learns that there are three fundamental hurdles that the plaintiff must overcome to be paid:

- (1) the initial challenge upon the filing of the complaint—usually not too much of a concern;
- (2) the motion for summary judgment—filed in nearly every important case, and a concern, therefore, in every case; and
- (3) the trial itself—which comes, as we know, in only the small percentage of cases.

The initial round of challenges to a complaint is usually somewhat routine; surviving those challenges, therefore, produces little or no settlement leverage. The vast majority of cases await the inevitable motion for summary judgment before settlement can even be meaningfully broached. This takes time. Because of their dispositive nature, lawyers are sometimes loath to pull the trigger (until they have everything they need) and judges are quick to grant additional time to either litigant. Delay is the name of the game. But, as we have heard, sometimes justice delayed is justice

denied. Costs increase, and the risk of losing the motion goes up accordingly. The plaintiff’s worst case, or nearly worst case, is losing a motion for summary judgment heard on the eve of trial. All the preparations and sunk costs are lost. If one is to lose, it would be better to lose early. And here is where the recent amendments to Section 437(c) may prove to be effective.

The amendments may increase our ability to shorten the time that it takes to resolve larger cases that present particularly thorny legal issues.

I believe that thoughtful plaintiffs’ lawyers should welcome the amendment and incorporate it into their practices. Based on my own experience, I believe many of my cases could have benefitted from early resolution of issues through a mechanism like this

As also mentioned above, motions *in limine* have effectively become the bastion of motions for summary adjudication. For some reason, the origin of which I cannot identify, judges use the motion *in limine* process not only to exclude prejudicial material, but also to give “haircuts” to cases that seem unduly complex or lengthy. A snip here and there—the day before the trial is about to start—seems to be *de rigueur*. If a judge is going to summarily adjudicate some issues in my litigation, I would like to know that when the case is young, before all of the significant time and expense of trial preparation has occurred, rather than on the eve of trial. I believe that judges sense which claims are legitimate and which are not, but—prior to this amendment—they did not have an effective pair of scissors to do the haircutting early in the litigation. The new amendments to Section 437(c) allow that trimming to occur earlier, potentially sparing what would otherwise be wasted efforts.

It is true that most plaintiffs’ attorneys will do almost anything to defer scrutiny of their claims. Samuel Johnson had it right: nothing focuses the mind like the noose. So, while most plaintiffs’ lawyers would not want to “rush to the execution,” I would suggest that a more thoughtful approach would be to allow the inevitable scrutiny sooner rather than later. There are several reasons for this.

First, the summary judgment standards are strict and a moving party’s burdens are great. It is important to recognize that the burdens are unaffected by the new issue adjudication amendments. Simply stated, the issues can be resolved earlier, but not more easily.

Second, we lawyers can be stubborn. I have lost two general civil cases on summary judgment in 22 years of practice. In one of the cases, I knew from day one that summary judgment was likely. In the other, I was robbed! The point is that I hung onto that case, worked hard on it, and invested time and energy in it, only, in the end, to have it thrown out. That case would have greatly benefitted from this new procedure.

Though I have lost a few motions, I have won twenty times more. And, in each of those cases, I had to listen to the defense lawyer tell me, again and again, how he or she was going to get summary judgment. I wish that, over the years, I could have “voted with my pocket book,” and said to the lawyer, “Fine, let’s stipulate to have your silver-bullet defense of this or that issue resolved once and for all.” I cannot estimate how many of the ever-confident defense lawyers would have taken me up on it, but, at a minimum, I am confident it would have been less than all of them.

The take away, from my standpoint, is that we tend to hang onto, and perhaps distract ourselves, with, hobby horse theories that we should

<sup>1</sup> Other than punitive damages, which can be addressed through the normal summary adjudication procedure that predated this amendment and remains intact

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know will not prevail. As dogged advocates, we sometimes convince ourselves that our cases are stronger than they are. The new procedure presents an opportunity to allow some subset of cases to be shorn of some of these issues, which otherwise might stand in the way of an earlier adjudication. An earlier resolution of the issue can mean an earlier resolution of the case, to everyone's ultimate benefit.

### Ms. Rosing

I am a huge fan of this new procedure. My main thought about it is that it does not go far enough.

I actually learned about this change to the statute when I was lamenting about the summary judgment/adjudication to a colleague at the State Bar of California. It has apparently been an issue that many have raised, and the Legislature finally addressed it when it became clear that a solution could help ease the burden of our already heavily taxed court system. For years I have agonized over the lack of a procedural mechanism to summarily adjudicate issues, other than a motion *in limine* on the eve of trial. I have thought time and time again what a waste of resources it is—for the parties and the judicial system—to have major issues that are subject to judicial resolution hanging out there until the eve of trial. By that time, everyone has poured much time, money, and emotion into the case. So when I learned about the change, I was thrilled.

Like Bryan, I can think of quite a few instances where this revised statute would have come in very handy. As mentioned in the preface, I mainly defend attorneys in lawsuits. One case comes immediately to mind when considering this revision to 437c. The allegation against my attorney client was that he had allowed a statute of limitations against a third party to elapse, and, had he filed in time, his client would have achieved a multi-million dollar recovery. I knew that we were likely able to prove that the statute had expired *prior* to my attorney client ever being hired, but this issue—which was clearly the main issue in the case—was just one of several mentioned in the causes of action for malpractice and breach of fiduciary duty. The other issues collectively had a maximum value of slightly over six figures. If the court would only decide the issue of whether the statute had expired prior to my client's representation, the uncertainty over the value of the case would be largely resolved (was it a \$150,000 case or a \$5,000,000 case?), and both my office and plaintiff's counsel's office could have an informed settlement discussion, saving all – involved including the court – a lot of needless effort.

Another example involved a case where my client was alleged to have committed an error that resulted in a governmental entity losing its ability to recover under a bond. There was authority, however, indicating the entity only had a right to the bond money to the extent it had or would incur certain delineated expenses. The plaintiff's counsel disputed our position, and said the entire amount of the bond was the damage in the case. Given the fact that resolution of this issue would not have settled an entire cause of action, it could not be summarily adjudicated. Had there been a mechanism for getting it resolved early on in the case, however, both sides may not have had to expend the significant resources they did commit preparing for trial. This one issue was in hot contention for the entirety of a very long case, and drove it forward.

As alluded to above, I also like this statute because it is exactly what we need at a time when our judges and courtrooms are overburdened. As I am sure everyone reading this article knows, it is extremely difficult

these days to get a prompt hearing date for a noticed motion. Some courtrooms are even "booked up" on *ex parte* appearance slots a month into the future, leaving the attorneys with literally no way of discussing pressing issues with the judge. This is not only unfair to our judicial officers, but causes severe hardship for the litigants. Recently, one clerk told us that our demurrer—which I was pretty sure would resolve the case—could not be heard for five months. When, at the case management conference, we raised the issue with the judge, he said that there was nothing to be done about it, and that we were expected to conduct discovery to keep the case moving forward while the demurrer was pending. So my client was in a position where he had to commit tens of thousands of dollars to an expensive discovery process in a case that never should have been filed against him, and likely would have been won on demurrer.

My point, of course, is that the system is working at over capacity, with serious consequences to the litigants. Solutions need to be devised. Early resolution of key issues is a potential solution, in part. And I think that the adaptation of this new tool should also be a reminder that the system can be changed, and that we all should remain open-minded in considering ways to economize our legal system.

I am fully cognizant of the fact that most plaintiffs' attorneys—as Bryan points out in his section—would prefer to completely avoid a summary judgment/adjudication process, and just get to trial. I frequently hear from my plaintiffs' attorney friends that the main goal is to "get past summary judgment." For this reason, I think some plaintiffs' attorneys will decline to stipulate to adjudication of issues under the revised statute. This is, however, in my opinion, short-sighted. The reason should be obvious: it ignores the fact that the defense attorney will almost assuredly bring up the issue at the motion *in limine* stage, so it will be resolved one way or the other at that point. By that time, however, all the time and money has already been invested in the case, and one side or the other is going to have to quickly reevaluate its position. There is a decent possibility that the ultimate ruling either causes the plaintiff to understand that he has overvalued the case, or the defendant to realize that he has undervalued the case. Either way, it would have been nice to have that information six months earlier, at the mediation.

It is my belief that litigated matters are generally (though not always) best served by communication between counsel on the substantive issues. Cases are *always* best served by counsel being civil and professional to one another. If indeed a given case involves a high level of communication and courtesy among counsel, it should not be hard to start a discussion about how to best utilize this new statute to everyone's advantage. I think it is crucial for the attorneys on both sides to keep in mind that they are not showing weakness by suggesting or agreeing that new provisions be utilized. The judge will still require that there be no issues of triable fact in order to rule on the issue. The same very vigorous standards that the courts have been utilizing for decades in the summary judgment/adjudication process apply. **This is not a procedural vehicle that gives either side an advantage.** Rather, it is one that simply gives both sides a more accurate picture of the value of the case sooner rather than later.

In conclusion, I hope the Legislature will enact, and the courts will implement, more provisions such as this to streamline the litigation process. There are a lot of ideas out there that could ease the burden on our system, lessen the cost for the litigants, and generally improve the public perception of the judiciary, the bar, and the legal arena.

