

The **Update**

Summer 2005 - Volume 8, Issue 6

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The Bottom Line

Case Title: Douglas J. Keppner v. Kelly Pittlekow

Case No.: GIC 817168

Judge: Honorable Patricia Y. Cowatt

Plaintiff's Counsel: William Berman, Berman & Seidel

Defendant's Counsel: John T. Farmer, Farmer & Case

Type of Incident/Causes of Action: Auto collision at entrance to Hyatt Aventine in La Jolla

Settlement Demand: \$25,000, CCP 998, increased to \$99,999 during trial

Settlement Offer: \$15,001, CCP 998

Trial Type: Jury

Trial Length: 4 days

Verdict: \$15,000 (\$12,000 economic, \$3000 non-economic)

Case Title: Smith vs City of Irvine

Case No.: 03CC05991

Judge: Honorable Geoffrey Glass

Counsel for Plaintiffs: Darren Aitken, Aitken, Aitken and Cohn

Counsel for Defendant TMI: Elizabeth Skane, Law Offices of Elizabeth Skane, APC

Type of Incident: Plaintiff, an Orange County attorney, was riding his bicycle through a construction zone. The City of Irvine contracted with KEC Construction for a road widening project on Shady Canyon Road in the City of Irvine. Defendant Traffic Management Inc. (TMI) was responsible for traffic engineering and warning signs during construction. Plaintiff fell when he impacted a lip created between the base pave and the original roadway during repaving of a portion of the roadway. Plaintiff claimed defendant failed to provide adequate warning. Plaintiff sued for negligent failure to warn. Plaintiff suffered a non union fractured hip with hip replacement. Plaintiff was bedridden 6 months, and claimed medical specials, future medical specials, past and future lost earnings, and general damages. Plaintiff's spouse, claimed loss of consortium damages.

Settlement Offer/Demand: Last settlement demand was \$250,000. Last settlement offer: \$127,500.

Trial Type: Jury

Trial Length: 12 days

Verdict: Defense: Jury Deliberations lasted 20 minutes.

President's Message



John Farmer

An organization, to remain effective and relevant to its members, must be dynamic and fluid, responsive to both the needs and interests of its members. In recent years, with the idea in mind that providing continuing legal education is a primary mission of SDDL, we have developed and implemented the monthly "brown bag" seminar program. To enhance communications and the sharing of practice-related information between members, we have established a confidential e-mail link through our website. But it is the sense of the current Board of Directors that there is more to be done to keep SDDL current and relevant to existing and prospective members. It is in this spirit that we have turned to you, the membership of SDDL, for direct input.

This process began with the "One Minute Survey" you received by e-mail a few weeks ago. For those who missed the opportunity to respond to that survey (or for those of you who may be "technologically challenged") we have included the same survey in written form as an insert in this edition of the Update.

We are pleased to have received a significant response to the initial e-mail survey. The comments received are both constructive and thought provoking. One of the themes which emerges from the responses is that the seminars, including the monthly "brown bags" and quarterly seminars, are considered valuable and of benefit to the members, but they can be improved upon by

making them more practical/nuts-and-bolts in orientation, occasionally involving presentations by plaintiff practitioners, and other similar ideas. Another theme involves enhancement of social interactions among members in new and varying settings and possibly involving clientele from time to time. Yet another theme related to suggested improvements to the annual Installation Dinner to make it more entertaining and more involving to its younger members.

If you did not respond to the e-mail survey, please take a moment to complete and return the enclosed written survey. Further, any issues you feel are not addressed by the survey can be e-mailed to us care of our SDDL administrator, Sandee Rugg. Or, you can simply pick up the phone and call me or any board member and tell us what you think or would like to see. Your opinions on these issues are extremely important to us. Our commitment, in return, is to carefully consider those opinions and ideas and, within our ability to do so, respond by moving SDDL in the direction that you, its members, would like to see it move.

Plaintiff litigators uniformly speak with pride when discussing the value of their membership in San Diego Consumer Attorneys. It is our vision that you feel the same about your membership in SDDL.

John Farmer

EXTRA!!! Member News EXTRA!!!



Balestreri, Pendleton & Potocki is pleased to announce that **Karen A. Holmes** has become a shareholder of the firm. Karen Holmes focuses her practice in the areas of professional liability and complex construction

law, with particular emphasis on design and engineering of products and premises, home builders' risk management and general civil liability of business owners. Prior to joining us in 2001, Ms. Holmes was a partner in Jaroszek, Roth & Kennedy and managing partner of Edwards, Sooy & Byron. An AV rated lawyer with more than 20 years' experience, she serves as Secretary of the San Diego County Bar Association Board of Directors.



Balestreri, Pendleton & Potocki is also pleased to announce that **Sean T. Cahill** has become a shareholder of the firm. Sean Cahill's practice emphasizes a broad range of commercial civil litigation areas, including sports and

corporate trademark protection, real estate sales and construction, business, transportation and high-risk operation claims. He will continue in the counsel of our clients on issues of property rights and transactional opportunities. Mr. Cahill is an AV rated attorney with more than 15 years' litigation experience having begun his career in 1990 with Shifflet, Sharp & Walters.



Fredrickson, Mazeika & Grant, LLP, is pleased to announce that **Elliot H. Heller** has become a partner of the firm. Mr. Heller's primary area of practice continues to be construction and construction defect matters.



The **Law Offices of Kenneth N. Greenfield** have added as an associates **Ernest L. Bell** and **Julie L. Dupré**. Ernest graduated from the University of San Diego School of Law in 1996. Immediately after, Ernest became a high

school English teacher, a profession he greatly enjoyed for several years. Since his return to the law, Ernest has developed broad experience in a civil litigation. Ernest will specialize in bad faith defense. Julie graduated from the University of California, Los Angeles with a B.A. in English in 1992 and attended California Western School of Law. Since passing the Bar in 1995, Julie's practice has included personal injury, family law and most recently, insurance defense, with a focus on bad faith.

Grace Hollis Lowe Hanson & Schaeffer LLP changed its name from Grace Brandon Hollis. The name change reflects the elevation to named partner for three of the firm's attorneys — **Coleen Lowe, Kirk Hanson and James Schaeffer**. Lowe joined Grace Hollis in February 1995 and became a partner in January 2001. She received her J.D. from the University of San Diego School of Law and focuses her practice in Construction Liability and Business, Construction and Real Estate disputes. Hanson, another USD Law School graduate, joined the firm in October 1995 and became a partner in April 2002. He concentrates his practice on employment law, construction defect defense, personal injury claims, business litigation and appellate law. Schaeffer defends physicians and health care professionals. He also represents businesses and individuals in contract disputes over the growing and handling of agricultural products. Schaeffer became a partner in July 2003 and heads the firm's Ventura County office.

Continued on page 5

The Bottom Line

Case Title: George Cullins and Helen Cullins v. Lee Wood, D.C.

Case No: GIN 033694

Judge: Honorable Jacqueline Stern

Plaintiff's Counsel: Thomas Massey, Esq.

Defendant's Counsel: Robert W. Harrison of Neil, Dymott, Frank, Harrison & McFall

Type of Incident/Causes of Action: Chiropractic manipulation allegedly causing pelvic fracture.

Settlement Demand: None

Settlement Offer: Waiver of Costs in exchange for dismissal with prejudice by Dr. Wood.

Trial Type: Jury

Trial Length: 1 day

Verdict: Defense

Case Title: Sayed Habibullah, individually and as personal representative of the estate of Nancy Habibullah v. Neighborhood Healthcare

Case No: GIC 805552

Judge: Honorable Richard E. L. Strauss

Plaintiff's Counsel: Teresa Trucchi, Esq., Suppa, Trucchi & Henein, LLP.

Defendant's Counsel: Daniel S. Belsky, Esq., Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice: wrongful death

Settlement Demand/Offer: Neighborhood Healthcare served plaintiff with a CCP \$998 offer for zero dollars and a waiver of costs. Plaintiff rejected this offer and served Neighborhood Healthcare with a CCP \$998 offer for \$399,999. Plaintiff's offer was rejected by the defense. There were no subsequent settlement discussions.

