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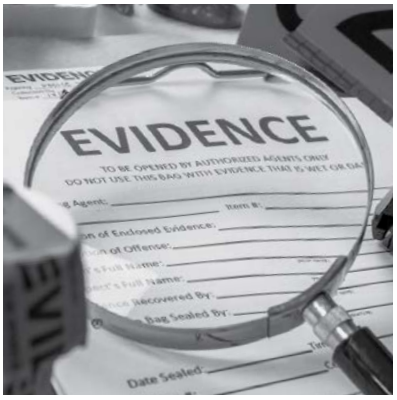

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PRESIDENT'S MESSAGE

MARTA A. ALCUMBRAC
2022 President

Resolve Law LA – ASCDC Members Making a Difference

Shortly after March 13, 2020, when our personal and professional lives were forever and irretrievably changed, then-ASCDC President Larry Ramsey asked that I join a working group of bar leaders formed by Los Angeles County Superior Court's then Presiding Judge Kevin Brazile. This group was tasked with offering guidance and feedback to the court while it grappled with a problem it had never before confronted – how to keep the courts operational while facing an unprecedented public health crisis.

Zoom meeting after Zoom meeting, we reported how the members of the respective organizations were struggling to represent their clients when the courts were essentially shuttered. In response, court leadership, recognizing these struggles, explained the complexities of balancing the competing needs of all participants within LASC, the largest unified court system in the U.S. These problems included not just meeting the needs of the civil branch, but LASC's court leadership also had to manage the criminal courts, along with the needs of over 600 bench officers, union members and other staff, as well as technological and fiscal constraints. Pivoting from an open public court system to a brand-new delivery of judicial administration required painstaking precision and well-considered thought. Meanwhile, new civil matters continued to be filed, and the already overcrowded dockets were becoming even more congested.

In late summer 2020, Genie Harrison, the then-President-Elect of the Consumer Attorneys Association of Los Angeles (CAALA), appeared during one of the bar leaders' meetings. Genie explained that to tackle the COVID-related backlog of cases in San Diego County, a group of lawyers created a virtual settlement program using local mediators who were volunteering their services to resolve cases. Genie suggested bringing a similar program to Los Angeles. Immediately intrigued, Genie and I formed an alliance; we knew that a similar LA-based program would bring some much-needed relief to its legal community, and we were up for the challenge.

Resolve Law LA was conceived, building on an ASCDC, CAALA and LA-ABOTA in-person Mandatory Settlement Conference program that began in approximately 2017. That first in-person program was a huge success. Two Settlement Officers – a defense and plaintiff attorney – partnered together to work with civil litigants in the Personal Injury Hub to resolve cases just before trial. Genie and I received approval from LASC's leadership to explore a virtual version of this program. Partnering with the Beverly Hills Bar Foundation, we pressed forward, raising private funds necessary to hire the team of talented professionals at Professional Exchange Service Corporation (PESC) to build out the program. Roughly six months later, we were ready to go live.

In its first year, over 600 cases were ordered to participate in Resolve Law LA's virtual MSC program; over 61% of those cases have either settled or the parties are continuing to discuss resolution. Those statistics are astonishing and a testament to the hard work of volunteer Settlement Officers that have set aside time to volunteer their expertise and advice to aid litigants in resolving cases.

Buoyed by the success in the PI Hub, LASC expanded Resolve Law LA's program to include employment cases. In February 2022, a pilot program was launched in five courtrooms to encourage resolution of non-complex employment cases, and to give preference to matters involving small businesses and other cases that are otherwise suitable for early dispute resolution. Over 53% of cases ordered into the program either settled or continued to discuss resolution. LASC has therefore announced that Resolve Law LA's employment case program will be available in every Individual Calendar (IC) court at the Stanley Mosk Courthouse.

PLEASE register to be a Settlement Officer and serve! If you are a member of ASCDC with 10 years of litigation experience, you are eligible to act as a defense Settlement Officer in cases from the PI Hub or employment matters, depending on your area of expertise. You will serve alongside

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CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

States Matter

Here is an irony to ponder: While the public and media remain endlessly fascinated by the drama and intrigue in Washington, D.C., media sources have steadily reduced their coverage of issues coming out of Sacramento. This, despite the fact that state government touches our lives far more than the federal system, whether relating to education, social services, roads, law enforcement, or other day-to-day interactions. In other words, the hat may be in Washington, but the cattle are in Sacramento.

This year is shaping up to be particularly impactful in the California Legislature for ASCDC members. By the time the Assembly and Senate adjourn for the year at midnight August 31, and Governor Newsom completes his signatures and vetoes by the end of September, several very significant changes to defense practice are likely to be enacted. The biggest issues include the following:

- **Medical Malpractice:** Most ASCDC members already are aware of this, but on May 23 Governor Newsom signed AB 35 (Reyes), representing a stunning compromise between doctors, medical groups, hospitals and the plaintiff's bar relating to MICRA limits. Not only will the limits go up quite significantly for cases resulting in wrongful death, and those not, where the case is filed or an arbitration is demanded on and after January 1, 2023, but the limits apply separately to doctors, institutions and unaffiliated providers. The limits will also be indexed for inflation in the future, and significantly, enactment of the bill caused the withdrawal of a MICRA initiative qualified for the November ballot. This was big stuff, indeed. Politically, the legislature absolutely loves it when major interest groups walk in with a compromise on a once-intractable issue. Where do we sign?