Continued from page 5

**Damages:** Plaintiff initially sought approximately \$500,000; reduced in closing argument to approximately \$270,000.

**Settlement demand:** None made

**Settlement offers:** None made

### Bottom Line

On March 31, 2011, DRI member Robert W. Frank of Neil, Dymott, Frank, McFall & Trexler, APLC, obtained a defense verdict on behalf of Tom Pousti, M.D., and Pousti Plastic Surgery in a medical malpractice case involving a wound separation injury arising out of a breast augmentation surgery for extra large breasts. *Natash Entzel, an individual v. Tom Pousti, M.D., an individual; Pousti Plastic Surgery, business form unknown; and Does 1 through 100*. San Diego County Superior Court Case No. 37-2009-00101673-CU-MM-CTL

After plaintiff's surgery for saline implants amounting to 1030 ccs each, incisions from the procedure began to separate, creating wound healing problems. Dr. Pousti first attempted to treat by suturing wounds back together. When that did not work, he applied silver nitrate treatment, and when that failed to work, he performed a full thickness skin graft from plaintiff's right inguinal area and used that skin to cover the breast incision open wound problem. In the end, the doctor removed the implants.

Plaintiff claimed the doctor's decision to enlarge the breasts to 1030 ccs was a bad decision, and the post-operative treatment of the wound healing problem was negligent. Plaintiff claimed Dr. Pousti should have immediately removed the implants. Plaintiff also claimed that the doctor's inguinal skin graft went into her lateral hip, to which she had not consented.

Defendant Dr. Pousti claims plaintiff was advised of all risks associated with extra large over-filled saline implants and that informed consent was obtained. He also claimed plaintiff's wound separation did not manifest until weeks after the procedure and that they were not due to the large implants but due to something plaintiff must have done to disrupt the healing process or that she developed a superficial infection that prevented adequate healing. Dr. Pousti claimed attempting to repair the wound with full thickness grafting was within the standard of care and that he had informed consent for the amount of tissue he removed from plaintiff's right inguinal and lateral thigh.

Plaintiff claimed past and future medical damages and past and future lost earnings as a licensed nude outcall entertainer.

After a nine day trial, the jury returned a defense verdict after one day. The plaintiff was represented by Michael L. Levine, Esq., San Diego.

## Potential Changes in Construction Defect Litigation – SB 474

By Elizabeth Skane, Esq.<sup>1</sup>

What is one of the biggest impediments to subcontractors and their insurers to settling many construction defect cases today? It is unquestionably two things: one, the duty to defend or pay for a portion of the general contractors fees and costs; and two, the duty to indemnify based on a showing of no or very little fault on the part of the subcontractor. The costs involved to resolve construction defect cases became even higher for subcontractors and their insurers following the landmark 2008 *Crawford vs. Weather Shield Manufacturing Inc.* decision. (44 Cal.4th 541). However, the landscape may be changing due to the passing of Senate Bill 474 at least in the context of commercial construction defect litigation.

On October 9, 2011, California Governor Edmund G. Brown, Jr. signed Senate Bill 474 into law. The new law imposes restrictions on the enforceability of indemnity provisions in commercial construction contracts. The law applies to commercial construction contracts entered into on and after January 1, 2013, and broadens the class of indemnity provisions that are unenforceable under California law. The key effect is this: After January 1, 2013, indemnity provisions in commercial contracts which purport to require a subcontractor to pay for the general contractor's concurrent active negligence are unenforceable.

Existing indemnity law (as it relates to residential work) remains unchanged as of 2009. In the residential arena, these types of indemnity provisions were already unenforceable under Civil Code 2782. Civil Code section 2782 limits the duty to indemnify including the costs to defend, in the residential construction arena, and invalidates the enforceability of contracts that purport to indemnify the builder regardless of any negligent act or omission by the general contractor.

The stated purpose of the new law is to make general contractors among others responsible for losses they cause on commercial construction projects. Under this law general contractors are now unable to shift the costs of defense, and are able to obtain a defense only in proportion to the extent of loss caused by the subcontractor. But before subcontractor insurance defense attorneys cheer too loudly, keep in mind that Senate Bill specifically exempts out certain insurance provisions. In fact, the law specifically notes in section 2782.05 (b): "This section shall not affect the obligations of an insurance carrier under the holding of *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571, nor the rights of an insurance carrier under the holding of *Buss v. Superior Court* (1997) 16 Cal.4th 35."

The new law goes on to provide in section 2782.5 (b) that it does NOT apply to "A provision in a construction contract that requires the promisor to purchase or maintain insurance covering the acts or omissions of the promisor, including additional insurance endorsements covering the acts or omissions of the promisor during ongoing and completed operations." So it appears that even after 2013, subcontractor insurance defense attorneys can expect general contractors and developers to demand subcontractors procure additional insured endorsements naming them as additional insureds; and that the subcontractor insurers who issue these endorsements will continue to litigate over their share of the general contractor's fees and costs.

However, the law makes no reference to the *Crawford* decision, leaving some question as to whether or not the Legislature intended to abrogate its holding. In *Crawford v. Weathershield Manufacturing* (2008) 44 Cal.4th 541, the Supreme Court of California held that the contractual duty to defend was immediate and mandatory under the wording of the indemnity agreement contained within the contract at issue. In *Crawford*, the court held that the subcontractor had to pay all of the general contractor's attorney fees even though the subcontractor itself was found by the jury to be NOT negligent.

The omission of a reference to *Crawford* may have been intentional, because the duty to defend under an additional insured endorsement may be broader than the duty to defend under a contractual provision. As the court in *Crawford* pointed out, the decision does not "even remotely impose on subcontractors who make promises like the one at bar anything resembling the broad triggers of a

See *Construction* on page 9

<sup>1</sup> The author is a named partner at the San Diego law firm Skane Wilcox, LLP, and is a graduate of the University of San Diego School of Law.

**Construction** *continued from page 8*

duty to defend that are associated with insurers' duties to defend." Senate Bill appears to acknowledge this difference by specifically exempting out any to change to an insurer's duties and obligations under current law, while bringing relief to subcontractors by invalidating contractual defense and indemnity provisions such as those seen in *Crawford*.

So at the end of the day, what will be the effect of Senate Bill 474 in the handling and resolution of commercial construction defect claims? One effect is likely to be that general contractors and their insurers will no longer hold all the cards and be successful in forcing subcontractors to the table

with the threat of ever-increasing *Crawford* fees. A second

likely effect is subcontractors and their insurers will fight more vigorously

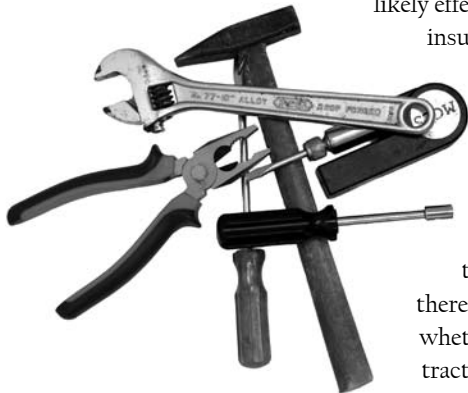
to dispute their share of any additional insured fees and costs, as well as any contractual fees and costs. Arguably under the

new law, there is no duty to defend or indemnify until there is a finding on the issue of whether or not the general contractor is "actively negligent".

Thirdly, there is sure to be a change in the manner in which general contractors and developers tender their claims to subcontractors and their insurers. The new law specifies that there is no bar to the parties "mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees

and costs". The law provides in Section 2782.05(e) a procedure for the "timing and immediacy of defense" and sets forth the manner in which defense must be tendered. Per statute there can be no duty to defend and indemnify until a written tender is issued to the subcontractor. Then, once a claim has been properly tendered, the subcontractor has the option of (1) defending the claim with counsel of their choice no later than 30 days following receipt of the tender or (2) paying within 30 days of receipt of an invoice that reasonably allocates the costs of the defense of the General Contractor. Moreover, the general contractor is prohibited from recovering an uncollectible share of any non participating subcontractor from any other subcontractor. Presumably this means that if the builder is unable to recover a reasonable share from a bankrupt subcontractor, the general contractor is no longer allowed to attempt to recover this sum from the remaining participating subcontractors. Finally, the statute also provides for a reallocation of defense costs upon resolution and settlement and includes penalties where either party fails to meet the obligations of the statute (Section 2782.05(e)(2)&(f)).

At the end of the day, the effect of the passing of Senate Bill 474 upon a subcontractor's defense and indemnity obligations to a general contractor remains to be seen. However, there certainly appears to be reason for subcontractor defense attorneys and their insurers to optimistic. The law appears to attempt to deal with many of the onerous obligations of subcontractors created by cases such as *Crawford*. Whether or not the law's attempt to even the playing field by forcing general contractors to be responsible for their own active negligence makes commercial construction defect cases easier to resolve remains to be seen.



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# Protecting United States and California Intellectual Property Rights for Green Technology in China

By: *Andrea N. Jones, Esq.*<sup>1</sup>

## I. Introduction

China and the United States account for 40% of global emissions, making them the largest emitters of greenhouse gases (GHG) in the world.<sup>2</sup> Of that, California produces 6.2% of the total United States GHG, and 1.4% of the world's GHG.<sup>3</sup> As a consequence, China and the United States have both taken steps to invest considerable amounts of resources toward "green technology"<sup>4</sup> and alternative ways to combat resultant climate change.<sup>5</sup> And this has given rise to a new industry involving Green technology and attendant concerns about intellectual property rights.