Trial Type: Jury

Trial Length: 7 days

Verdict: Defense

Recent Supreme Court Decision May Deter Parties From Voluntarily Cleaning Up Contaminated Sites

Danielle H. Moore

Koeller, Nebeker, Carlson & Haluck, LLP



On December 13th, 2004, the U.S. Supreme Court ruled that a private party cannot sue another for cleanup costs from a contaminated site under CERCLA without first being involved in a civil action or settlement with a State or the Environmental Protection Agency.

In *Cooper Industries, Inc. v. Aviall Services, Inc.* (2004) 125 S. Ct. 577, Aviall Services, an airplane parts manufacturer, purchased aircraft engine maintenance facilities located in Texas, from Cooper Industries. In the course of Cooper's operations, various hazardous substances contaminated the groundwater. The pollution continued during Aviall's early ownership of the property. Aviall soon after discovered the contamination and alerted the state and the Texas Natural Resource Conservation Commission. While neither the State or the Federal Government attempted to induce clean up, the Texas Natural Resource Conservation Commission threatened to pursue an enforcement action against Aviall if it did not clean up the site. Aviall thereafter conducted a decade-long, multimillion-dollar remediation effort under the State's supervision, and subsequently filed an action against Cooper to recover \$5 million in cleanup costs.

Aviall sought reimbursement under §113(f)(1) of CERCLA, which provides that any person "may" seek contribution from any other person liable or potentially liable under CERCLA § 107(a) "during or following any civil action" under CERCLA §§ 106 or 107(a). §106 authorizes the federal government to compel responsible parties to clean up contaminated areas, while §107(a) empowers the government to recover its response costs from potentially responsible parties.

Aviall argued that the word "may" in § 113(f)(1) should be read permissively and that "during or following a civil action" is not the exclusive point at which a person may seek contribution under the section. Cooper however, asserted that because Aviall had never been the subject of a civil action to compel remediation or to obtain remediation costs, its contribution claim was statutorily precluded. The district court agreed with Cooper and held that contribution under § 113(f)(1) was unavailable because Aviall had not been sued under § 106 or § 107. The Fifth Circuit ultimately reversed the district court, reasoning in part that "may" in § 113(f)(1)'s enabling clause did not mean "may only" and that a private party can sue for contribution without being party to a civil action.

The United States Supreme Court reversed.¹ The Supreme Court held that Aviall could not maintain a contribution action against Cooper. In an opinion written by Justice Thomas, the Court held to a strict construction of CERCLA's "clear meaning," ruling that a party performing a cleanup may seek CERCLA §113(f)(1) contribution only if it was a defendant in a CERCLA §§ 106 or 107(a) "civil action," or if it had previously resolved its liability to federal or state regulators in "an administrative or judicially approved settlement."

The question as to whether a private party can recover under §107(a) however, was left open. Noting the absence of briefing and decisions by the courts below, the Court declined to address whether Aviall could recover costs under § 107(a)(4)(B) even though it was a potentially responsible party. The court further declined to address whether Aviall had an implied right of contribution under §107(a). §107(a) provides that a potentially responsible party "shall be liable for ... any other necessary costs of response incurred by any person consistent with the national contingency plan." In *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Su-

preme Court previously stated that “§107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs....” The court in *Cooper* however, refused to rely on the dictum in *Key Tronic Corp.* and declined to address the issue in any way.

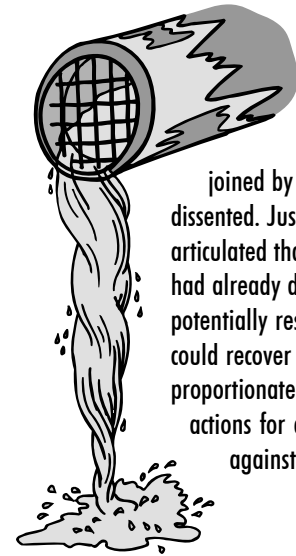
Prior to the *Cooper Industries* decision, the legal community generally understood §113(f)(1) to mean that a private party which, had voluntarily incurred remediation costs, *could* bring a private action for contribution against another potential responsible party. The decision therefore radically alters the current understanding of how CERCLA applies to private cost recovery actions. Specifically, the opinion can significantly deter potentially responsible parties from voluntarily cleaning up contaminated sites.

Practically, in states that have their own statutes allowing contribution actions after voluntary cleanup, parties like Aviall can still obtain contribution. California has a such a “Superfund” law, §25363 of the California Health & Safety Code. However, in States that do not have comparable provisions, parties will be deterred from voluntarily cleaning up a contaminated site. The EPA will be forced to bring federal claims to achieve these cleanups resulting in additional costs to the EPA.

Additionally, businesses, states and some industry groups are dismayed by the decision. Specifically, friend-of-the-court briefs supporting Aviall’s position in the case were filed by twenty-three states, the commonwealth of Puerto Rico, the Lockheed Martin Corp., the American Chemistry Council and some environmental groups. The groups argued that the statutory construction of CERCLA encouraged voluntary cleanup of contaminated sites. The Court however, in holding that the language was clear, did not address the purposes or legislative history of CERCLA.

Ultimately, the decision will greatly impact how environmental cost-recovery actions are handled. Private parties will need to be much more careful in considering how to proceed with investigations, clean ups, and cost recovery proceedings, especially in cases not involving the

EPA or the State. It appears that the decision will make cost-recovery litigation more expensive and more complicated. In light of the *Cooper Industries* decision it is therefore advisable to amend existing pleadings, or write new pleadings, to assert CERCLA claims under Section 107, and not Section 113. Further, if a remediating party intends to recover contribution costs from other parties, it is advisable to enter into an administrative settlement with the State or the EPA before engaging in cleanup. Without a settlement or order by a State or the EPA, a private party now risks being unable to recover remediation costs at all.



(Footnotes)

¹ Justice Ginsburg, joined by Justice Stevens dissented. Justice Ginsburg articulated that the Fifth Circuit had already determined that potentially responsible parties could recover under § 107 their proportionate share of costs in actions for contribution against other parties.

EXTRA!!! Member News EXTRA!!!

Continued from page 3

Farmer & Case is pleased to announce that **John P. Pearson** and **Susan J. Skelley** have joined the firm as associates in its San Diego office.

SDDL Members **Thomas W. Byron** and **Lili Mostofi** have joined with Michael M. Edwards to establish **Byron Edwards Mostofi APC** located at 402 W. Broadway, Suite 1900. Associates of the firm are Joyce R. Dondanville, Robert J. (“R.J.”) McCarthy, III, Scott B. Hilberg, Craig A. Weeber and Krishnan W. Coughran.



Robert G. Bernstein has joined **Shewry & Van Dyke** and will continue practicing in the areas of construction defect and personal injury defense litigation. Mr. Bernstein is a graduate of UCLA and the USD School of Law. He is a former research attorney with the San Diego Superior Court and former editor of SDDL’s quarterly publication THE UPDATE.



Kristina M. Pfeifer joined **Koeller, Nebeker, Carlson & Haluck, LLP’s** San Diego office in March 2005. Kristina will focus on the defense of developers in construction defect matters. Her undergraduate degree is from San Diego State University (with Honors) and her J.D. is from the University of San Diego School of Law. She was admitted in December 2004. Kristina is active with Volunteers in Parole.

The Bottom Line

Case Title: : Marc Paskin, Michael Paskin and Michelle Paskin v. Marc Kramer, M.D.

Case No: GIC 816506

Judge: Honorable William C. Pate

Plaintiff's Counsel: Cynthia Chihak, Esq.