- **Products Liability and Environmental Hazards:** For some years, the legislature has been gradually limiting confidential settlements, mostly in employment litigation. With SB 1149 (Leyva), now pending on the Assembly floor but not yet enacted, the trend would be continued, and expanded, on certain products liability and environmental hazards claims. Under the terms of the bill, in such a "covered claim" which involves a substantial risk of injury, illness or death, agreements between the parties which "purport to restrict the disclosure of factual information" are prohibited, unless otherwise exempt by other provisions of the bill. Thus, not only are confidential settlements covered, but also protective orders in discovery, for which a presumption against confidentiality will be created. Exempt are customer lists, trade secrets, the amount of settlements, or cases where the party can establish that "the presumption in favor of disclosure is clearly outweighed by a specific and substantial overriding confidentiality interest."

- **Employment Data:** SB 1162 proposes to modify and expand upon the existing obligation of employers with 100 or more employees to file the federal EEO-1 report with the state Department of Fair Employment and Housing. Under the terms of the bill, a new pay data report would be required. The bill would also expand upon existing requirements relating to notice and posting of pay scales, and these changes would apply to any employer with 15 or more employees. A very substantial coalition of business organizations is opposed to the bill, which is pending in the Assembly Appropriations Committee. One of the biggest bones of contention is that these pay data reports would be public documents, posted by DFEH. Clearly, employment law continues to be a very active subject of interest in the California Legislature.

- **Remote Appearances:** Current statutory law relating to remote appearances in civil cases is codified at Code of Civil Procedure Section 367.75. In a political compromise last year, the provisions of this CCP section will "sunset," or expire

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This Year's Annual Meeting a Great Success

David Byassee, Plain Legal PC

It was wonderful to see our friends, colleagues, judges and vendors at the ASCDC Annual Seminar in March of 2022. Two years after the announcement by Governor Newsom that the State of California was going into lockdown, we emerged from our Zoom proceedings and met face to face, embraced each other, and pressed onward in our pursuits. For me, the best part was loitering in the gallery visiting the vendors. In speaking with them I learned of new document management technology (Filevine and Clio); research, AI and judicial analytics tools (LexisNexis); was introduced to new dual biomechanical and accident reconstruction experts (Vector Scientific); learned of physical conferencing facilities available for use to facilitate remote proceedings (Personal Court Reporters); and chatted with famed plaintiff's trial attorney Gary Dordick about the Dordick Trial College in Cabo (illustration below). Was a great time!

David J. Byassee

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Diversity & Inclusivity – Why It Matters

Diana P. Lytel, Lytel & Lytel LLP

Outgoing ASCDC President Diana P. Lytel moderated this in-depth discussion featuring Presiding Judges of Los Angeles and Orange County Superior Courts, two of the largest trial courts in the country, the Honorable Eric C. Taylor and the Honorable Erick L. Larsh. Both jurists provided unique perspectives on why diversity and inclusion are important and how programs aimed at achieving these ends work to ensure fairness and equity under the law.

Throughout the conversation, Judges Taylor and Larsh shared personal experiences from their lives and discussed how each of their respective backgrounds significantly influenced their own concepts of diversity, inclusivity, what the terms mean and how ideas of diversity and inclusion have changed throughout the years. Judge Taylor was born in Sacramento but grew up in Los Angeles. His grandmother, Ella Mae Ferneil, was the first African American registered nurse in California and his father was a lifelong activist for racial equality and one of the Freedom Riders in the South during the Civil Rights Movement. Judge Larsh, on the other end of the spectrum, was born in Frankfurt, Germany, son of an Army private, with roots in Santa Ana. Judge Larsh entered the United States at 11 months of age, the first born of four boys, all growing up in Yorba Linda, California. He graduated from Troy High School in Fullerton and attended California State University Fullerton with a dual major in Psychology and Criminal Justice. His father died while he was in college, and he found himself working full time to help support his mother and three younger brothers which was challenging. While both came from very different backgrounds, the common thread was the importance of having a variety of people from different backgrounds and cultures to provide us with the balance of voices and diversity of thought that we all need to succeed. V

Diana P. Lytel

The State of the Civil Division at the Los Angeles Superior Court

David J. Cowan, LA Superior Court

Our judges are very busy. We are making significant headway meeting the pent-up demand for trials that could not go forward since the onset of COVID. Judges are holding firm on trial dates. Seemingly record number of trials are being held. Dept. 1 is finding courtrooms for trials to start shortly after parties come to Dept. 1 – without significant trailing of cases or delay. In view of the moratoria related to UD cases, we temporarily have slightly greater capacity. In the I/C courtrooms, judges are scheduling trials as soon as possible consistent with their ability to handle those if they in fact are needed. Compliance with Final Status Conference rules, evidencing readiness to start trial, are critical to courts being able to arrange for holding trial when scheduled.