The Green-tech industry has, unsurprisingly, centered itself here in California. This has attracted at least \$11.6 billion in related venture capital since 2006, or about one-quarter of all global investment in this market sector.<sup>6</sup> The sector shows signs of significant future growth; California drew 40% of all global clean-tech venture capital in the first half of 2010. More than half that money was invested in Silicon Valley ventures.<sup>7</sup>

Experts predict a trade boom between the United States and China due to the United States' advanced green-tech sector and China's enormous market and need for green technology.<sup>8</sup> But although China's market is enticing given its size and growth rate,<sup>9</sup> many green-tech businesses remain nervous about sharing their technology because of China's notoriously ineffective intellectual property (IP) protection.<sup>10</sup>

In an effort to reassure inventors, China has participated in all major international IP treaties since 1980, and has complied with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) since its accession into the World Trade Organization.<sup>11</sup> Yet, China's prior efforts to improve IP protection have proven to be "a castle in the air,"<sup>12</sup> as counterfeiting and piracy rates continue to occur at 80%–95%.<sup>13</sup>

This article addresses whether United States and California businesses and China can effectuate a plan to improve green technology while still respecting IP rights in China.

## II. China's Need to Develop Green Technology and United States and California Business Opportunities

Climate change has already shocked the Asia-Pacific region with global warming accounting for 70% of its natural disasters.<sup>14</sup> Adverse effects in China include twenty-one warm winters from 1986 to 2007.<sup>15</sup> Warm winters are faulted for China's prevalent water droughts and floods, loss in agricultural

*See China on page 11*

1 The author is a 2011 graduate of the University of San Diego School of Law.

2 James T. Areddy, *Optimism Over China's Green Technology Market*, Wall St. J., Sept. 10, 2009, available at <http://online.wsj.com/article/SB125256399493998709.html>. China is planning an "unprecedented package" worth \$444 billion over multiple years focused on renewable energy alone. See Ellen G. Carberry & Randall S. Hancock, *The China Greentech Report 2009* 38 (Katie Howe & Siobhan Das Bachran eds., Snap Printing 2009) (2009) [hereinafter *Greentech Report 2009*]; see also Alan S. Beebe & Randall S. Hancock, *The China Greentech Report 2011* (PORO Marketing and Design Solutions, Beijing, China 2011) (2011) [hereinafter *Greentech Report 2011*].

3 Advanced Algae Remediation Technologies, *AB 32, California's Global Warming Solutions Act*, (2011), <http://advancedalgae.com/news3.php>.

4 For the purposes of this article, "green technology" refers to any technology curbing the negative impacts of human involvement on the environment.

5 Areddy, *supra* note 1.

6 Carolyn Said, *California Leads Nation in Green Tech*, SFGate.com, Oct. 7, 2010, available at [http://articles.sfgate.com/2010-10-07/business/24115289\\_1\\_clean-tech-green-manufacturing-jobs-green-technology](http://articles.sfgate.com/2010-10-07/business/24115289_1_clean-tech-green-manufacturing-jobs-green-technology).

7 *Id.*

8 Xinhua, *Green Technology May Spark New US-China Trade Boom*, China Daily, Oct. 22, 2009, available at [http://www.chinadaily.com.cn/china/2009-09/06/content\\_8660027.htm](http://www.chinadaily.com.cn/china/2009-09/06/content_8660027.htm); see also Joseph Lazzaro, *Thomas Friedman: Red China? No, Green China*, AOL Money & Finance, (posted Sept. 28, 2009) <http://www.bloggingstocks.com/2009/09/28/thomas-friedman-red-china-no-green-china/>.

9 From 1989 to 2010 China's GDP grew at an average of 9.3%, and surpassed Japan to become the second largest economy in the world. If the 9% growth rate continues China will become the largest economy by 2027. *Greentech Report 2011, supra* note 1, at 23.

10 Areddy, *supra* note 1.

11 See David A. Fazzolare, *Wielding the Double-Edged Sword: Creating the Perception of A Chinese Enterprise to Obtain and Enforce Patent Protection in China*, 5 *BYU Int'l L. & Mgmt. Rev.* 207, 217 (Spring, 2009); See Jennifer A. Crane, *Riding the Tiger: A Comparison of Intellectual Property Rights in the United States and the People's Republic of China*, 7 *Chi-Kent J. Intell. Prop.* 95, 109 (Spring 2008);

12 Fazzolare, *supra* note 10, at 583.

13 See United States Trade Representative, *2010 Report to Congress on China's WTO Compliance*, 5 (2010), available at [http://www.uscc.gov/annual\\_report/2010/annual\\_report\\_full\\_10.pdf](http://www.uscc.gov/annual_report/2010/annual_report_full_10.pdf) (last visited Dec. 2, 2011) (outlining China's legal obligations to the WTO and their shortfalls with regard to such obligations).

14 China Econ. Info. Network, *APEC Says Asia-Pacific Most Affected by Climate Change*, China Climate Change Info-Net, (Nov. 9, 2009), <http://www.ccchina.gov.cn/en/NewsInfo.asp?NewsId=20210>

15 *Id.*, see also Climate Talk, *China: Climate Change and China's National Circumstances*, available at <http://www.asianewsnet.net/home/climate.php?sec=5&country=45>.

## China *continued from page 10*

production, and rising sea levels.<sup>16</sup> China's government has responded with a green-tech emphasis to address the nation's vulnerability to global warming.<sup>17</sup> For example, in 2007, China adopted the *China National Climate Change Program*, which defines specific targets and policy measures to improve climate change.<sup>18</sup> One such objective is a 20% reduction in energy intensity per unit of GDP by 2013, and the program heavily relies upon technological progress.<sup>19</sup> China's large shift towards green-tech improvement presents advantageous opportunities for United States and California businesses and innovators.

From a business standpoint, the California and China relationship is already steady.<sup>20</sup> California's exports to Mainland China increased to \$12.5 billion in 2010, making it the state's third largest trading partner.<sup>21</sup> This steady relationship with China offers prime opportunities for California businesses to capitalize on China's market, home to one-fifth of the world's population.<sup>22</sup> Further opportunity lies in China's commitment to environmental sustainability by allocating nearly 40% of its \$586 billion stimulus plan in 2008 toward green technology.<sup>23</sup>

Foreign investors and innovators are particularly appealing to China, whose historical path to lucrative success is in low-cost manufacturing. Thus, without any real foundation for innovative success, China will necessarily seek foreign, green-tech-savvy businesses to further its environmental initiatives.<sup>24</sup>

### III. The Problem: China's Deficient IPR Regulation.

#### A. Current Factors: Young Laws, Lack of Judicial Predictability, and Minimal Economic Incentives.

Many factors contribute to China's historically weak IP protection. Current causes include: (1) IP protection's relative newness in China, (2) a lack of judicial predictability and expertise, and (3) minimal economic incentives. First, the *Chinese Patent Law* was enacted a mere 25 years ago, compared to the United States' *Patent Act of 1790*.<sup>25</sup> Moreover, Chinese IP rights were not a consequence of "organic" development or an understanding of the value in protecting ideas.<sup>26</sup> Rather, China sought to westernize its economy, and thus implemented IP laws as a means to gain favorable trading partnerships with western countries through international agreements.<sup>27</sup> Hence, IP protection never gained any real government or public support.<sup>28</sup>

Second, a lack of judicial predictability drives weak IP protection and presents obstacles to bringing winnable infringement claims. This unpredictability is a result of China's codified legal system where *stare decisis*—the hallmark principle of the American legal system—does not exist.<sup>29</sup> Past judicial opinions do not influence a patentee's case, which in turn raises litigation costs as businesses gamble on the success of their infringement claims.<sup>30</sup> Additionally, judicial competency is traditionally poor because many judges are military veterans with no legal training or education.<sup>31</sup> Reformation of the legal system, including implementing new laws such as TRIPS and the Third Amendment to China's Patent Law, make it difficult for even experienced judges to keep track of new laws and emerging concepts.<sup>32</sup>

Finally, local governments have little incentive to protect IP because protection efforts stunt local financial opportunities.<sup>33</sup> Specifically, there is little

*See China on page 12*

16 Ministry of Sci. & Tech. et al., *China's Scientific & Technological Actions on Climate Change*, 1 (2007).

17 *See id.* November 2008 economic stimulus plan allocates about 37% to "greentech-related areas." Greentech Report 2011, *supra* note 1 at 12.

18 Wen Jiabo, Premier of the State Council of the People's Republic of China, Strengthen International Technology Cooperation and Address Climate Change Actively, Speech at the Beijing High-level Conference on Climate Change: Technology Development and Technology Transfer, (Nov. 7, 2008).

19 *Id.*

20 CalChamber, *Importance of U.S.-China Trade Relations* (2011), available at <http://www.calchamber.com/international/trade/pages/china.aspx>

21 *Id.*

22 *Id.*

23 *See* Ben Furnas, *We Must Seize the Opportunity or Slip Further Behind: A Primer on Global Competition in Green Technology Investments*, Center for American Progress, (April 20, 2009), available at [http://www.americanprogress.org/issues/2009/04/global\\_competition.html](http://www.americanprogress.org/issues/2009/04/global_competition.html). For further reading on China's focused green technology sectors *see* John H. Barton, *Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuels and Wind Technologies*, 2 ICTSD Trade and Sustainable Energy Series 15 (2007), available at <http://ictsd.org/i/events/dialogues/11251/>.

24 Greentech Report 2009, *supra* note 1, at 15.

25 *See* Crane, *supra* note 10, at 103; *see also* U.S. Department of Commerce International Trade Commerce, *Protecting Your Intellectual Property Rights (IPR) in China: a practice guide for U.S. companies*, [http://mac.doc.gov/China/Docs/BusinessGuides/IntellectualPropertyRights.htm#CHINAS\\_CURRENT\\_IPR\\_ENVIRONMENT](http://mac.doc.gov/China/Docs/BusinessGuides/IntellectualPropertyRights.htm#CHINAS_CURRENT_IPR_ENVIRONMENT).