Defendant's Counsel: Robert W. Harrison of Neil, Dymott, Frank, Harrison & McFall

Type of Incident/Causes of Action: Death resulting from infection developed subsequent to ablation procedure of the soft palate to reduce snoring. Plaintiffs alleged that defendant Marc Kramer, M.D. negligently performed a coblation procedure on Marsha Paskin for her snoring. Specifically, it was asserted that defendant used the "wrong" coblation wand which was designed for turbinate procedures and perforated the soft palate into the retropharyngeal space so as to cause the infection. It was also claimed the standard of care required the patient to receive a prophylactic antibiotic prior to the procedure. Plaintiffs also alleged that Marc Kramer, M.D. negligently failed to diagnose decedent Marsha Paskin and properly treat a post procedure infection, which allegedly caused her death.

Settlement Demand: \$240,000

Settlement Offer: \$29,999.00

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense

Acosta v. Glenfed Development Corp.: A New Development in Construction Defect Litigation

By: Robert M. Augst of Koeller Nebeker Carlson & Haluck LLP



Background:

California Code of Civil Procedure §337.15 was enacted in 1971 by the Legislature to provide a "firm and final" outside ten-year limitation period for construction suits involving claims for latent defects. However, C.C.P. §337.15(f) contains an exception to the 10-year limitation period for "actions based on willful misconduct or fraudulent concealment." A recently decided case, *Acosta v. Glenfed Development Corp.* (2005) 128 Cal.App.4th 1278, may have created new possibilities for plaintiffs to circumvent this ten-year limitation period.

Prior to *Acosta*, there was little case authority discussing the C.C.P. §337.15(f) exception for willful misconduct or fraudulent concealment. One case, *Felburg v. Don Wilson Builders* (1983) 142 Cal.App.3d 383, addressed what constitutes willful misconduct for purposes of applying C.C.P. §337.15; however, no previous case specifically addressed whether a developer or general contractor can be held liable after 10 years for the willful misconduct of others involved in the project.

On April 29, 2005, the California Court of Appeals for the Second Appellate District decided *Acosta v. Glenfed Development Corp.* The Court in *Acosta* held that developers/contractors "may not successfully assert the 10-year limitations period set out in California Code of Civil Procedure §337.15 as a defense, if the trier of fact determines that: (1) there was willful misconduct involved in the construction of the plaintiffs' homes, (2) such willful misconduct resulted in the alleged latent construction defects and (3) such willful misconduct was committed by the defendants or the facts and circumstances are such that the willful miscon-

duct of others is appropriately chargeable to them."

In *Acosta*, the homeowner Plaintiffs brought a complaint alleging causes of action for strict liability, breach of express and implied warranties, negligence, and negligence per se. The defendants had acted as both the developer and the general contractor. Importantly, 47 of the 59 named plaintiffs in *Acosta* were brought into the suit more than 10 years after the limitation period had commenced running as to their homes. On that basis, the defendants moved for summary judgment, as to those 47 plaintiffs.

In opposition to the defendant's motion for summary judgment, the plaintiffs argued that pursuant to C.C.P. §337.15(f), the defendants were not entitled to assert the 10-year statute of limitations defense. Plaintiffs introduced declarations from two experts, stating that they believed that the defects were not negligently caused. Rather, the experts opined that the defects were the result of willful misconduct by defendants in that the defects were "so serious and prevalent that they were either the result of a deliberate decision to cut corners for cost saving or the result of a near total, virtually reckless failure by the developer to adequately supervise subcontractors." The trial court granted the defendant's motion for summary judgment, and rejected plaintiffs' claim that the willful misconduct exception set out in CCP §337.15(f) precluded defendants' reliance on the 10-year limitation period. The trial court held that plaintiffs had failed to provide evidence that the alleged acts of willful misconduct had been committed directly by the defendants or under their supervision.

In reviewing the trial court's decision, the Court of Appeal in *Acosta* addressed several issues, including: 1) who has the

burden of production regarding the issue of willful misconduct, II) what constitutes willful misconduct for purposes of applying C.C.P. §337.15(f), and III) can a developer or general contractor be held liable beyond the ten-year limitations period for the willful misconduct of others involved in the project.

Issue I: Who has the burden of production respecting the issue of willful misconduct?

Generally, a defendant moving for summary judgment based on an affirmative defense must present evidence that supports each element of its affirmative defense. Here, defendants' affirmative defense was CCP §337.15's 10-year statute of limitations for latent construction defects, which defendants' separate statement of undisputed material facts sought to address by setting forth the dates of the Notices of Completion, and the dates those homeowners were named as plaintiffs. The *Acosta* court held that once defendants met this burden of production on their statute of limitations affirmative defense, the burden of production shifted to plaintiffs to raise a triable issue of material fact on the matter of willful misconduct.

Issue II: What constitutes "willful misconduct" for purposes of applying CCP §337.15(f)?

In discussing the nature of "willful misconduct" the court noted that "willfulness generally is marked by three characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger; and (3) conscious failure to act to avoid the peril. As the foregoing suggests, willful misconduct does not invariably entail a subjective intent to injure. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct." The Court concluded "a contractor or developer cannot avoid application of section 337.15, subdivision (f), by a claim of ignorance of the existence of a serious latent defect where the evidence permits the reasonable inference that he knew or should have known otherwise."

Issue III: Can a Developer or General Contractor be held liable beyond the ten-year limitations period for the willful misconduct of others involved in the project?

The Court of Appeals in *Acosta* held that "a defendant, acting as the developer and general contractor, can be held liable after 10 years for the willful misconduct of others involved in the project." The Court set forth numerous

reasons in support of its holding, including: 1) CCP §337.15(f) does not specifically exclude a general contractor or developer from the exception, 2) the rules regarding vicarious liability of principals are an overlay on this action, 3) case and statutory law include supervisory requirements for developers and contractors, 4) public policy considerations fully support such a conclusion, and 5) subdivision (f), by its terms, applies to an "action", it is not limited to the conduct of the specific defendant seeking to assert a limitations defense.

Conclusion

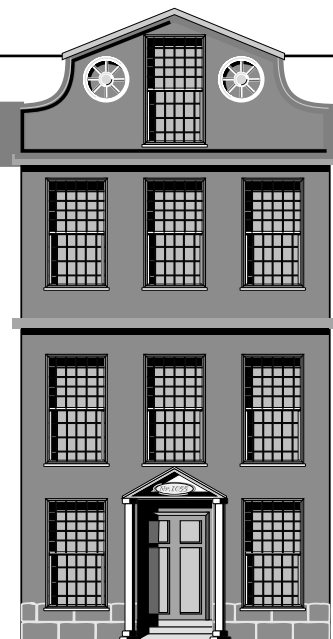
It will be important for all defense attorneys practicing in construction litigation to become familiar with the *Acosta* decision. This decision opens up new possibilities for Plaintiffs. Plaintiffs may now be able to avoid the outside ten-year limitation period established in C.C.P. §337.15. The decision has the potential to greatly increase the number of claims brought against developers and general contractors. The *Acosta* decision is currently on appeal at the California Supreme Court, Supreme Court Case # S134171. Practitioners in construction litigation should continue to follow the Supreme Court's ruling in *Acosta* for further developments in this area of law.

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ETHICS IN MEDIATION

By: Shari I. Weintraub,
Fredrickson Mazeika & Grant



The Honorable Herbert B. Hoffman (Ret.) and the Honorable Richard Haden (Ret.) spoke at the June 2005 San Diego Defense Lawyers Brown Bag lunch. Speaking on the topic of "Ethics in Mediation" through a series of examples of various conduct, the seminar covered the relationship of the mediator to the parties before the mediation, and the mediator's own ethical obligations in conducting mediation sessions.

Generally, a mediator will send a letter confirming the mediation dates, fee schedule, and briefing dates. In addition, there are statutory requirements which the mediator must comply with. In the mediator's letter used in the hypotheticals, the mediator disclosed the following:

I know of no reason which would disqualify me to mediate this case on any grounds set forth in Code of Civil Procedure section 170.1 as required by Code of Civil procedure section 1282.

Pursuant to Code of Civil Procedure section 1281.9, I have conducted two prior mediations involving [a Plaintiff's attorney] which were both settled.