Parties are also electing in many cases to try their case before the bench, even if a jury was requested previously. The Court also continues to make available increased opportunities for informal resolution of cases, including through the MSC Unit – at a time when it makes sense to do so – or if a different judge is available between the FSC and trial dates. In addition, in partnership with different bar associations, and attorney volunteers, the Court is arranging MSCs through the Resolve Law LA platform for PI Hub cases and in employment cases at the Mosk Courthouse. Finally, consistent with the Informal Discovery Conference model, the Court continues to place a premium on encouraging lawyers to talk to one another in the same room – even if a virtual one – so they can truly meet and confer. With civility, the Bench and Bar can together sort through the conflicts and disagreements of the litigants we serve. V

David J. Cowan

INTRODUCING THE

Hon. Daniel Buckley (Ret.)

SIGNATURE

The Honorable Daniel Buckley (Ret.) brings over 40 years of experience, innovative thinking, and leadership skills to Signature Resolution. His background as a litigator in private practice and a judge, including as the Presiding Judge of Superior Court of California, County of Los Angeles—the largest court in the country—makes him the perfect choice for litigants in search of a balanced, insightful, and neutral facilitator and decision maker.

Daniel J Buckley

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Police Reports Are Often Inadmissible – But Not Always...

David Kahn, Tyson & Mendes

The Second District Court of Appeal recently held in a published opinion that the corporate and individual owners of a residence for the disabled had a legal duty to prevent the sexual assault of one of its residents. The key to the court's analysis was a detailed examination of the admissibility of police reports and the witness statements contained within. The court held police reports themselves are admissible under the official records with exception to the hearsay rule. Although witness statements contained in police reports may be hearsay, the statements become admissible if offered a purpose other than the truth of the matter stated, such as to prove property owners had notice of crimes. Statements of certain witnesses may also be admissible under a recognized hearsay exception such as admission of a party opponent.

1. Facts: *Doe v. Brightstar Residential Inc.*, No. B304084 (Cal. Ct. App. Mar. 10, 2022)

Plaintiff Jane Doe ("Doe"), who was in her 20s but had the mental age of a child, was sexually assaulted at the Brightstar residence for the disabled. *Doe v. Brightstar Residential et. al.* 2. Doe could not do things for herself and required close supervision. Doe was sexually assaulted by a handyman who was classified as an independent contractor. (*Id.* at 3.) The handyman was instructed to have no contact with the residents, to not wander from his work area, and to never be alone with a resident. (*Ibid.*) On the night in question, a nighttime caregiver found the handyman in the backyard of the residence with Doe. The nighttime caregiver saw Doe undressed from the waist down and saw the handyman adjusting his pants and zipper. (*Id.* at 4.) The handyman fled the scene and later fled the country. (*Ibid.*) Brightstar did not have surveillance cameras or an alarm system on the property and had only one caregiver on duty that night. (*Ibid.*)

2. Trial Court Decision

Doe sued Brightstar and its individual owners for negligence; negligent hiring/retention; and negligent failure to warn, train, or educate. Brightstar and owners moved for summary judgment claiming they had no duty to prevent the assault because it was not foreseeable. Doe sought to introduce police records, one of which included statements by a defendant owner who told the police shortly after the incident that he knew the handyman had a "history of loitering around the facility and harassing female employees. Another police record included "triple hearsay" statements by Brightstar employees about reported observations of intimacy between Doe and the handyman. (*Id.* at 13.) After ruling the statements contained in police records were inadmissible hearsay, the trial court granted summary judgment because there was no evidence defendants had notice of the handyman's dangerous propensities. (*Ibid.*) Doe appealed.

3. Analysis

Doe's appeal raised two central issues: (1) whether the police reports were properly excluded as inadmissible hearsay and (2) what duty defendants owed Doe. (*Id.* at 2.)

a. Police Report Evidence

The Court of Appeal agreed that police reports are inadmissible when they contain improper multiple hearsay. (*Id.* at 8.) However, double hearsay is admissible if the evidence rebuts the hearsay objection at each level. (*Ibid.*) The court analyzed the first level of hearsay regarding the owner's statement to the police. (*Id.* at 9.) The court found the owner's statement offered by Doe was admissible under the hearsay exception allowing the admission of a party opponent. (*Ibid.*) The second level of hearsay is the police report itself, which was admissible under the official records exception to the hearsay rule. That exception presumes public servants act with care and without bias or corruption. (*Ibid.*)

With respect to the statements reportedly made to the police by Brightstar employees, the court explained these statements were not, in fact, hearsay because they were not being offered by Doe for the truth of the matters stated but instead, were being offered to impute knowledge from the employee to the company, thereby establishing notice. (*Id.* at 12.) These statements established the employee – and

Continued on page 14

therefore the company and it owners – had knowledge the handyman was on the property late at night and knew Doe called the handyman "daddy." (*Ibid.*)