26 *See* Crane, *supra* note 10, at 97.

27 *Id.*

28 *Id.*

29 *See* Mei Y. Gechlik, *Protecting Intellectual Property Rights in Chinese Courts: An Analysis of Recent Patent Judgments*, 78 Carnegie Papers 1, 27 (Jan. 2007), available at [http://www.carnegieendowment.org/files/cp\\_78\\_gechlikpatent\\_final.pdf](http://www.carnegieendowment.org/files/cp_78_gechlikpatent_final.pdf).

30 *Id.*

31 Gechlik, *supra* note 28 at 7; *see also* Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for Rule of Law*, 15 UCLA Pac. Basin L.J. 1, 26 (Fall 1996).

32 Gechlik, *supra* note 28.

33 Crane, *supra* note 10, at 116.

## China *continued from page 11*

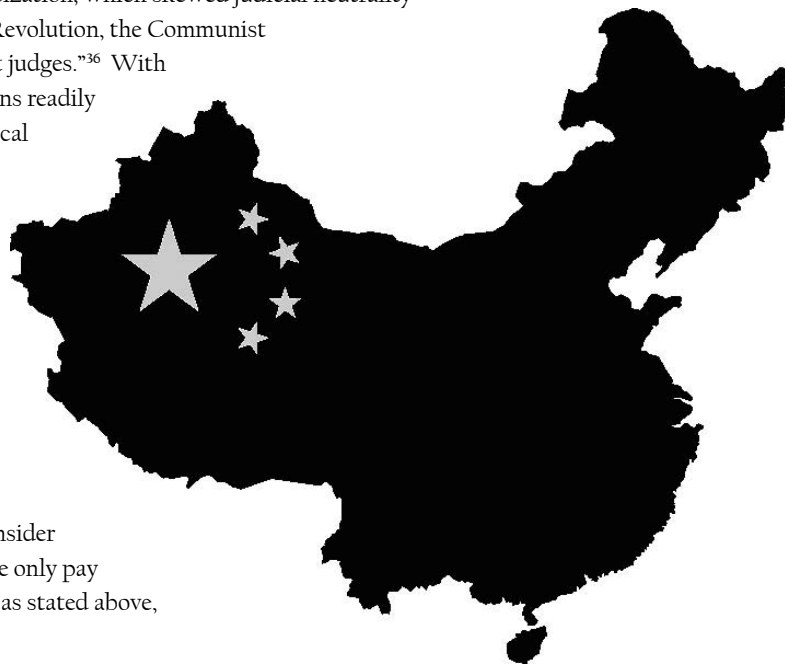
incentive to shut down a local Chinese factory producing infringed goods when doing so would be devastating to the local economy.<sup>34</sup>

### Historical Factors: Corruption and Culture

Other factors contributing to poor IP protection remain rooted in China's historically ineffective judicial body. First, corruption is prevalent in China's judicial body. This corruption is a product of politicization, which skewed judicial neutrality and promoted favoritism towards local businesses.<sup>35</sup> During the Cultural Revolution, the Communist Party sought to "reeducate" all local judges, and essentially created "puppet judges."<sup>36</sup> With the Communist Party's direct influence over appointments, judicial decisions readily reflected their interests.<sup>37</sup> Local protectionism grew because the people's local congress had power to remove judges, allowing local infringers to reap home-court advantages.<sup>38</sup>

Second, China's ineffective IP protection is a result of long-standing cultural and societal norms. The Communist regime's 60-year shadow bestowed an under-appreciation, or even abhorrence, for Western society's "monopolistic" exclusionary IP rights.<sup>39</sup> Hence, China's philosophy of sharing wealth and knowledge directly conflicts with the concept of IP rights that seeks to protect individual ideas.<sup>40</sup>

Finally, China's trademark history demonstrates more value is placed on who *made* the product, and less on who *invented* it.<sup>41</sup> The Chinese do not consider imitating or copying others' works wrong because traditionally the Chinese only pay for tangible goods while intangible goods have no economic value because, as stated above, knowledge should be shared.<sup>42</sup>



### IV. Solutions and Strategies for Protecting Green-Tech Patents

There are two helpful strategies that United States and California businesses can use to conquer the above obstacles and protect their IP rights: (1) creating a "Chinese Enterprise" front; and (2) familiarity with China's unique legal system.

#### A. Hiding Behind the Dragon: Perceptions of a "Chinese Enterprise" Theory

International businesses have often used Chinese ownership as a façade to sidestep local protectionism and judicial corruption.<sup>43</sup> The underlying premise is that when a United States or California business creates the perception that it is primarily a Chinese enterprise, judicial biases will become less apparent, and judges will tend to rule in favor of the "pseudo-Chinese" business.<sup>44</sup> Essentially, United States and California businesses try to gain local dependency and support because this plays a major role in judicial decisionmaking.

The Chinese façade can be accomplished in a number of ways, including having joint Chinese ownership and by hiring Chinese laborers, researchers, and managers.<sup>45</sup> Another option centers on United States and California businesses obtaining ownership interests in domestic Chinese Enterprises. Sino-Foreign Contractual Joint Ventures (CJV) are Chinese enterprises established by joint investment between the foreigner and China.<sup>46</sup> A CJV usually involves having the foreign partner provide funds and technology while the Chinese partner contributes land, facilities, natural resources and limited

*See China on page 14*

<sup>34</sup> Fazzolare, *supra* note 10, at 219.

<sup>35</sup> *Id.*, at 7.

<sup>36</sup> *Id.* at 107-08; *see also* Crane, *supra* note 10, at 107.

<sup>37</sup> Fazzolare, *supra* note 10, at 208.

<sup>38</sup> *See Id.* at 209; *see* Crane, *supra* note 10, at 107; *see* Berkman, *supra* note 30, at 19.

<sup>39</sup> Crane, *supra* note 7, at 97.

<sup>40</sup> *See* Wei Shi, *Incurable or Remediable? Clues to Undoing the Gordian Knot Tied by Intellectual Property Rights Enforcement in China*, 30 U. Pa. J. Int'l. L. 541, 545 (2008) (quoting Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DePaul-LCA J. Art & Ent. L. 63, 79-80 (2002)).

<sup>41</sup> Crane, *supra* note 10, at 106.

<sup>42</sup> *Id.*

<sup>43</sup> *See* Fazzolare, *supra* note 10, at 219.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

# The U.S. Supreme Court Reaffirms The Enforceability of Arbitration Agreements

By Shannon Z. Petersen



In *CompuCredit Corp. v. Greenwood*, \_\_\_S.Ct. \_\_\_, 2012 WL 43514 (U.S. Jan. 10, 2012), the Supreme Court has again enforced an arbitration clause and class action waiver in a consumer contract. In doing so, the Court solidified the holding of its recent landmark decision of *AT&T Mobility v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011) that under the Federal Arbitration Act (the "FAA") arbitration agreements must be enforced according to their terms. Indeed, *CompuCredit* demonstrates a growing consensus on this point. While the Court decided *Concepcion* by a 5-4 majority, 8 out of 9 justices formed the majority in *CompuCredit*, with only Justice Ginsberg dissenting. Justice Scalia wrote the majority opinions in both cases.

*CompuCredit*, however, does not merely repeat *Concepcion*. The Court in *Concepcion* held that the FAA preempts state law refusing to enforce arbitration terms (such as class action waivers) that some argue favor corporate defendants over consumers. The Court in *CompuCredit* expands this by holding that the FAA also trumps federal law implying a

statutory right to a civil action in a court of law. Unless some other federal law expressly prohibits arbitration, the FAA requires that arbitration agreements be enforced. As for state law, the FAA preempts any implied or express statutory right to a judicial action.

The class action plaintiffs in *CompuCredit* obtained credit cards through a form application containing an arbitration provision enforceable under the FAA. The plaintiffs sued in federal court in California claiming CompuCredit violated the federal Credit Report Organization Act (the "CROA"), 15 U.S.C. § 1679 *et seq.* by allegedly misrepresenting the credit limits and by claiming that credit cards could be used to rebuild poor credit. CompuCredit moved to compel arbitration and enforce a class action waiver.

The plaintiffs opposed the motion, arguing that the CROA granted them a statutory right to a judicial action. Specifically, the plaintiffs relied on a provision of the CROA stating that consumers "have a right to sue a credit repair organization that violates" its provisions and that this right cannot be waived. The U.S. District Court of the Northern District of California agreed with the plaintiffs and denied the motion to compel arbitration, holding that "Congress intended claims under the CROA to be non-arbitrable." *CompuCredit*, \_\_\_S.Ct. \_\_\_, 2012 WL 43514 at \*2-3. The Ninth Circuit affirmed, holding that CROA's "right to sue" provision "clearly involves the right to bring an action in a court of law." *Id.*

The U.S. Supreme Court disagreed, and reversed the decision of the Ninth Circuit. The Court began by repeating from *Concepcion* and other precedent that the FAA "establishes a liberal policy favoring arbitration agreements." *Id.* at \*3. "It requires courts to enforce agreements to arbitrate according to their terms." *Id.*

The Court then went on to add that this "is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* According to the Supreme Court, the CROA's "right to sue" provision does not override the FAA. Instead, it means only that consumers "have the legal right, enforceable in court, to recover damages from credit report organizations that violate CROA." *Id.* at \*5. The parties "remain free to specify" how this legal right can be pursued, including by arbitration. *Id.* at \*4. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at \*6.