Finally, I have no past or present relationship with any party to the mediation. I have participated as a judge in civil trials and numerous settlement conferences involving both [counsel for the Defendant and the Plaintiff].

What else, if anything, should be disclosed by the mediator to the parties in order to insure an ethical and mean-

ingful mediation? First, financial arrangements, including the fees paid and the settlements reached, do not necessarily need to be disclosed. The mediator has already disclosed the two previous mediations with the Plaintiff's attorney, the fees paid to the mediator are of little relevance. Similarly, settlement amounts are not relevant. There is a further issue related to the settlement amounts, as well. Settlements are often confidential. For the mediator to disclose such information would violate his ethical obligations to those other parties and the mediation process.

Oral, although not necessarily written, disclosure may be proper where the mediator and the Plaintiff's counsel have, for example, played golf or otherwise socialized together, or where the mediator has been a guest of the Plaintiff's counsel at the Plaintiff's golf tournament. This helps to avoid defense party and counsel from, at the very least, the appearance of being "hometowned". While this could occur where all party and counsel are located in the same place, but the defense counsel has absolutely no relationship whatsoever with the mediator, this often occurs where counsel and client are from out-of-town. Other relationships which may require disclosure include where the mediator and one of the counsel served together years ago at the same firm or governmental agency and the mediator was fired. Disclosure is dictated by factors which include whether counsel and mediator were employed a the same time. Even in that circumstance, however, there is no need to go into details beyond the disclosure of the employment.

What about the situation where the Defendant is insured by an insurance company which has paid significant sums in mediation fees when that insurance company was represented by other counsel? The insurance company's identity is often not disclosed. Practically speaking, the information is not generally tracked in the mediator's records. Disclosure in this situation is not warranted.

In addition, to the above considerations, there is an overarching consideration: lawyers go through the mediation process on a regular basis, their clients are often not as sophisticated. Thus, while the above-situations may not be anything of concern to the lawyer(s), the information may be critical to the client. The mediator needs to be sensitive to the clients' perspective when evaluating whether to disclose and how much to disclose.

At the mediation itself, it is important that the parties are informed about the mediation process (which should be voluntary to be as effective as possible), and the mediator's role (impartiality). Mediator's are not arbiters or judges or any finder of fact. A mediator is a facilitator, but the settlements are achieved by the parties. Last, it is important the mediator ensures the parties understand the terms of settlement. Confidentiality in the process and the results are important to all participants.

Thank You

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EMPLOYMENT LAW



*Kirk Hanson, Esq.,
Grace Hollis Lowe
Hanson & Schaeffer
LLP*

Employers: Resist the Independent Contractor Urge

As an employer, you may be tempted to classify a worker as an independent contractor rather than an employee in order to avoid the cost and headaches associated with complicated leave laws, overtime, and Workers' Compensation. Resist the urge. An employer seeking to avoid these issues by labeling workers as independent contractors has the burden of proving that such workers are, in fact, independent contractors and not employees. In other words, there is a presumption of employment. Lab.C. § 3357.

Misclassification can have serious consequences in the workers' compensation context. For example, employers will not secure workers' compensation coverage for employees they have misclassified as independent contractors. Of course, it is illegal to employ workers without providing workers' compensation coverage. Furthermore, insurance companies will typically audit payroll records to ensure proper classification of workers and, in the process, often determine that workers have been misclassified as independent contractors. When this is the case, the insurance company will seek the back-owed workers' compensation premiums for those employees who have been misclassified as independent contractors. In certain industries, there has been a history of misclassification of employees as independent contractors in order to avoid paying steep workers' compensation premiums. If misclassification has occurred on a large or even a limited scale, it can quickly force an employer out of business who cannot afford to pay the back-owed workers' compensation premiums, which premiums can be massive.

The misclassification of an employee as an independent contractor can also have serious consequences for an employer under the Labor Code. A failure to pay an employee minimum wage, overtime, vacation pay or the failure to give rest breaks and meal breaks because the employer has misclassified the employee as an independent contractor will give rise to claims under California's Labor Code Private Attorneys General Act ("PAGA"). Under PAGA, also known as the "Sue Your Boss Law," employees can sue their employers directly in the Superior Court on behalf of themselves and all other current and former employees for almost any violation of the Labor Code, including the violations set forth above resulting from employee misclassification. If successful, the employee recovers his or her wages, attorneys' fees and 25% of the penalties that previously went exclusively to the State.

If an employer is questioning whether it has properly classified a worker as an independent contractor, a misclassification may have occurred. If the employer's reason for designating a worker as an independent contractor is to avoid paying overtime and worker's compensation, then a misclassification has likely occurred. Although there is no bright-line test for independent contractor status, the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 set out the following factors to consider when evaluating whether a worker is an employee or an independent contractor:

- Is the worker performing services in an occupation distinct from that of the employer?
- Is the work part of the employer's regular business?
- Does the worker supply his own specialized tools?
- Does the worker have specialized skills?
- Does the worker's opportunity for profit or loss depend upon his managerial skill? In

other words, does the worker use his best judgment and discretion to bid the job and make a profit or loss irrespective of the profit or loss of the employer.

- The length of time in which the service is performed? Short one-time jobs are often indicative of an independent contractor relationship as compared with longer, permanent relationships which indicate employer/employee status.
- The method of payment - by the hour, by the job? Payment by the hour is indicative of employee status, whereas payment by the job indicates an independent contractor status.

These factors can be applied in a simple example where a restaurant hires a plumber to install a dishwashing system. The plumber's occupation is distinct from that of the restaurant and the work performed by the plumber is different from the work normally performed in the restaurant of food preparation and service. The plumber supplies his own specialized tools and uses his specialized skill to perform the work. The plumber relies on his own judgment to bid the job for profit and makes a profit (or loss) irrespective of the restaurant's profits or losses. Finally, the installation of the dishwashing system is a short, one-time job. Based upon these factors, the plumber in this example is clearly an independent contractor.

It is helpful to evaluate independent contractor status keeping in mind the simple examples given above concerning the plumber. However, independent contractor situations are usually not so simple. Because the presumption in California is that of employee status, employers must carefully evaluate each case where a worker is classified as an independent contractor. If it does not feel right, it probably is not. If there is any question, employers should seek the advice of an attorney who specializes in employment law.

INSURANCE LAW



*James M. Roth,
The Roth Law Firm*

With summer just around the corner, the Courts are slowing down the decisions related to insurance. I believe that this is occurring because we want to be outside to enjoy the nice weather. Be that as it may, below is a picnic of newly created case law.

Announcements to customers and employees of a decision to start a new company and a request for continued patronage were not “advertising” activities within the meaning of a general liability policy’s “advertising injury” coverage. In *Rombe Corp. v. Allied Ins. Co.* (2005) 128 Cal.App.4th 482, the California Court of Appeal for the Fourth Appellate District held that general business announcements to customers and employees of a decision to start a new company and a request for continued patronage were not “advertising” activities within the meaning of a general liability policy’s “advertising injury” coverage. Rombe was a franchisee of TRC Staffing Services, a nationwide temporary employment agency. Rombe invited customers and employees of its franchise to a breakfast meeting at a hotel and announced that it would no longer be affiliated with TRC and solicited those in attendance to become customers and employees of the new agency. The breakfast meeting and plans were later reported in an internet newsletter. TRC sued Rombe alleging breach of contract, misappropriation of trade secrets, and unfair competition. AMCO insured Rombe under a Premier Businessowners Policy which provided coverage for “advertising injuries” including slander or libel; violation of the right to privacy; copyright, title or slogan infringement; misappropriation of advertising ideas or style of doing business. The policy defined “advertisement” as “a notice that is broadcast or published to the general public or specific market segments about your

goods, products or services for the purpose of attracting customers or supporters.” AMCO denied Rombe’s tender of the TRC suit. Rombe sued AMCO and cross-motions for summary judgment were filed. The trial court ruled in favor of AMCO and the appellate court affirmed. Rombe argued the breakfast it hosted, and the later internet report of the breakfast and Rombe’s plans constituted the “use of another’s advertising idea in your ‘advertisement’” within the meaning of the AMCO policy. Rombe contended that the breakfast was arguably a form of advertisement to “specific market segments.” The court of appeal disagreed. It reasoned that the term “specific market segments” does not relieve an insured of the burden of demonstrating that it was engaged in relatively wide dissemination of its advertisements even if the distribution was focused on recipients with particular characteristics or interests. With respect to the breakfast, the court found that it did not involve the broad dissemination of information required by the AMCO policy. As for the internet report, the court found that while it might have been broadly disseminated, nothing in the record indicated it involved any covered “advertising injury” offense. Perhaps there would have been coverage if the ballroom doors were left open so that the solicited would have reached a larger audience. Think about that the next time you solicit a client.