The court did not identify other independently admissible evidence supporting the truth of the matter, without which, it is questionable whether "notice" evidence may be admitted. One might ask: The report is *notice of what?* If the only answer is found in the report itself, then the report would appear necessarily to be offered for the truth of its content. The court noted that one employee heard two others talk about hearing Doe refer to the handyman as "Daddy." While it is true that the evidence was not offered to prove that the handyman was, in fact, her father (first level hearsay), the evidence was offered to prove the truth of what the two employees believed or said they heard (second level hearsay about the exchange between Doe and the handyman). If that account was not true, the last level of hearsay – the report from the first employee to the police – is not notice of anything relevant to the case. The opinion, however, simply states that the first employee's statement to the police shows she had "notice of *possible* intimacy." Under that analysis, much hearsay about unsubstantiated statements would be admissible as establishing notice of the "possible" truth of information that is not independently corroborated, in contravention of the core policy behind the hearsay rule. (See *Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1043-1044 [hearsay cannot be admitted for "notice" where its only significance depends on unproven assumptions: "because plaintiffs did not present evidence to support those assumptions, these gaps in foundational evidence were far too broad to support the admission"].)

The Court of Appeal also held that notice to the non-party employee constituted notice to the employers, without analysis of cases holding that notice to employees is not necessarily notice to the employer for purposes of showing the employer's state of mind, where that state of mind is an element of the plaintiff's case. (See, e.g., *Crawford v. Sacramento County* (1966) 239 Cal.App.2d 791, 799–801 ["An ordinary agent's admissions, not a part of the res gestae, are not competent evidence against his employer. [Citations.] Contra, *where the agent is high in the 'hierarchy' of the defendant corporation."*]; see also *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 169 [defendant's consultant's].)

Having found the testimony was not offered for its truth, and was relevant to show the employer's statement of mind, the court held the exclusion of this evidence was an abuse of discretion. (*Id.* at 14.) This evidence created an inference the defendants had notice the handyman was loitering to groom a disabled woman for assault, which went to the issue of foreseeability. (*Ibid.*) Further, the evidence would have allowed the trier of fact to infer the handyman was a "problem waiting to happen." (*Ibid.*) Because one of the owners submitted a declaration in support of the summary judgment stating he had no basis for suspecting the handyman had the propensity to harass women, the trier of fact had to resolve the conflicting evidence. (*Ibid.*)

b. Duty

The court introduced its analysis of duty by framing the issue in terms of Brightstar's duty to prevent third-party criminal conduct. (*Id.* at 15.) In this case, the defendants' duty was to take cost-effective measures to protect Doe from foreseeable harm from the handyman. (*Ibid.*) The court noted defendants and Doe were in a special relationship creating a legal right to expect protection from a defendant who can control a dangerous third party's conduct. (*Ibid.*) Defendants had the ability to control when and under what conditions the handyman worked and also the ability to replace him at will. (*Ibid.*) The court also found an analysis of

Continued on page 15

the factors set out in *Rowland v. Christian* favors a finding defendants owed a duty to Doe. (*Id.* at 16, citing *Rowland v. Christian* (1968) 69 Cal. 2d 108, 112-113.) Having found duty, a factual dispute exists as to whether keeping the handyman at Brightstar was a breach of duty causing Doe's injuries. (*Id.* at 18.)

4. Takeaways

Defense counsel should advise their clients to take care in how company representatives and employees interact with police about any injury on property that is caused by third party criminal activity. Here, the owner made a party admission to the police that directly contradicted the owner's sworn declaration submitted to the court in support of the summary judgment motion. The court's analysis of the hearsay rule and its exceptions as applied to police report evidence is very instructive for attorneys, considering how often the admissibility of police reports and the statements contained within are an issue in civil, as well as criminal, matters.

In addition, defense counsel seeking to exclude police reports should consider preserving an argument that the opinion does *not* endorse broad admissibility of hearsay on "notice" grounds absent independent evidence that the content of the official police record is true, given that the court does not address that issue. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) And, to the extent the opinion is viewed as containing a holding on that subject, it is arguably in conflict with other authority, which allows a trial court confronted with the conflict to disregard the Doe opinion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 ["where there is more than one appellate court decision, and such appellate decisions are in conflict ... the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions"].) V

David Kahn

David Kahn is Senior Counsel in Tyson & Mendes' San Diego office specializing in the defense of complex, multi-party general litigation and personal injury matters. Mr. Kahn has extensive litigation experience representing individuals, businesses and employers in California state and federal district courts. Mr. Kahn has successfully resolved many cases involving complex personal injury, wrongful death, real estate, fraud, as well as state and federal workers' compensation matters.

Lisa Perrochet

Lisa Perrochet is a partner at the appellate litigation firm Horvitz & Levy. Based on her experience dealing with evidentiary issues that arise on appeal, she provided commentary and editorial suggestions for David's analysis of the *Doe v. Brightstar Residential* decision.