This decision reaches well beyond the CROA. Prior to *Concepcion*, the plaintiffs' class action bar argued that class action waivers are unenforceable as unconscionable under state

## Meet Your New Board Member

### Deborah Dixon



I am a fifth year associate at Wingert Grebing Brubaker & Juskie. My practice focuses on litigation, including professional liability defense, employment and business litigation and defending national businesses in an array of claims. I believe my training and background at Wingert Grebing fosters my desire to promote and exemplify integrity and professionalism in our community.

I enjoy maintaining leadership roles within our community and am currently the Co-Chair of the Golf Committee for Lawyers Club, as well as an active member of the Fund for Justice within Lawyers Club. I continue to work with law students as an adjunct professor in the trial skills department at California Western School of Law.

### Steven T. Sigler



Stephen Sigler joined Neil Dymott in 1996 and became a shareholder in 2003. Mr. Sigler specializes in civil litigation with an emphasis in professional liability. Mr. Sigler is a member of the California State Bar and is admitted to practice in the U.S. District Court, Southern District of California and the U.S. Court of Appeals for the Ninth Circuit.

Mr. Sigler received his law degree from the University of Kansas where he was also awarded the David H. Fischer Advocacy Award.

Past community involvement has included the San Diego Chapter of the University of Kansas Alumni Association and as a member and chairman of the San Diego Medical Professional Liaison Committee. Mr. Sigler has also provided Pro Bono assistance in matters involving conservator actions and immigration asylum claims. He has spoken to multiple groups and associations on a variety of HIPAA and healthcare legal issues.

**China** *continued from page 12*

funding.<sup>47</sup> This option is a suitable fit for United States and California green tech companies because they are in a better position to provide funds and technology, and China to contribute land and facilities.<sup>48</sup> Moreover, CJVs are attractive because ownership and managerial retention is based on knowledge and technology.<sup>49</sup> Thus, because United States and California companies are so far advanced in green technology, they would have disproportionately high ownership rights over the company while still benefitting from China's land and resources.

Whichever strategy a United States or California company uses to create the Chinese façade, the "Chinese Enterprise" theory solves many concerns of individual patent owners. It alleviates judicial corruption and local protectionism concerns, while still providing an opportunity for foreign businesses to utilize China's market.

#### B. Understanding China's Legal System and Current Remedial Actions for Patent Infringement

United States patent owners can assist in protecting their products by understanding how, as explained above, politics influence China's legal process.<sup>50</sup> It is also wise to learn relevant Chinese IP laws and remedial options such as the Third Amendment.<sup>51</sup> Although this may seem self-evident, several patent owners have become victims of their own ignorance, which minimal research and time could have prevented.

First, it is important to patent the product *in* China. The misconception that there is no point in paying and registering for a patent because it would not likely be enforced could seriously jeopardize the invention and innovator. This is because the patent not only provides the owner remedial effects against an infringer, but it also protects the owner from getting sued against his or her own invention.<sup>52</sup> If another company patents the idea first, then it can turn around and sue the original inventor for patent infringement.<sup>53</sup>

*See China on page 15*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Wei Shi, *supra* note 39, at 583.

<sup>51</sup> See William L Warren et al., *Legal Alert: the Third Amendment to the Chinese Patent Law*, Sutherland 1, 3 (Mar. 9, 2009), available at <http://www.sutherland.com/files/News/ddae6f2a-7502-4740-b58b-060ced14e4bb/Presentation/NewsAttachment/2dbe51c9-bb0a-48bc-bfd9-8f6d7e663b25/TheThirdAmendment.pdf>.

<sup>52</sup> ChinalawBlog.com, *The China Patent Shuffle*, [http://www.chinalawblog.com/2007/08/so\\_what\\_about\\_a\\_china\\_patent.html](http://www.chinalawblog.com/2007/08/so_what_about_a_china_patent.html) (Posted Aug. 29, 2007).

<sup>53</sup> *Id.*

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## China *continued from page 14*

Second, a patent holder should be aware of the legal remedies it could obtain if the patent were infringed. This knowledge of available remedies will be valuable when deciding whether the benefits of entering China's domain exceed the costs.<sup>54</sup> Third, learning the general legal process is invaluable to a patent owner. Currently, patent owners may bring a claim of action either before the Patent Affairs Administration (PAA) or the district court.<sup>55</sup> The PAA is an administrative agency that is part of a major city government.<sup>56</sup> Bringing a claim before the PAA has its advantages in that it is quick and relatively inexpensive. However, because green technology is valuable and lucrative, an action against an infringer would better be brought to the district court where, unlike the PAA, damages can be awarded.<sup>57</sup> Under China's Third Amendment to Patent Law, the penalties for patent law have been strengthened.<sup>58</sup> The infringer must pay civil liabilities and is ordered by the Administrative Authority for Patent Affairs to amend his act.<sup>59</sup> The infringer's illegal earnings are confiscated, and additional damages may be awarded amounting to no more than four times illegal earnings.<sup>60</sup> An owner's knowledge of the legal process is helpful for the patent's protection and will assist the holder in determining whether to enter the market.

### C. A Note on Compulsory Licenses: Unnecessary Fix or Fair Alternative?

There is much debate about whether compulsory licenses should be granted in China's green-tech sector. Although not necessarily a solution to improve China's IP regulation, compulsory licenses are an alternative for green-tech patent owners and are worth explaining.

Compulsory licenses are when the government forces a patent holder to grant use of the technology to the state.<sup>61</sup> Usually the state will grant royalties to the patent owner, though often at a substantially lower price.<sup>62</sup> The debate outlines typical concerns between developed and developing countries. Developed countries argue compulsory licensing is "legalized piracy" and discourages innovation by allowing developing nations to freely distribute other nations' work.<sup>63</sup> Developing nations argue it is unfair to criticize their inability to swiftly reduce global emissions when green technology is unobtainable due to high prices.<sup>64</sup>

According to TRIPS, compulsory licensing is permitted at the discretion of the country, yet is usually suspended for "emergencies."<sup>65</sup> For example China has granted compulsory licenses for importing pharmaceutical products treating diseases.<sup>66</sup> As a matter of public health, the licenses provided access to medicines that would otherwise be unaffordable.<sup>67</sup>

With respect to green technology, China has vocalized that compulsory licenses are necessary to combat global emissions because they place developing countries within reach of energy-saving technologies that would otherwise be unaffordable.<sup>68</sup> The European Parliament has also urged the European Commission—which oversees trade agreements on behalf of EU members—to "launch[] a study on possible amendments to the WTO Agreement on [TRIPS] in order to allow for the compulsory licensing of environmentally necessary technologies . . ."<sup>69</sup>

But others question the need for compulsory licenses in green technology.<sup>70</sup> John Barton, a Stanford University law professor and leading authority on technology transfer, distinguishes traditional compulsory license zones from green technology.<sup>71</sup> Most patents in basic PV, biomass, and wind technol-

*See China on page 16*

54 For an additional resource on Chinese legal remedies see Steven J. Birt, *IP Client Strategies in Asia: Leading Lawyers on Understanding Variations in Intellectual Property Law Systems, Advocating for Improved Enforcement Practices, and Staying on Top of Local Patent Law Amendments: Hong Kong: A Focus on IP in Urban China*, 2009 WL 2029072 (ASPATORE) 3 (July 2009).

55 John Gladstone Mills III, Donald C. Reiley III, and Robert C. Highley, *Patent Law Fundamentals: Part VII. Patents in Global Context: Obtaining and Maintaining Rights Abroad*. Ch. 26 People's Republic of China. (Nov. 2007).

56 *Id.*

57 *Id.*

58 See Warren, *supra* note 50.

59 *Id.*

60 Chinese Patent Law, Article 63, adopted by the People's Congress, December 27, 2008.

61 See WTO.org, *Compulsory Licensing of Pharmaceuticals and TRIPS*, [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/public\\_health\\_faq\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/public_health_faq_e.htm) (last visited, Dec. 5, 2009); see also Stephen Albainy-Jenei, *Should Green Technology be Subject to Compulsory Licensing?*, Patent Baristas, Nov. 23, 2009, <http://www.patentbaristas.com/archives/2009/11/23/should-green-technology-be-subject-to-compulsory-licensing/>.

62 Int'l Centre for Trade & Sustainable Dev., *Link Between Patent Rules and Access to Green Technology Come Under Scrutiny*, 7 Bridges Trade BioRes Rev. 22 (2007), available at <http://ictsd.org/i/news/biores/9153/> [hereinafter *ICTSD Link Between Patent Rules and Access to Green Technology*].

63 Cynthia Cannady, *Access to Climate Change Technology by Developing Countries: A Practical Strategy*, 3 Bridges Trade BioRes Rev. 3 (2009), available at <http://ictsd.org/i/news/bioresreview/64053/>.

64 *Id.*

65 WTO.org, *supra* note 58.

66 Michael Sage, *The Doha Mandate – Compulsory Licensing of Pharmaceutical Patents*, X-tech group, May 2006, at 1, available at [http://www.simpsongrierson.com/assets/expertise/xtech/publications/biotech/AXJ\\_May06.pdf](http://www.simpsongrierson.com/assets/expertise/xtech/publications/biotech/AXJ_May06.pdf).

67 *Id.*

68 *ICTSD Link Between Patent Rules and Access to Green Technology*, *supra* note 59.