Insurer has the right to rescind an insurance policy based on an insurance applicant’s unintentional misrepresentations. In *Mitchell v. United Natl. Ins. Co.* (2005) 127 Cal.App.4th 457, the California Court of Appeal for the Second Appellate District affirmed the trial court’s order granting the insurer’s motion for summary judgment, holding that an insurer has the right to rescind an insurance policy based on an insurance applicant’s unintentional misrepresentations based upon Insurance Code §§ 331 and 359. James Mitchell, individually and on behalf of the Mitchell Family Trust, submitted an insurance application for fire insurance on a commercial building to Debra Messina, an authorized under-

writer for defendant United National Insurance Company. The application included several misrepresentations. A business associate of Mitchell, Carl Robinson, set fire to the building and Mitchell submitted a claim to UNIC, which denied the claim, citing Mitchell’s numerous misrepresentations on the insurance application. Mitchell sued alleging that the misrepresentations were immaterial and solely the fault of his brokers. Darn. UNIC filed a motion for summary judgment based on California Insurance Code §§ 331 and 359. Section 331 states: “Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.” Section 359 provides: “If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false.” The trial court granted United’s motion for summary judgment and the appellate court affirmed relying on Messina’s declaration stating that had she known the truth, she would have underwritten the policy differently, or rejected the application altogether. Mitchell argued that Insurance Code §§ 2070 and 2071 controlled over §§ 331 and 359. Section 2070 requires all fire insurance policies to be on the standard form set forth in section 2071 which states that rescission of a policy based on the insured’s misrepresentation requires that the statement “have been knowingly and willfully made with the intent (express or implied) of deceiving the insurer.” The court of appeal rejected Mitchell’s argument, finding that nothing in §§ 2070 and 2071 prevents the application of §§ 331 and 359 to fire insurance policies, noting that such policies usually insure more than just fire. This, of course, brings to mind the axiom: Don’t play with matches or you will get burnt.

Court Issues Confusing Discovery Ruling Which Makes Sense after You Think about it for a While. In *Catholic Mutual Relief Society v. Superior Court* (2005) 128 Cal.App.4th 879, the California Court of Appeal for the Second Appellate District issued a peremptory writ of mandate directing the

trial court to vacate an order denying a non-party insurer's motion to quash deposition subpoenas aimed at obtaining documents concerning the insurer's financial condition, including its reserve and reinsurance information. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). This is from L.A. What do you expect?

A Weather Conditions Clause Specifically Excluded Damage Caused by a Rain-induced Landslide Which Was Within the Risks Excluded by the Weather Conditions Clause. In Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, the California Supreme Court enforced a "weather conditions clause" relied on by Hartford to deny a first party claim over the insureds' objection that the clause violated the efficient proximate cause doctrine. In this case, a rain-induced landslide caused damage to plaintiffs' home. Hartford denied coverage for all but a minor part of the damage citing the policy's exclusions for earth movement and weather conditions that "contribute in any way with" another excluded cause to produce a loss (the "weather conditions clause"). It was undisputed that Hartford covered losses caused by weather conditions that did not join with another excluded cause. Hartford filed a motion for summary judgment on the ground that its denial was appropriate because the efficient proximate cause of plaintiffs' loss, the rain-induced landslide, was excluded under the weather conditions clause. The trial court granted the motion and the appellate court affirmed. The appellate court's decision conflicted with another appellate decision which

found that the weather conditions cause violated Insurance Code Section 530, which codified the efficient proximate cause doctrine. The California Supreme Court granted review to resolve the dispute over the validity of the weather conditions clause. The efficient proximate cause doctrine holds that when a loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss, but the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate cause. An insurer cannot contract around the efficient proximate cause doctrine with an exclusion. Plaintiffs argued that Hartford attempted to avoid the efficient proximate cause doctrine because rain, a covered risk, was the efficient proximate cause of their loss. The Court disagreed. It found that the weather conditions clause specifically excluded damage caused by a rain-induced landslide which was within the risks excluded by the weather conditions clause (weather in combination with another excluded risk).

The Supremes: On May 11, 2005, the California Supreme Court granted review and removed from publication Essex Ins. Co. v. Five Star Dye House, Inc. (2004) 125 Cal.App.4th 1569, a decision in which the Second District Court of Appeal held that an insured may assign its right to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurers bad faith. I discussed this case in the April 2005 edition of *The Adjuster*.



HOT CASES!!!



By Robert J. Walters

**GRACE HOLLIS LOWE HANSON
& SCHAEFFER, LLP**

It has been relatively quiet in the appellate decisions. However, less is sometimes more as employers may hide behind a lack of awareness of conditions that otherwise could provide the basis for a discrimination liability. In addition, the California Supreme Court has expanded the discovery rule to permit the addition of a products liability claim in the medical malpractice context. The Supremes have also attempted to clarify the scope of punitive damages awards in the aftermath of the U.S. Supreme Court's State Farm rule limiting punitive damages. In the construction defect context, the statute of limitations defense may be less of a factor when there is willful misconduct regardless whether it stems from the general contractor or from subcontractors. Also in the construction defect context, insurers will be able to intervene to protect its rights of subrogation. To be

sure, important issues continue to loom in defense practice, although the water still seems a little muddy. As the water clears, some of the answers may still remain cloudy.

EMPLOYMENT LAW

Trop v. Sony Pictures Entertainment Inc. (2005) 129 Cal.App.4th 1133, 29 Cal.Rptr.3d 144. A terminated employee filed action against employer alleging, inter alia, sexual discrimination based on pregnancy and wrongful termination in violation of public policy, also based on pregnancy. The employer obtained summary adjudication of pregnancy-related causes of action, other causes were dismissed, and the Superior Court entered judgment for employer and the employee appealed. The Second District Court of Appeal affirmed holding that the employee (1) failed to establish a prima facie case of discrimination by failing to show employer's knowledge of her pregnancy, and (2) did not present direct evidence of discrimination. In addition, the employer presented nondiscriminatory basis for termination. The court applied the three-stage burden-shifting test established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973): (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff is successful, the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) if the employer produces such evidence, the plaintiff must then show that the employer's proffered reason was in fact a pretext for discrimination.

The court rejected Trop's argument that the McDonnell Douglas burden-shifting analysis was inapplicable in this case. Trop contended this was so because she

had presented direct evidence of discrimination in the form of various statements from Thomas, including several post-termination comments such as, "I need somebody here who wants to be here and doesn't have a life" and "What were you thinking? How could you possibly be my assistant and be pregnant? How did you ever think that was going to work?" However, the court concluded that these statements, among others, did not "rise to the level of direct evidence of discrimination based on pregnancy." The court's holding concerning the employer's ignorance of an employee's protected status suggests significant implications not only in the pregnancy-discrimination context, but also in cases involving alleged discrimination based upon other characteristics that may not be readily known to an employer. For example, employers without actual knowledge of the characteristic in question presumably should be able to defeat some claims of discrimination based upon religion, national origin, ancestry, sexual orientation, medical condition, age and disability. See, e.g., California Government Code Section 12940(m) (employer must reasonably accommodate the known physical or mental disability of an applicant or employee). This case also suggests the need for employers to consider adopting a modified policy of "Don't Ask, Don't Tell" when it comes to certain subjects. Had Thomas even informally pursued the topic of Trop's pregnancy in any of their conversations, she unquestionably would have been charged with having knowledge thereof, and the employer may have had greater difficulty extricating itself from the lawsuit. Trop v. Sony reinforces the rule that the less an employer asks (or knows) about certain subjects, the easier it will be to avoid later claims of discrimination based upon such information.