WHEN EXPERIENCE MATTERS

John M. Coleman

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Recent Court of Appeal Opinion Helps to Mitigate Bad Faith "Set-Ups" and Policy "Lid-Off" Tactics

Min K. Kang, Coddington, Hicks & Danforth

"It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith." (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 900, fn. 2 [concurring and dissenting opn. of Kaus, J.].) Justice Kaus expressed his concerns nearly forty years ago. Yet this recurring theme of counsel focusing on "set-ups" of "open" policy limits rather than settlement in insurance matters prevails today, as in the recently published case of *CSAA Insurance Exchange v. Hodroj* (2021) 72 Cal.App.5th 272.

CSAA Insurance Exchange v. Hodroj, 72 Cal.App.5th 272 (2021)

The fact pattern in the *Hodroj* case is an unfortunately all too commonplace occurrence in insurance claims: A claimant extends a time-sensitive settlement demand to a tortfeasor's insurer for policy limits with various convoluted conditions (many unnecessary or near impossible to meet) in the hope the carrier will fail to timely accept or somehow err slightly in responding to each condition. Although the insurer evinces acceptance of the demand, the claimant nonetheless alleges that the carrier's conduct constitutes a rejection such that they proceed with filing suit against its policyholder. The claimant then alleges that the "lid is off" and that the insurer has "opened up" policy limits, with the intent to obtain an assignment of rights from the policyholder against their carrier for an amount awarded at trial in excess of the policy limit.

The declaratory relief action of *Hodroj* involved an underlying case that arose out of a single-car accident. *Hodroj* was a passenger in a vehicle operated by the defendant insured at the time of the accident, which resulted in personal injuries to the passenger. There is nothing in the record, nor was there any other indication, that the passenger claimant ever actually asserted or even suggested any potential property damage claims.

Before filing suit against the insured, who was also the passenger's driver, the passenger claimant's counsel had issued a time-sensitive policy limit demand to the driver's insurance carrier. The demand contained several conditions with various subparts. One of the "conditions" in the demand was actually an option for the carrier to have the passenger sign a settlement agreement and release regarding his bodily injuries. There was no mention of any potential property claim of the passenger.

The driver's carrier complied with all stated conditions of the demand seven days before its expiration. The insurer sent a letter stating in the first sentence that "We accept [the passenger's] demand for the settlement of this claim." It then timely provided the policy limit of $100,000, the demanded policy information and a signed declaration. The carrier also sent a proposed release to the passenger's attorney, which was a form release that the assigned adjuster had revised to comply with the demand, and which included property damage language.

Leaping upon the property damage language in the release, and despite the carrier's acceptance of the demand and satisfaction of the conditions, the passenger's counsel claimed the insurer had failed to *strictly* meet all of the conditions of the demand. He therefore claimed that the demand was rejected and the policy limits were now "open." In essence, after acceptance, the passenger's attorney seized upon the inclusion of an insignificant clause within the proposed release to declare a breach of the agreement or rejection of the offer.

The passenger then filed suit against his driver, after which the insured driver's carrier filed its declaratory relief action seeking a declaration that CSAA had, in fact, accepted the demand and that there was thus a binding settlement. The trial court granted summary judgment in favor of CSAA, and the passenger appealed.

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Timely Acceptance of a Policy Limits Demand, Though Imperfect, May Result in Formation of a Binding Settlement Agreement

Ultimately, the Court of Appeal affirmed the judgment of the trial court, holding that the carrier's acceptance of a policy limits demand, though imperfect, was, in fact, an acceptance such that a binding contract was formed. The Court of Appeal concluded that the carrier's proposed release was not a rejection or some counter offer, but merely an attempt to reduce the binding agreement into a formal writing and finalize the settlement. (*Hodroj, supra,* 72 Cal.App.5th at 276.) The *Hodroj* decision is important, because it is the first case in a context of an insured third party claim to address these types of demands that are, in actuality, not geared to settle the claim but to "set up" an allegation that the policy limits are opened.

Proffering Proposed Settlement Language that Varies From the Offer Does Not Constitute Rejection of the Demand

The Court of Appeal in *Hodroj* found it is well-established that the lack of a formal writing does not negate the existence of the prior contract, particularly when there is nothing to suggest that the contract or the parties specifically required a signed mutual agreement. (*Id.,* [citing *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 and *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358]; see also, *Smissaert v. Chiodo* (1958) 163 Cal.App.2d 827, 830-831; *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal. App.2d 620, 629.)

The Court of Appeal further relied on authority to conclude that newly proposed terms that are ultimately rejected are simply considered a "nullity" rather than a purported counteroffer. (*Hodroj,* supra, 72 Cal.App.5th at 276 [citing *American Aeronautics Corp. v. Grand Central Aircraft Co.* (1957) 155 Cal.App.2d 69, 82]; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 61.)

Public Policy Favoring of Resolution Supports a Finding of a Valid Settlement Agreement

The Court of Appeal also considered and upheld public policy issues to find the existence of a valid contract, reasoning that "'[a]ny other rule would always permit a party who has entered into a contract like this, through letters ... to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule, the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business.'" (*Id.* at 277-278, citing *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 848-849.)