69 *Id.*

70 *Id.*

71 Barton, *supra* note 22, at x.

## China *continued from page 14*

ogy have expired; thus competition is increased because patented items are now in specific improvements of a product—not the product itself.<sup>72</sup> This differs from pharmaceutical patents, which often have high financial returns because there are no substitutes for the drug.<sup>73</sup> Hence, green technology may not be so expensive.

In short, compulsory licensing for green technology is not ideal, and debatably unnecessary. However, it is an option that may be granted to patent owners given the crucial issue at stake—planet conservation.

### V. Conclusion

China's primary impediments to strong IP protection are conquerable. United States and California businesses should not hesitate to partake in green-technology transfer. Although China is still developing its laws to better protect IP rights, there are strategies that United States and California businesses can use to avoid poor IP protection, such as merging with Chinese businesses to present a "Chinese Enterprise" front, due diligence when conducting business in China, and becoming familiar with China's unique legal system and culture, which will foster cultural understanding.

Together, the United States and China are in the best position to combat climate change because they are the highest contributors of GHG and global emissions. With California leading green-tech innovation, the state is in prime position to continue developing its trade relationship with China seeking to reduce GHG. Not only is the Chinese green-tech market lucrative, its effects will benefit the world today and generations to come.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

### Meet Your New Board Member

## Todd M. Ratay



Todd Ratay was born in Chicago, Illinois. Mr. Ratay attended the Murphy Institute of Political Economy at Tulane University, where he earned his Bachelor of Arts degree in Political Economy in 1997. In 1998, he lived in Santiago, Chile, where he translated Chilean mining news for US and Australian investors. From 1998 - 2002, Mr. Ratay assisted in establishing U.S. subsidiaries of European corporations in

the semiconductor industry as a project manager for John Cabot International, Inc. in Silicon Valley. Mr. Ratay then attended the USD School of Law from 2002-2005 where he was a member of the San Diego International Law Journal. While at USD, Mr. Ratay served as a legal intern for Elder Law & Advocacy and as a Judicial Intern for the Honorable Patricia Benke in the California Court of Appeal, Fourth District. He joined Neil Dymott in 2006, and practices general civil liability with a focus on professional liability and medical and dental malpractice, along with some licensing board cases. Mr. Ratay is a member of the CA state Bar, and admitted to practice in the CA Superior Court and the US District Court, Northern District of CA.



***“He established almost instantaneous rapport with our client by conveying to him... how the litigation process would respond to his claims. Judge Bianchini then managed [to move] our client from his initial, unrealistic demands to a reasonable settlement figure.”***

## Hon. Victor Bianchini

(Retired)

During his tenure on both the state and federal benches, Judge Bianchini mediated more than 3,500 cases ranging from simple to multi-issue complex matters. Among his settlements are many multi-million dollar verdicts in complex cases ranging from patent cases to class actions. Judge Bianchini is known to be an advocate for the settlement process while using a warm and caring approach. Many clients praise him for not giving up and truly exploring every avenue for possible settlement.

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# Insurance Law Update

By James M. Roth, Esq.

The Roth Law Firm

The final quarter of 2011 saw a volume of published and unpublished insurance related cases handed down by both the state and federal courts. Among the more interesting or unique cases are those which evaluated policy and statutory arbitration, direct actions against carriers by judgment creditor plaintiffs, and whether the seizure of medical marijuana triggered coverage under the “theft” provision of a homeowners’ policy – all of which are discussed more fully below.

**To the Extent There Is a Dispute Between the Parties Concerning the Amount of Independent Counsel Fees Owed in the Defense of an Insured in a Third Party Suit, That Dispute Ultimately Must Be Resolved by Arbitration as Required by the Statute Governing a Liability Insurers’ Duty to Provide Independent Counsel, but Where an Insured Raises in a Bad Faith Action the Duty to Defend, That Issue must Be Resolved First in the Trial Court Before Any Such Arbitration.**

In the opinion styled Janopaul + Block Companies, LLC, et al., v. the Superior Court of San Diego County (St. Paul Fire and Marine Insurance Company), (Nov. 17, 2011) (2011 WL 5581840), Acting P.J. Benke, writing for the Court of Appeal, Fourth District, Division 1, held that to the extent there is a dispute between the parties concerning the amount of independent counsel fees owed in the defense of an insured in a third party suit, that dispute ultimately must be resolved by arbitration as required by the statute governing a liability insurers’ duty to provide independent counsel, but where an insured raises in a bad faith action the duty to defend, that issue must be resolved first in the trial court before any such arbitration.

Factually, Janopaul was the owner of the historic El Cortez Hotel in San Diego (“El Cortez”), which Janopaul planned to restore. Janopaul contracted with St. Paul Fire and Marine Insurance Company’s (“St. Paul”) named insured, Ninteman Construction Company, now known as The Sundt Companies, Inc. (together, “Sundt”), to serve as the general contractor for the El Cortez project (“Janopaul contract”). In the Janopaul contract, Sundt agreed under an express indemnity provision to defend Janopaul for claims arising from Sundt’s work. When the El Cortez Owners Association later filed suit against Janopaul for construction defects at the El Cortez project, Janopaul timely requested that Sundt defend and indemnify it in the El Cortez action. When Sundt failed to do so, Janopaul cross-complained against Sundt alleging several causes of action including breach of express indemnity. Janopaul retained Golub & Morales, LLP (“Golub”) to represent it. Golub thereafter tendered Janopaul’s defense and indemnity in the underlying action to St. Paul, which acknowledged receipt of the Janopaul tender. However, St. Paul stated it was investigating the matter and was then unable to “either decline or accept all or part of this tender.”

More than two years after Janopaul’s original tender, Janopaul informed St. Paul that it intended to file a bad faith complaint against St. Paul because of the latter’s “complete failure” to respond to Janopaul’s defense and indemnity tender. Three days later, St. Paul agreed to defend Janopaul under a reservation of rights. Although Janopaul had never requested appoint-

ment of independent counsel, St. Paul nonetheless agreed as follows to provide Janopaul “Cumis counsel,” advising that “Civil Code [section] 2860 provides the right to independent counsel where the outcome of a coverage issue may be controlled by counsel first retained by the insurer. In light of the allegations of intentional conduct, St. Paul concludes that Janopaul is entitled to independent counsel and understands that your [Golub’s] office has been selected by the insured to represent its interests in this matter. However, St. Paul’s obligation to pay defense fees and costs incurred by independent counsel is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. Thus, St. Paul agrees to contribute to the defense of Janopaul at the rate of \$150 an hour for [p]artners, \$135 an hour for associates and \$75 an hour for paralegals.” St. Paul further stated in its reservation of rights letter that it was not obligated to reimburse Janopaul for any fees and costs Janopaul incurred pursuing any “affirmative claims” against Sundt or any other party in the underlying action; that it only agreed to pay costs and fees that were “reasonable and necessary” to Janopaul’s defense in the underlying action; and demanded “to the extent reasonably possible, [Golub] segregate its billing entries so that tasks performed in defense of potentially covered claims are delineated from those associated with the uncovered and affirmative claims outlined herein.”



Some time later, St. Paul notified Golub that it was in the process of reviewing invoices Golub had submitted for defending Janopaul in the underlying action and expressed concerns over Golub’s alleged “objectionable billing practices,” including “excessive hourly rates, block billing entries and tasks which did not appear reasonable and/or necessary to the defense of Janopaul.” St. Paul thus invoked arbitration to resolve the disputed legal fees and costs under section 2860(c), claiming there was a “dispute[ ] concerning attorney[ ] fees” between the parties. Specifically, because St. Paul had previously acknowledged Golub as independent counsel to Janopaul, St. Paul claimed the attorney fee dispute “must be submitted to a single auditor for resolution.” St. Paul also claimed the scope of such arbitration included “(1) the applicable rate; (2) the extent the fees submitted to St. Paul are reasonable and necessary to the defense of Janopaul; and (3) any reimbursement right St. Paul may have against Janopaul for overpayment of defense fees after the audit process is complete.” St. Paul initially requested Janopaul and Golub voluntarily agree to arbitrate. St. Paul suggested any such arbitration be stayed pending resolution of the underlying action in order for Golub to focus solely on Janopaul’s defense. When Janopaul and Golub refused to arbitrate, St. Paul filed a petition to compel arbitration. Writing for the trial court, Judge Steven R. Denton denied the motion by Golub and Janopaul to dismiss the arbitration petition and granted St. Paul’s competing motion to compel arbitration. Judge Denton thereafter requested supplemental briefing which did not change his opinion. Before the supplemental briefing was concluded, Janopaul filed

**Insurance** *continued from page 17*

a “bad faith” action against St. Paul.

As relevant here, Civil Code § 2860(c) provides in part: “Any dispute concerning attorney’s fees not resolved by [an alternative procedure set forth in the policy] shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.” In reversing Judge Denton, the Court found that before granting St. Paul’s request to compel fee arbitration between Golub and Janopaul, Judge Denton was required to first examine the allegations contained in Janopaul’s “bad faith” complaint and make a preliminary determination of whether St. Paul had a duty to defend Janopaul and if so, whether St. Paul breached that duty and engaged in bad faith conduct. If, as alleged by Janopaul, the delay of more than two years by St. Paul in responding to the original tender was a breach of St. Paul’s duty to defend Janopaul, then St. Paul’s breach of that duty resulted in St. Paul’s forfeiture of the right to control the defense of the action or settlement, including the ability to take advantage of the protections and limitations set forth in the statute governing liability insurers’ duty to provide independent counsel.