MEDICAL MALPRACTICE

Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 27 Cal.Rptr.3d 661. Patient filed medical malpractice action against her surgeon and, based on information learned from surgeon's deposition, filed amended complaint asserting products liability cause of action against manufacturer of stapler used in

surgery. Brandi Fox got gastric bypass surgery on April 10, 1999. After having severe complications, she filed a medical malpractice suit against the surgeon on April 6, 2000. She amended her complaint on Nov. 28, 2001, to include a products liability claim against Ethicon Endo-Surgery Inc. She claimed that she could not have discovered a basis for the claim until the deposition of the surgeon, who indicated on Aug. 13, 2001, that a stapler manufactured by Ethicon malfunctioned. Manufacturer filed demurrer based on statute of limitations, and the Superior Court sustained demurrer without leave to amend. Patient appealed. The Court of Appeal reversed and remanded, and the Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court held that the discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. The court of appeal limited that exception in *Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, 38 Cal.Rptr.2d 298, holding that when a plaintiff has cause to sue based on suspicion of negligence, the statute begins to run as to all potential defendants. However, the Supreme Court concluded that the appellate court failed to note the important distinction between situations in which a plaintiff did not know the identity of a party and those in which the plaintiff did not discover that a cause of action existed. Because it would be contrary to public policy to require that plaintiffs file a lawsuit at a time when the evidence available to them failed to indicate a cause of action, that court's holding is disapproved to the extent that it indicated otherwise. Fox's complaint alleged facts sufficient that the statute of limitations as to Ethicon was tolled to the date of the surgeon's deposition. Accordingly, the Supreme Court disapproved the opinion in *Bristol-Myers Squibb Co. v. Superior Court*.

CONSTRUCTION DEFECT

Hodge v. Kirkpatrick Development Inc. (2005) __ Cal.App.4th __, __ Cal.Rptr.3d __, 2005 WL 1439193. Douglas and Kylie Hodge purchased a homeowner

insurance policy from State Farm Insurance Co. In 2002, their home suffered water and mold damage resulting from the negligence of a third party and they submitted a claim to State Farm to cover their claimed losses, which was only partially approved. In 2003, the Hodges filed a construction defect lawsuit against Kirkpatrick Development Inc. They also sued State Farm for bad faith denial of coverage. Citing a subrogation agreement in its contract with the Hodges, State Farm sought to intervene in the construction defect lawsuit against Kirkpatrick. A trial court denied State Farm's motion for leave to intervene. The Fourth District Court of Appeal reversed, holding that a party may intervene as of right under Code of Civil Procedure Section 387(b) in a case in which an interest related to the transaction of the underlying lawsuit exists, disposition of the action will impair the party's ability to protect that interest, and the interest is not adequately represented by existing parties. As the insurer, State Farm has a direct, pecuniary interest relating to the property in the construction defect lawsuit between the Hodges and Kirkpatrick, the allegedly responsible party. Further, the disposition of the lawsuit without State Farm's presence would impede State Farm's ability to protect its subrogation rights because it would have no other recourse. State Farm's interests are not adequately represented by the Hodges. Thus, it should be allowed to intervene.

OF ADDITIONAL INTEREST:

Punitive Damages Limitations Under State Farm Clarified?

The California Supreme Court, in two separate cases authored by Justice Kathryn Mickle Werdegar, has now enunciated rules that impacts decisions testing the limits of punitive damages, represented by the 2003 landmark U.S. Supreme Court ruling, *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408, that curtailed large awards. In most cases under the State Farm decision, punitive damages should be no more than nine times compensatory damages. However, the United States Supreme Court left room for exceptions, and plaintiffs and defendants have been sparring over when to go beyond the

"single-digit" range. The two cases decided by the California Supreme Court were *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) __ Cal.3d __, __ Cal.Rptr.3d __, 2005 WL 1404425 and *Johnson v. Ford Motor Co.* (2005) __ Cal.3d __, __ Cal.Rptr.3d __, 2005 WL 1404423.

In the Simon case, a prospective buyer of office building brought action against seller for specific performance of contract, and also sought damages for breach of contract and fraud. The Superior Court entered judgment on jury award to prospective buyer of \$5000 in compensatory damages and \$1.5 million in punitive damages. Seller appealed, and prospective buyer cross-appealed. The Court of Appeal affirmed. The Supreme Court granted review and held that (1) excessive punitive damages violate due process; (2) punitive damages are reviewed de novo; (3) ratio of more than 10 to one between punitive and compensatory damages is presumed excessive, and (4) punitive damages 340 times \$5,000 compensatory award was constitutionally excessive.

In the companion case, *Johnson v. Ford Motor*, the justices rejected a \$10 million jury award. However, they also weren't satisfied with the 5th District's reduction to \$53,435 and ordered appellate judges to take another look. There, certain car purchasers recovered a judgment in the Superior Court against manufacturer for concealing the automobile's history of transmission repairs and replacements when reselling the car, and jury awarded them \$17,811.60 in compensatory damages and \$10 million in punitive damages, which the manufacturer appealed. The Court of Appeal reduced punitive damages award to \$53,435. The Supreme Court subsequently granted review, and held that (1) punitive damages may be awarded for the sake of example and deterrence; (2) punitive damages may serve as a tool to protect the consuming public; (3) award based on disgorgement of profits may be invalid; (4) plaintiffs were not entitled to punitive damages on a disgorgement theory, and (5) reduced award of three times compensatory damages lacked justification.

SDDL Brown Bag Series, March: By Shari I. Weintraub of Fredrickson Mazeika & Grant

DISCOVERY IS A PAIN...

Judge Robert J. O'Neill has suggestions to lessen it



In April 2005, the Honorable Robert J. O'Neill (Ret.) presided over a gathering of San Diego Defense Lawyers to discuss discovery, why it is so painful, and how parties can work together to relieve that pain.

Discovery is a necessary "evil". The Discovery Act was implemented in order to facilitate the efficient sharing of evidence between the parties in order to move the litigation forward, whether that means an informal settlement, a mediated conclusion, or trial. In practice, this is often forgotten. Instead, discovery oftentimes is painful as one party propounds broad-ranging, unfocused, argumentative requests, which then seems to induce the responding party to provide responses which contain objections (whether appropriate or not), is non-responsive and argumentative. This makes the process a waste of time, money and effort for counsel and client,

and is often tedious and unproductive. This also leads to visits with the court, as the propounding party moves to compel responses, which makes no one, not the court or the parties, happy.

Why has discovery become so painful? Conventional legal wisdom is that discovery is used for more than, well, discovery. It can be used to harass, intimidate, annoy, delay, overreach, and obfuscate. It can be more extensive than necessary to posture for a pre-trial resolution, when one is warranted. It is often unfocused. When over Ninety-Seven percent (97%) of all cases are actually disposed of short of trial, it is important to remember that discovery actually needs to be focused, effective and efficient in order to posture the case for resolution.

How do we make this necessary "evil" more palatable? Judge O'Neill proposes attorneys in litigation keep the following in mind:

Attorneys should remember they are professionals. It serves no one, whether the client's goals in the litigation or the attorneys reputations, to act otherwise.

- Fighting over who is right and wrong is not helpful to the process, including involving the court. This will produce a species of "grudging compliance" but will never provide real cooperation;

- Having said that, with the agreement of each attorney, it can be helpful to involve a neutral third party.