After the Court of Appeal granted the carrier's request for the *Hodroj* decision to be published, the Supreme Court received multiple requests for depublication, including from the Consumer Attorneys of California. The American Property Casualty Insurance Association and other amici filed briefs opposing the depublication requests. The Supreme Court declined to depublish.

Examples of Commonplace Conditions and Set-Up Tactics

These types of attempts to deter application of contract law to settling insured claims in effort to mindfully induce a "failed" settlement is to reap the potential rewards of threatening that an insurer has "rejected"

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a reasonable demand within the policy limits. This is based upon the proposition that the insured may be fully indemnified against the claim, regardless of the policy limits, depending upon whether there was an unreasonable rejection of a reasonable demand. (See *Critz v. Famers Ins. Group* (1964) 230 Cal. App. 2d 788.)

The flood of such insurance claims involving allegations of excess exposure championed by parties and their counsel who seek to effectively manufacture the basis for a bad faith claim and "blow-up" smaller or minimal policy limits often include such conditions or requirements that:

- The insurer explain to the insured the legal meaning of certain phrases, such as "course and scope," although this requires the unauthorized practice of law;
- The release only release the insured and no one else, even if other potential tortfeasors could bring cross-complaints against the insured;
- The insurer provide proof that all statutory liens were perfected, even if that is impossible to do within the demand's time limit;
- The insurer ignore all non-statutory liens;
- The insurer accept a promise that the claimant will "handle" statutory liens, including Medicare liens, in contravention of federal statutes; and
- All settlement documents be received by the claimant attorney within an unreasonably short period of time, although an additional one or two days would not make the slightest difference to the claimant.

In addition, the demands are often accompanied by a recitation of the law regarding excess exposure (often incorrect) and a threat that the rejection of the demand will result in a finding of bad faith and excess exposure.

Conclusion

The *Hodroj* decision is significant in view of prevalent, ongoing attempts to orchestrate extracontractual claims. The strength of this decision is that it goes to the heart of the gamesmanship of plaintiff attorneys in making demands within the policy limit. If the insurer tries to accept the demand, agreeing to terms – it is accepted. That it does not completely meet every core element of the demand in execution is irrelevant.

While succinct, the published *Hodroj* opinion serves as a useful guide and precedent of the relevant analysis that must be undertaken in adjudicating these types of disputes and resultant insurance policy "lid-off" matters. It also helps to mitigate these bad faith set-up tactics by claimants' counsel, setting forth the clear standards for offer and acceptance and clarifying that these standards are no different in the negotiation of third-party insurance claims.

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Min K. Kang is a shareholder at the law firm of Coddington, Hicks & Danforth. Her practice encompasses contract analysis and disputes, regulatory/compliance, business litigation, insurance and coverage, appellate, transportation, e-commerce, privacy, aviation and administrative law matters.

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LESSONS LEARNED: *Owen Diaz v. Tesla Motors, Inc.* File Under Labor and Employment Defense

John G. McCabe, John G. McCabe Consulting, Inc.

"Smart people learn from their mistakes. But the real sharp ones learn from the mistakes of others."
— Brandon Mull

On June 27th, Judge William H. Orrick of the U.S. District Court in San Francisco granted Tesla Motors Inc.'s motion for a new trial on the damages in the above-entitled case. In April, he slashed the jury award in what was the largest single plaintiff employee verdict at the time.

Last fall, a jury in his court awarded an employee (Owen Diaz) $6.9 million in emotional distress damages and an eye-popping $130 million in punitive damages for racial slurs (the "n-word" and others), intimidation, and harassment by co-workers and managers that Tesla Motors, Inc. knew about but failed to adequately address. The judge reduced the award to $1.5 million in compensatory and $13.5 million in punitive damages, denying Tesla's motion for a new trial contingent on the plaintiff's acceptance of the reduced award. On June 21st, the plaintiff rejected the judge's award, and no date has been set for the new trial.

As a litigation consultant, I wondered why the jury awarded such an extreme amount in the first place? What made the jury so angry?

Given the outcome, it might be easy to laud lead plaintiff counsel J. Bernard Alexander III of Alexander Morrison + Fehr and fault lead defense counsel Tracey Kennedy of Sheppard Mullin. However, both attorneys have stellar reputations.

Besides, anyone who has worked for the defense of a large and powerful company like Tesla knows that the company's upper management and in-house attorneys often drive the case strategy, which can severely limit trial counsel's options. And while some cases have such a strong fact set that the plaintiff will not settle, some corporate defendants refuse to even discuss settlement. Still, it is obvious that what Tesla argued was not only ineffective, but also extremely counterproductive. The extremity of the damages indicates that by the end of the trial, the jury was pissed off at Tesla.

"Good judgment comes from experience, and experience – well, that comes from poor judgment."
— Anonymous

After listening to plaintiff's counsel, J. Bernard Alexander III talk about the case, reviewing the closing argument transcripts and press releases, here are a few thoughts for others as to how Tesla may have contributed to the jury's fury.