Consequently, to the extent there was a dispute between the parties concerning the amount of independent counsel fees owed in the defense of an insured in a third party suit, that dispute ultimately must be resolved by arbitration as required by the statute governing a liability insurers’ duty to provide independent counsel, but where an insured raises in a “bad faith” action the duty to defend, that issue must be resolved first in the trial court before any such arbitration.

In *Order for a Plaintiff, Who Has Obtained a Judgement Against an Insured Defendant, to Recover on That Judgment Against the Insured Defendant’s Insurer as a Judgment Creditor under Insurance Code § 11580(b)(2)*, the Defendant must Be an Insured of the Insurer.

In *Estate of Cartledge v. Columbia Casualty Company*, (Nov. 23, 2011) (2011 WL 5884255), the United States District Court, E.D. California, held that in order for a plaintiff, who has obtained a judgement against an insured defendant, to recover on that judgment against the insured defendant’s insurer as a judgment creditor under Insurance Code § 11580(b)(2), the defendant must be an insured of the insurer.

Factually, Sierra Manor Associates, Inc. was a residential elder care facility. Cartledge obtained a default judgment in state court against Sierra Manor Associates, Inc., individually and doing business as Sierra Manor, in the amount of \$2,000,471.50 for claims arising from injuries allegedly sustained by Emma Cartledge while a resident at Sierra Manor. Columbia Casualty Company (“Columbia”) issued a commercial liability policy to Attwal Enterprises, Inc., a corporation that used two fictitious business names - Sierra Manor and Woodson Lodge. That policy was valid at the time of the acts under which the underlying state action arose. Sierra Manor Associates, Inc. was not listed as an insured on the policy. Interestingly, Balwinder Attwal was the CEO of both Attwal Enterprises and Sierra Manor Associates, Inc. Cartledge alleged that Columbia was aware of the underlying action, but did not participate in the underlying action and rejected Cartledge’s offers to settle within policy limits. Claiming that Sierra Manor Associates, Inc. was an insured under the Columbia policy, Cartledge brought this action in federal court against Columbia as a judgment creditor pursuant to Insurance Code section 11580, seeking to collect on the default judgment against Sierra Manor Associates, Inc. and bringing

a claim for breach of the implied covenant of good faith and fair dealing.

The opinion began with a statement of the law: under Insurance Code § 11580(b)(2), “whenever judgment is secured against the insured ... in an action based upon bodily injury, death, or property damage ... an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.” At issue was whether plaintiff could be said to have obtained a judgment against a party insured by Columbia. In deciding that the response to that issue was a resounding “no,” the Court noted that the Columbia policy was issued to Attwal Enterprises, Inc. dba Sierra Manor. In the underlying action, the only named defendant was “Sierra Manor Associates, Inc., individually and doing business as Sierra Manor.” Plaintiff argued that because Sierra Manor Associates, Inc. also did business under the fictional name “Sierra Manor,” Sierra Manor Associates, Inc. should be considered as an insured under the Columbia policy. A fictional business name, or dba, explained the Court, does not create a separate legal identity. Other than sharing a similar “dba,” there was no evidence that the insured, Attwal Enterprises, Inc., doing business as Sierra Manor and as Woodson Lodge, was the same entity as Sierra Manor Associates, Inc., doing business as Sierra Manor. In finding for the insurer, the Court concluded that plaintiff had not obtained a judgment against Attwal Enterprises, Inc. and, therefore, had not become a third-party beneficiary of the policy issued to Attwal Enterprises, Inc. and could not therefore bring a claim for breach of good faith and fair dealing.

*Police Officers’ Seizure and/or Destruction of Insured’s Medical Marijuana Was Not a Covered “Theft” under a Homeowners’ Insurance Policy, and That the Insurer Did Not Commit “Bad Faith” in Failing to Wait for the Outcome of Pending Criminal Proceedings Before Denying Coverage.*

In *Barnett v. State Farm General Insurance Company* (2011) 200 Cal. App.4th 536, the Court of Appeal, Fourth District, Division 3, held that a police officers’ seizure or destruction of an insured’s marijuana was not a covered “theft” under a homeowners’ insurance policy, and that the insurer did not commit “bad faith” in failing to wait for the outcome of pending criminal proceedings before denying coverage.

Factually, Officers from the Costa Mesa Police Department executed a search warrant at Barnett’s residence, digging up Barnett’s marijuana plants from his backyard, and also seizing two freezer bags of marijuana and a tray containing loose marijuana and rolling papers. At the time of the search and seizure, Barnett had a homeowners’ insurance policy issued by State Farm. Barnett thereafter filed a claim with State Farm under his homeowner’s policy for the “items” taken from his home during the search. Barnett included in his claim an appraisal of \$98,000 for the seized marijuana and marijuana plants. State Farm initially denied the claim but reopened the file for reconsideration because of then pending possession charges filed against Barnett. Because Barnett was able to prove this his possession was lawful under California’s medical marijuana laws, all charges were eventually dropped against him, though the quantity of his marijuana was in excess of the legal limit. All of the property taken by the police was thereafter destroyed. When State Farm denied the claim, Barnett filed his “bad faith” complaint against State Farm.

The State Farm policy included coverage for personal property on a

## Insurance *continued from page 18*

named perils basis. Specifically, that policy covered “direct physical loss to property” caused by enumerated hazards, including theft. The theft provision in the policy extended coverage to: “theft, including attempted theft and loss of property from a known location when it is probable that the property has been stolen.” An additional provision specified that the insurance policy covered losses to personal property owned or used by Barnett if stolen “away from [his] residence premises,” with certain exemptions inapplicable to the Court’s analysis. That policy expressly covered “Trees, Shrubs and Other Plants,” specifying: “We cover outdoor trees, shrubs, plants or lawns, on the residence premises, for direct loss caused by the following: ... Vandalism or malicious mischief or Theft.”

The Court began its analysis by noting that the word “theft” in a property insurance policy should be given the usual meaning and understanding employed by persons in the ordinary walks of life, and should be construed as common thought and common speech now imagine and describe it. In other words, the words “theft” and “steal” involve the idea of a knowingly unlawful acquisition of property; that is, a felonious taking of it. Consequently, the police officers’ seizure of Barnett’s marijuana at his home pursuant to a search warrant did not constitute a “theft” within the coverage of his homeowners’ insurance policy when there was no specific language – including or excluding – governmental acts within that policy, regardless of whether Barnett lawfully possessed the marijuana under California law, because the seizure was not criminal, nor was there any evidence of an intent to deprive Barnett of his property in a criminal manner, rather than by due process of law. This is because a claim of right to take disputed property negates the criminal intent necessary for “theft” for purposes of theft coverage in a homeowner’s insurance policy. *Penal Code § 511*.

Based upon the above analysis, the Court concluded that State Farm did not commit “bad faith” by delaying its coverage decision and waiting for the outcome of the criminal proceedings against Barnett before making its determination that the police officers’ seizure and destruction of Barnett’s marijuana were not a covered “theft” under his homeowners’ policy, since the issue was not whether Barnett’s conduct was lawful, but rather whether the police officers’ actions constituted theft within the meaning of the policy.

When the Amount of Loss in a Homeowners’ Policy for Property Damage Repairs Is Not Disputed, the Arbitration Appraisal Provision Does Not Apply to Policy Interpretation Issues Such as Whether the Insurance Company Can Exclude the General Contractor’s Overhead and Profit And/or Depreciate the Sales Tax.

In the unpublished opinion styled *Sarkisyan v. Newport Insurance Company et al.*, (Nov. 28, 2011) (2011 WL 5995990), the Court of Appeal, Second District, Division 2, held that when the amount of loss in a homeowners’ policy for property damage repairs is not disputed, the arbitration appraisal provision does not apply to policy interpretation issues such as whether the insurance company can exclude the general contractor’s overhead and profit and/or depreciate the sales tax.

Factually, Serozh Sarkisyan purchased a homeowners’ insurance policy (“Policy”) from Newport Insurance Company (“Newport”). During the Policy period, Sarkisyan suffered a covered loss to his home. Sarkisyan submitted a claim, on which Newport initially paid \$6,764.50 and later revised its estimate of the loss to \$14,779.29. From that amount, Newport deducted

the contractor’s overhead and profit (\$2,373.95) and depreciated the sales tax (\$132.28). The amount of injury, destruction or damage to Sarkisyan’s property was not in dispute. Sarkisyan accepted Newport’s assessment of the cost to repair his home and accepted Newport’s computation of the sales tax and contractor overhead/profit. He challenged, however, Newport’s reduction of the amount owed for property damage by withholding the entire amount of the general contractor’s overhead and profit and by depreciating the sales tax.

Sarkisyan thereafter filed a putative class action suit for “bad faith” based upon those reductions and withholdings by Newport. Newport unsuccessfully moved to stay the proceedings and compel an appraisal, arguing that Sarkisyan was required to submit to an appraisal in any dispute regarding the amount of his claim, including disputes over deductions. The trial court embraced Sarkisyan’s opposition in which he argued that an appraisal cannot be used to resolve a coverage dispute when the amount of loss is not at issue.