Judge O'Neill advocates a process of collaborative discovery, where the parties, at whatever stage of discovery requires it, evaluate their case, determine what they truly need to posture the case for mediation or trial, sit down with the opposing counsel, and work out a plan to accomplish those goals. Although the Code provides for a "meet and confer" process once disputes arise with the discovery, there is nothing in California State courts which requires it



SDDL Members sign in, engage in conversation and enjoy a nice lunch provided by Peterson & Associates.



before the process starts. In either case though, a “meet and confer” should be face-to-face or telephonic. Correspondence does not often convey the cooperative nature of the process, as counsel is not truly able to evaluate the opposing counsel’s needs or desires.

If a third party neutral is needed to assist the parties in working out a collaborative discovery plan, the third party neutral Judge O’Neill suggests does not always have to be an official referee. It can be someone all counsel agree they respect, who will not insert themselves into the process so much as help counsel find the common ground. This neutral can:

- Settle down the lawyers;
- Settle down the parties;
- Assist in the determination of professional and case related needs;
- Help to isolate and focus on the outstanding issues;
- Assist in prioritizing the issues and their immediacy;
- Assist in developing workable, and where necessary, innovative techniques or procedures to accomplish the parties’ goals;
- Aid in scheduling dates, locations, and order of depositions;
- Provide real-time guidance in the world of complex discovery;
- if absolutely necessary, and by stipulation, provide a binding resolution for issues which otherwise would require a motion to compel;
- serve as an ombudsman in incidental disputes;

Judge O’Neill advocates the “collaborative discovery” process because he has been instrumental in implementing it in complex litigation with success. It can work in smaller-scale cases as well. It takes the job of discovery lawyering from competitive, distasteful, inefficient, frustrating and stressful to respectful, professional, efficient, collaborative and rewarding.

“PREPARING FOR YOUR FIRST TRIAL”



SDDL Brown Bag Series, May 31, 2005

By: Steven M. Polito, Esq., Lorber, Greenfield & Polito, LLP

On May 31, 2005, Kenneth J. Medel, Esq. of The Medel Law Firm presented the SDDL Brown Bag Seminar “Preparing for Your First Trial”. As a distinguished trial attorney, Mr. Medel discussed the necessary preparation for the following areas of a trial: Voir Dire, Opening Statement, Direct Examination, Cross-Examination and Closing Arguments.

VOIR DIRE

Mr. Medel explained that Voir Dire is sometimes considered the most difficult part of a trial. Twenty-four to thirty-six names are given to the court for the Judge. Trial counsel has sometimes as little as twenty to thirty minutes to pick juries in a case that he has been working on for over a year. Mr. Medel explained that the purpose of the Voir Dire process is to attempt to select a juror most likely to be fair to your side of the story. It is also necessary to weed out those jurors that are most likely less fair to your position and theories. Establishing a rapport with the jury is paramount during the Voir Dire process.

OPENING STATEMENT

Mr. Medel explained that this is simply an outline of the evidence to promote your themes in the case. Mr. Medel made it clear that you are not defending the case, but you are prosecuting your defense. These must be presented in orderly fashion and not be argumentative. Introduction of witnesses along with reinforcing the themes are paramount.

DIRECT-EXAMINATION

The purpose of direct-examination is to bring good information out of the witnesses that helps your case in a concise and convincing presentation. Personalize your clients and your experts as important witnesses. The preparation for the direct-examination is organization. Also anticipate evidentiary objections and prepare for them. Typical objections during direct-examination are on leading, compound, assumes facts not in evidence, argumentative and no foundation.

CROSS-EXAMINATION

The purpose of cross-examination, as Mr. Medel explained, was to establish through adverse witnesses points that help your case. The additional purpose is to undermine the credibility of the adverse witness. Leading questions, unlike the direct-examination, are permitted. Use of prior statements, photographic evidence and deposition transcripts are used in cross-examination.

CLOSING ARGUMENTS

The purpose of the closing argument is to organize all the information that came out during the trial that was persuasive for your client. Again, as noted, you are not to defend your case, but prosecute the version of your facts. Organization is paramount and must be repeated along with walking the jury through the verdict form. Discussions regarding the flaws in plaintiff’s case are also important along with a constant recitation of the theme.

Overall, Mr. Medel explained that preparation for the trial is paramount for the jury and sticking with your theme is paramount. The current theme that came out in Mr. Medel’s presentation was simply being yourself, respectful and professional in the court. We look forward to asking Mr. Medel for future presentations.

SDDL Annual Golf Benefit

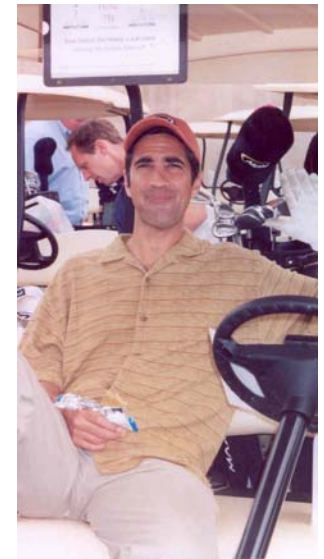
San Diego Defense Lawyers held their Annual Golf Benefit on June 10th. SDDL continued their partnership with The Auld Course for the fourth consecutive (and successful) year. Sixty-eight players attended a beautiful day on the links-style course in a best-ball format. Many members took advantage of the opportunity to spend a day out of the office golfing with friends, colleagues and clients. The weather was perfect, and the competition fierce, with the event winning foursome being **Judge Herb Hoffman, Bob May, Link Ladutko and Ken Patrick**. Second place went to **Dennis Aiken, Darin Boles, Steve Todd and Del Tulao**. The TRUTHFULNESS AWARD went to **Anna Amundson** (first time ever golf player!), **Kristina Pfeifer, Joan Blaine and Bert Rutherford**.

With many generous sponsors providing sponsorships, many holes had more than just golf for the players. Sponsors provided food, beverages and giveaways for the players. SDDL wishes to thank all of the sponsors and will appreciate members patronizing these businesses as a THANK YOU! for their support.

As in the past, this year's tournament was a benefit for the Juvenile Diabetes Research Foundation. JRDF provides funding for research into finding a cure for juvenile diabetes, the fastest growing disease in children in the United States. SDDL started the benefit in memory of Tom Dymott who died of complications from diabetes. In addition to receiving a portion of the entry fees, a raffle and auction were held after the BBQ dinner with the proceeds going to JRDF. SDDL would like to thank the many generous attendees who bought raffle tickets as well as those who bid on and secured various auction items. **The generosity of the participants and the sponsors is what makes this event a success every year!**

Thanks also go out to the SDDL golf committee, **Scott Barber, Dennis Aiken and Tony Case** for organizing the event. A big thank you also goes out to our own **Dino Buzunis**, who is a fantastic, results producing auctioneer.

If you attended this year we hope you will be back next year and for those who missed out, plan on attending next year as it will be another great benefit.





Beware of Plaintiffs Shoehorning A Professional Negligence Case Against a Health Care Provider Into A Veritable Jackpot of Heightened Remedies Under EADACPA

By Rachael A. Campbell¹



There is no question that the Elder Abuse and Dependent Adult Civil Protection Act² (“EADACPA”) reflects an important public policy of protecting

elders and dependent adults. However, it may provide a loophole whereby plaintiff’s counsel will attempt to avoid the procedural safeguards of Code of Civil Procedure section 425.13 (which provides that no claim for punitive damages may be included in an action against a health care provider without a court order)³ by pleading an ordinary professional negligence case under EADACPA.

Defense counsel has at least two lines of attack on this issue: (1) demur to the complaint on the basis that if the plaintiff has any claim at all, it is for professional negligence, which is expressly **excluded** from the Elder Abuse Act; and (2) scrutinize the complaint for **specific** facts articulating abuse or neglect and any allegations of reckless, oppressive, fraudulent or malicious conduct, both of which are **mandatory** prerequisites to obtaining relief under the EADACPA and demur on that ground if the complaint is deficient. In either case, counsel should also concurrently move to strike any reference to punitive damages.