- **"Oh no we didn't." – blanket denial without an alternative story.**

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"But in this particular case, the evidence is going to show that Tesla is not responsible and not liable for all of the allegations made by Mr. Diaz...." 927:25 - 928:3

I have no issue with a denial like this, had it been quickly followed up with Tesla's story about "what really happened." In general, Tesla's strategy was to counter the plaintiff's case story point by point, rather than present a cohesive counternarrative. The problem with this strategy is that it is reactive, focusing jurors even more on the plaintiff's story, in which the plaintiff gets to define what the evidence means.

Add to this the inflammatory nature of the accusations, in particular the allegation that Diaz was referred to by coworkers as an "n-word," a claim that was corroborated by other "me too" coworkers.

According to the speakers at LACBA's Symposium in March, before Sheppard Mullin was brought on for trial, a lawyer from the prior defense firm that litigated the case used the "n-word" when deposing the plaintiff's son. No, not the euphemism, the actual "n-word!" Repeatedly! Due to the unavailability of the witness, portions of the video deposition were shown to the jury. I don't know if the strategy was to try to normalize the word for jurors (good luck with that!) or shock and offend the witness. But in a case that alleges that people in the Tesla plant used the word repeatedly and directed it at the plaintiff and others, what were they thinking? For jurors, the trial is a reenactment of the events at issue. I assume the tactic was approved by Tesla which did itself no favors with this incendiary stunt.

In their same-day press release Tesla noted:

> "While they all agreed that the use of the n-word was not appropriate in the workplace, they also agreed that ***most of the time*** they thought the language was used in a ***"friendly"*** manner and ***usually*** by African-American colleagues." [Emphasis added.]

As a reminder, this trial took place in San Francisco which is surrounded by three of the bluest of the blue counties in California, which was a double-edged sword, particularly considering the federal requirement of a unanimous verdict. On the one hand, Tesla was likely very well-regarded in the community because it employs lots of people and produces popular zero-emission cars, favored by the environmentally-conscious. On the other, the jury was likely made up of at least some who would not just *want* a story from Tesla to explain "what really happened," but would *demand* it. They likely focused on Tesla's failure to explain how something so outrageous as the commonplace use of the "n-word" in its factory could happen in this day and age. The jurors were angered and likely thought, whether Tesla was on notice or not, it should have been.

- **Denigrating the plaintiff**

"One of the important things is whether or not Mr. Diaz was actually engaged in the very product that Tesla was selling. He was an elevator operator. He was not making cars." 933:17-20

Ouch! This comment can easily be interpreted as implying the plaintiff was unimportant, just an elevator operator, not worthy of Tesla's time and attention. I found a quote in an article on labor and employment cases I wrote nearly a decade ago: "Any perceived attack on a [plaintiff] in court will only reinforce to the jury the notion that the corporation is capable of the very [offense] the plaintiff is claiming." Although not a prominent issue in this case, this strategy is as overused as it is dangerous. And plaintiffs' counsel knows it!

> "[Plaintiffs] are never perfect, and the defense exposes every imperfection. They bring in every person who hated them. I tell the jury they have to apply the law to imperfect people, and

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imperfect people need the law most." — Diaz's lawyer, J. Bernard Alexander, III, *Super Lawyers Southern California, 2022*

And yet, I cannot count the number of times corporate clients in labor and employment cases have reflexively wanted to vilify the plaintiff. Who do they think the jurors are more likely to relate to, an elevator operator or Elon Musk?

This is not to say that you cannot impeach the plaintiff's credibility, only to say that you must show that the plaintiff is not credible or trustworthy or is exaggerating through testimony and evidence. You just shouldn't call them a liar. It's a subtle but important difference. Juries can be hard to read, so you don't know if the attack causes them to resent the plaintiff or you, so why risk it?

- **Legally, we've done nothing wrong because....**

"We'll talk about the issues of joint employer, contractual relationships. But, in fact, Mr. Diaz was never a Tesla employee." 928:12-14

The plaintiff was able to convincingly argue to the jury that Owen Diaz was Tesla's employee, despite being provided to Tesla by an outside staffing agency. The argument had two elements. Tesla controlled nearly everything Diaz did and that they trained and certified him in various aspects of his job. Tesla also provided Diaz with a location to work, tools, assignments, and determined his compensation. Tesla was thus his joint employer.

If jurors weren't satisfied with this first argument, the plaintiff gave them another. The plaintiff argued that Diaz was the beneficiary of, and thus party to, the contract between the staffing agency and Tesla. Therefore, the alleged discrimination, harassment, and failure to correct were civil rights violations in the contractual relationship between Tesla and staffing agency. But for this contract, Diaz could not have worked at the Tesla plant.

For its part, Tesla argued that Diaz was an employee of the staffing agency and therefore Tesla was not liable for any of his claimed harms. Diaz applied to the agency, got his pay direct deposited and was given a W-2 by the agency. Tesla pointed jurors to a section of the jury instructions on the tax treatment of wages, which (thankfully) they did not spend time arguing about in closing.