The issue giving rise to this matter was whether the Policy or state law imposed on Newport a duty to pay the contractor’s overhead/profit and/or the sales tax. That issue, stated the Court, can only be resolved by interpreting the Policy provision relating to “Actual Cash Value” and applicable state law. The Newport Policy provided in pertinent part that “If you and we fail to agree on the amount of loss, then, either party may make a written request for an appraisal. In this event, each party will select a competent and impartial appraiser. Each party shall notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the two appraisers will select a competent and impartial umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the ‘residence premises’ is located. The appraisers will appraise the loss, stating separately the loss to each item. If they fail to agree, they will submit their differences to the umpire. An award in writing, agreed to by any two, will set the amount of loss.” That Policy covered “physical loss” to the insured property. While that Policy did not define the word “loss,” it described “property damage” as “physical injury to, destruction of, or loss of use of tangible property.” A “loss” in connection with insurance means injury, destruction or damage to property that gives rise to liability on the part of the insurer. The Newport Policy allowed for an appraisal when the “amount of loss” was in dispute. Using the commonly accepted definition of “loss,” the Policy’s appraisal clause came into effect when the amount of injury, destruction or damage to the property was in dispute. Additionally, Newport was required to pay “no more than the actual cash value of the damage....” The Policy defined “Actual Cash Value” as “the amount it would take to repair or replace the damaged property, at the time of the loss, with material of like kind and quality subject to a deduction for deterioration, depreciation or obsolescence and contractor’s overhead and profit. Actual cash value applies to the valuation of property whether that property has sustained partial or total loss.”

The Court noted that because both state law (Insurance Code § 2051 and title 10 of the California Code of Regulations section 2695.9.5) and the Policy language directed the appraisers to evaluate the loss, “stating separately the loss to each item,” the only reasonable interpretation of the Policy language was that the appraisal was limited to examining the value of “each item” of damaged property, and to not consider issues such as sales tax or contractor profits.

## Supreme Court *continued from page 13*

law. Deprived of that argument post-*Concepcion*, they now focus on the argument that plaintiffs have unwaivable statutory rights that trump any agreement under the FAA. In California, for example, plaintiffs argue that the Consumers Legal Remedies Act (the “CLRA”) grants an unwaivable statutory right to a class action in a court of law. See *Fisher v. DCH Temecula Imports*, 187 Cal.App.4th 610 (2010); *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). Similarly, plaintiffs also argue that they have an unwaivable right to a public injunction in a court of law under both the CLRA and California’s Unfair Competition Law (the “UCL”). See *Cruz v. Pacific Health Systems, Inc.*, 30 Cal. 4th 303, 316 (Cal. 2003); *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1082 (1999).

The language of the CLRA and the UCL, however, is similar to the language of the CROA. The CLRA states that a consumer “is entitled to bring an action,” including a class action, and that any waiver of this right is unenforceable. Similarly, the CLRA and the UCL state that plaintiffs have

the right to seek injunctions on behalf of the public. Like the CROA, the CLRA and the UCL do not expressly preclude arbitration. Thus, according to the U.S. Supreme Court, the parties “remain free to specify” how these legal rights can be pursued. See *CompuCredit*, ---S.Ct.---, 2012 WL 43514 at \*4. Because the CLRA and the UCL are silent on whether claims under them can proceed in an arbitrable forum, “the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at \*6.

In any event, under *Concepcion* and other law, the FAA preempts any state-law based statutory right to a class action, a public injunction, or a judicial action. See, e.g., *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (holding the FAA preempts any unwaivable statutory right to a class action under the CLRA).

- The author is a business litigation partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP, where he specializes in class action defense.

## New Hanif Case Applying Howell

By: Brittany H. Bartold

On Friday, November 4, 2011, the Fifth District Court of Appeal (Fresno) decided *Sanchez v. Strickland* (F060582) \_\_ Cal.App.4th \_\_, which discussed and applied two aspects of the California Supreme Court’s recent decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Interestingly, only one of the holdings is published.

The case arose out of an accident in which the decedent collided with an International truck hauling two semi-trailers. (Slip opn., p. 3.) As a result, the decedent spent four months in the hospital and later died. (*Ibid.*) At trial, the jury awarded the decedent’s daughters over \$1 million in past medical expenses. (*Id.* at p. 4.) The trial court granted defendants’ motion reducing the jury’s award of past medical expenses from the amount billed by the medical providers to the amount actually paid to the providers under Medicare and Medi-Cal. (*Id.* at p. 2.) The daughters appealed, contending that the trial court misapplied California’s collateral source rule. (*Ibid.*)

In the unpublished portion of the opinion, the court unequivocally extended *Howell* to Medicare. (Slip opn., p. 2.) *Howell* held that a plaintiff may not recover as past medical expenses the difference between (1) the

medical providers’ full billings for the medical care and services supplied to the plaintiff and (2) the amounts the medical providers have agreed to accept from the plaintiff’s private insurer as full payment. (*Ibid.*) The court in *Sanchez* concluded that *Howell*’s holding concerning private insurance applies with equal force to Medicare. (*Ibid.*) While the two-paragraph discussion of this issue is unpublished, this holding is mentioned in the introduction section of the opinion, which is published.

In the published portion of the opinion, the court held that “[w]here a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule.” (Slip opn., p. 13.) As a result, the court held that the limitation on recovery set forth in *Howell* does not extend to amounts gratuitously written off by a medical provider. (*Id.* at p. 3.)

- The author is a 2010 graduate of the Pepperdine University School of Law. She is an associate in practice at the San Diego office of Lewis Brisbois Bisgaard & Smith LLP.



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**Bottom Line**

**Title of Case:** Karen Beck and Paul Beck v. Ralphs Grocery Company; Colorado West Construction, Inc. & Axis Insurance Company as intervenor on behalf of Gardner Pipe & Mechanical, Inc.

**Case No:** 37-2009-00098719-CU-PO-CTL

**Judge:** The Honorable Ronald L. Styn

**Type of Action:** Premises Liability

**Type of Trial:** Jury

**Trial Length:** 7 days

**Verdict:** 9-3 defense

**Attorney(s) for Plaintiff(s):** Rocky K. Copley, Esq.

**Attorney(s) for Defendant(s):** Thomas A. Balestreri, Jr., Esq. & Zachariah H. Rowland, Esq. of Balestreri, Pendleton & Potocki

**Settlement Demand:** \$200,000.00 (C.C.P. § 998)

**Settlement Offer:** \$100,000.00 (C.C.P. § 998)

**Facts:** Plaintiff Karen Beck tripped over an alleged ½ inch rise in a trench-cover in a Ralphs Grocery Store that was under remodeling work by defendants Colorado West Construction, Inc. and Gardner Pipe & Mechanical, Inc. Plaintiff Karen Beck claimed ~ \$53,000.00 in past and future medical expenses as well as pain and suffering; plaintiff Paul Beck claimed damages for loss of consortium. Defendants brought a motion for nonsuit on the basis of the trivial defect doctrine at the close of Plaintiffs' case. The Court denied the motion holding that the trivial defect doctrine did not apply indoors where the change in elevation was greater than ¼ of an inch. Plaintiffs introduced the testimony of two expert witnesses in trial on the issues of liability and damages, respectively. Defendants called a single percipient expert as to damages: plaintiff Karen Beck's treating physician. The jury deliberated for four (4) hours.

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 ★ On the Move ★
 

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## Robert F. Tyson Jr. of Tyson & Mendes Named San Diego Defense Lawyer of the Year by San Diego Defense Lawyers

Robert F. Tyson Jr., a partner at Tyson & Mendes, LLP, was named San Diego Defense Lawyer of the Year by the San Diego Defense Lawyers (SDDL). The award is given to one outstanding defense attorney in San Diego, recognizing recent successes as well as lifetime achievements in law.

Mr. Tyson stood out amongst a field of successful local attorneys because of his success in the high profile of, *Rebecca Howell v. Hamilton Meats & Provisions, Inc.* matter, which was one of the largest cases in California for 2011. "Bob was nominated for the award because of his success in the *Rebecca Howell v. Hamilton Meats & Provisions, Inc.* case," according to SDDL President Victoria Stairs. "He was on the board's radar for the award throughout the process of the *Hamilton* case." The SDDL board was particularly impressed by Bob's decision to We keep the case with his firm in San Diego rather than referring it out to an appellate firm.

"Our firm is proud of Bob for all his success in 2011," offered Patrick J. Mendes, partner at Tyson & Mendes. "Bob is a superior attorney and it's a tremendous honor to be recognized by an organization with such a high prominence as the San Diego Defense Lawyers." And the SDDL is honored to have Bob as a member and pleased to honor him as the Lawyer of the Year.

Mr. Tyson has practiced law in San Diego for over 22 years. He primarily litigates cases in the areas of products liability, personal injury; commercial and general civil litigation, professional malpractice, environmental and employment law.

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## James A. McFaul becomes a shareholder of Butz Dunn & DeSantis, APC

James A. McFaul has become a shareholder of the San Diego law firm of Butz Dunn & DeSantis, APC. Mr. McFaul has been in practice in California since 2007, after practicing in New York and New Jersey for several years. He is a graduate of Seton Hall University School of Law. Mr. McFaul's areas of practice include general business representation and complex civil litigation including commercial disputes, insurance coverage matters, and employment disputes including wrongful termination claims. Mr. McFaul also focuses on professional liability matters including the representation of attorneys, accountants, architects, and engineers.

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## Andrew Servais named a partner Wingert Grebing Brubaker & Juskie

Andrew Servais has been made a partner at the San Diego firm of Wingert Grebing Brubaker & Juskie. Andrew, who has been in practice since 2005, is a graduate of the California Western School of Law. His practice primarily consists of complex litigation including legal malpractice defense, class actions, wrongful death actions as well as both the defense and prosecution of personal injury cases.

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