EADACPA Does Not Apply to Ordinary Professional Negligence Actions

The California Supreme Court has held that the heightened remedies provided by the Elder Abuse Act **do not apply** to an ordinary professional negligence action against a health care provider. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 30-31.) Recently, the California Supreme Court reiterated this principle. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783.)

Delaney concerned the relationship of two provisions of the Elder Abuse Act: Welfare & Institutions Code sections 15657 and 15657.2.⁴ Section 15657 provides for heightened remedies, such as punitive damages, attorneys fees and costs, among other things. Section 15657.2 provides, “[n]otwithstanding this article, any cause of action for injury or damage against a health care provider . . . based on the health care provider’s alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action.” Plaintiff *Delaney* argued that a cause of action may be based on “professional negligence” within the meaning of section 15657.2 **and** be for “reckless neglect” within the meaning of section 15657. (*Delaney, supra*, 20 Cal.4th at 29.)

The California Supreme Court disagreed, and found that the legislative history of section 15657 indicated that “professional negligence,” at least within the meaning of section 15657.2, was **mutually exclusive** of the abuse and neglect specified in section 15657. (*Delaney, supra*, 20 Cal.4th at 30.)

The *Delaney* court further held that “as used in [EADACPA], neglect refers not to the substandard performance of medical services [citation] but, rather, to the ‘failure of those responsible for attending to the basic needs and comforts of the elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.’” (*Id.* at 34.) The other forms of abuse as defined in EADACPA - - physical abuse and fiduciary abuse (Welfare & Inst. Code § 15657) - - are forms of intentional wrongdoing also distinct from ‘professional negligence.’” (*Delaney, supra*, 20 Cal.4th. at 34.)

Therefore, “the acts proscribed by section 15657 do not include acts of simple professional negligence, but refer to some forms of abuse or neglect performed with some state of culpability greater than mere negligence.” (*Id.* at 32.) While recognizing the difficulty in distinguishing between “professional negligence” and “neglect,” the *Delaney* Court emphasized that the language of section

15657 provides guidance. (*Id.*) The Court stated, if the neglect was ‘reckless’⁵ or done with oppression, fraud or malice,⁶ then the action falls within the scope of section 15657 and . . . cannot be considered simply ‘based on professional negligence’ within the meaning of section 15657.2. . . . [T]he explicit exclusion of “professional negligence” in section 15657.2, make clear the Elder Abuse Act’s goal was to provide heightened remedies for . . . ‘acts of egregious abuse’ against elders and dependent adults. (*Delaney, supra*, 20 Cal.4th at 35.)

Therefore, plaintiff must allege specific facts demonstrating that the health care provider or any other defendant elected a conscious choice of course of action, knowing that it would injure the plaintiff.

To Obtain Relief Under EADACPA Plaintiff Must Plead Specific Facts Articulating Abuse Or Neglect And Reckless, Oppressive, Fraudulent Or Malicious Conduct

Mandatory prerequisites to obtain relief under EADACPA are that plaintiff must plead **specific** facts articulating abuse or neglect **and** allegations of reckless, oppressive, fraudulent or malicious conduct. *Delaney* is a perfect example of a case that demonstrates the evils that EADACPA was designed to prevent (in contrast to an ordinary professional negligence case). In *Delaney*, the 88-year old mother of the plaintiff died after four months in a nursing facility, which she entered due to a fractured ankle. (*Delaney, supra*, 20 Cal.4th at 27.) At the time of her death, the decedent had stage III and stage IV pressure ulcers on her ankles, feet and buttocks.⁷

Such a case demonstrates the type of abuse that the Elder Abuse Act was designed to redress. Plaintiff must allege “detailed and specific factual allegations” of abuse, such as the children of the decedent in the *Covenant Care* case (there, decedent had Parkinson’s and was unable to care for himself). The *Covenant Care* plaintiffs alleged that decedent was left in his bed, unattended and unassisted for long periods of time, was not fed or provided hydration, was left in

his own excrement for hours, developed ulcers all over his body, became septic and died as a result of the abuse and neglect that he sustained. (*Covenant Care*, *supra*, 32 Cal.4th at 778.) The foregoing are examples of cases properly pled under EADACPA, because they include **detailed, specific** allegations of acts of egregious abuse.

Plaintiff Must Demonstrate by Clear and Convincing Evidence That Defendant is Liable For Elder Abuse and Has Been Guilty of Recklessness, Oppression, Fraud, or Malice in the Commission of Such Abuse

The California Supreme Court has held that in order to obtain the heightened remedies (including punitive damages, attorneys fees and costs) provided by Welfare & Institutions Code section 15657, a plaintiff must allege conduct essentially equivalent to conduct which would support recovery of punitive damages. (*Covenant Care*, *supra*, 32 Cal.4th at 790.) Welfare & Institutions Code section 15657 requires the plaintiff to demonstrate: (1) clear and convincing evidence that a defendant is liable for elder abuse; **and** (2) that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse.”

Clear and convincing evidence has been defined by the Fourth Appellate District, Division One as, “a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong enough to command the unhesitating assent of every reasonable mind.” (*In re Michael G.* (2000) 63 Cal.App.4th 700, 709 [internal quotations omitted].)

Therefore, plaintiff must allege facts detailing abuse or neglect as defined by EADACPA that, if proven, demonstrate a high probability or are so clear as to leave no substantial doubt that the patient suffered abuse or neglect.⁸

Conclusion

As demonstrated by the foregoing, defense counsel should carefully examine any complaint that claims relief under EADACPA and make sure that is not simply an action for ordinary professional negligence, which is expressly **excluded** from EADACPA. In addition, defense counsel should scrutinize the complaint, to make sure plaintiff has met his or her burden to plead **specific** facts articulating abuse or neglect and allegations of reckless, oppressive, fraudulent or malicious conduct, both of which are **mandatory** prerequisites to obtaining relief under EADACPA.

(Footnotes)

¹ Ms. Campbell is an associate of Deuprey & Associates, LLP. She assists Deuprey & Associates, LLP with appellate matters, the firm’s representation of physicians in medical malpractice cases and defense work in business and general liability matters. For more information about the firm, please see the firm website at www.deupreylaw.com

² See California Welfare & Institutions Code §§ 15600 et. seq.

³ California Code of Civil Procedure section 425.13 provides, in relevant part, “In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint . . . unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed.” The section further provides that the court shall only grant the motion for an amended pleading where the plaintiff’s moving papers and supporting affidavits demonstrate a substantial probability that the plaintiff will prevail on the claim pursuant to Civil Code section 3294.

⁴ Hereafter, all code section references are to the California Welfare & Institutions Code, unless otherwise noted.

⁵ Recklessness, in the context of an Elder Abuse

Act action has been articulated by the California Supreme Court as follows: “[r]ecklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of course of action . . . with knowledge of the serious danger to others involved in it.’” (*Delaney*, *supra*, 20 Cal.4th 23, 31-32, see also, *Mack v. Soung* (2000) 80 Cal.App.4th 966, 972.)

⁶ “‘Intentional, ‘willful’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. (*Delaney*, *supra*, 20 Cal.4th at 31.)

⁷ A stage IV pressure ulcer means that the tissue were eaten away down to the bone.

⁸ Welfare & Institutions Code section 15610.07 defines abuse of an elder or dependent adult as: “Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.” Welfare & Institutions Code section 15610.57 defines neglect as: “(1) Failure to assist in personal hygiene, or in the provision of food, clothing or shelter. (2) Failure to provide medical care for physical or mental health needs. . . (3) Failure to protect from health or safety hazards. (4) Failure to prevent malnutrition or dehydration.”



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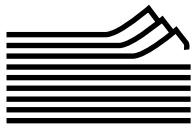
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Jay M. Bulger
Koeller, Nebeker, Carlson & Haluck
225 Broadway, 21st Floor
San Diego, CA 92101
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Jay.bulger@knchlaw.com



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