The image that the plaintiff painted with its arguments about who is an employee is twofold. The first is hardhats, lunch pails, time clocks, work assignments, and bosses. The second evoked visions of civil rights protests in nearby Berkeley in the 1960s. Tesla countered with administrative and technocratic excuses.

The problem with this defense is that in arguing for its lack of *liability,* it failed to address Tesla's *responsibility.* Liabilities are legal requirements. Responsibilities are ethical ones. And, although related, they are not the same. It was Tesla's plant. Ergo, Tesla, a huge, rich, powerful company, was responsible for everything that happened in that plant. In denying Diaz's employee status, the jury likely saw Tesla as attempting to shirk both its liability and ethical responsibility.

- **The power dynamic**

"This [use of staffing agencies] was not a structure purposefully to avoid liability." 935:8

The plaintiff's case had a theme, easily articulated and understood and repeated by the plaintiff's lawyer, Bernard Alexander, throughout closing argument: "As opposed to a zero-tolerance policy, Tesla had a zero-responsibility policy." Note the word choice, *responsibility.* Like it or not, many jurors will hold rich and powerful corporate defendants to a higher standard. The ancient adage, "With great power comes great responsibility," comes to mind. The jury was apparently persuaded that Tesla's use of staffing agencies was intended to avoid liability and responsibility for those workers. As such, it decided Tesla would have to be taught a lesson.

What may have been worse for Tesla was that it did become involved with some of Diaz's complaints, some of which were seemingly resolved. In a press release on the day of the verdict Tesla's spokesperson wrote, in parts:

"Mr. Diaz made written complaints to his non-Tesla supervisors. Those were well-documented in the nine months he worked at our factory."

"The three times that Mr. Diaz did complain about harassment, Tesla stepped in and made sure responsive and timely action was taken by the staffing agencies: two contractors were fired, and one was suspended (who had drawn a racially offensive cartoon)."

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So, Tesla could "step in" on certain complaints and could even direct the staffing agencies to terminate or suspend workers, but somehow lacked the power to train and monitor workers not to use racial slurs, write offensive graffiti on bathroom walls, or engage in other harassing conduct. The jury was likely irate that despite Tesla's overwhelming power to protect workers, it seemed more concerned with protecting itself from liability and only exercised its power when it chose to.

- **Legally, we've done nothing wrong because....** (part 2)

"...[N]o Tesla employee harassed Mr. Diaz as "harassment" is defined in the law during his nine and a half months that he was at the Tesla factory." 929:8-10

Jurors are allowed to use their common sense. Although I am not a lawyer, citing the legal definition of "harassment" in a case in which the plaintiff claims to have been called racial slurs like the "n-word" and others, or was subjected to racist graffiti and physical intimidation, if true, sounds like harassment to me. Jurors were likely insulted by the attempt to use legalese to define away the plaintiff's claims.

- **Not Matching Plaintiff Experts**

" ... "

The plaintiff produced three experts: a medical expert, an HR expert, and an economist. Tesla produced none. While I fully support using the opposing side's experts as your experts through cross examination, which I assume was the defense's plan, the optics of Tesla not responding with counter experts was likely problematic. The plaintiff was portraying itself as wanting to provide the jury all the information it needed, while trying to paint Tesla as callous and arrogant. What communicates indifference more than not providing experts to tell Tesla's side of the story? Again, for jurors, the trial itself is a reenactment of the incidents at issue. It seems that Tesla acted just as the plaintiff was portraying them to be, adding to the jurors' anger.

- **No counter-anchor for damages figures**

"[T]here's no evidence to support ... an award of $6 to $9 million of emotional distress damages." 956:21-24

"This is not a punitive damages case. There is no reason here to punish Tesla on behalf of Mr. Diaz in light of the facts of this case." 958:20-22

For decades psychological research has demonstrated the impact of numerical figures (so called "anchors") on estimates in the absence of information, referred to as the Anchor and Adjust Heuristic. Given this research, not to offer a counter-anchor is unfathomable in nearly every case. Most will remember the character of Michael Corleone in the *Godfather Part 2,* when he says, "Senator, you can have my answer now, if you like. My offer is this: Nothing." Now contrast that with every negotiation you have seen or been a part of. At some point, did you "split the baby?" You can't "split the baby" without a counteroffer.

The counter-anchor is not an admission of liability. The counter-anchor is a hedge. And yes, plaintiff's counsel will call out your counter-anchor as an admission, so inoculate the jurors to that claim. Address the jury in closing, saying something like: "We believe in our case. We believe the facts are on our side. We don't believe we are liable for all the reasons we've laid out for you, but if at the end of your deliberations, you believe we are, here is what we think would be fair and reasonable compensation for the plaintiff." And, most importantly, you then explain why you think it's fair and reasonable. At this point, it pays to appear generous.

Jurors don't like to be told what to think. A counter-anchor engenders good faith and communicates not only that the defense understands that its fate is in the jury's hands, but also that the defense trusts the jury to make the right decision and find in your favor or soften the blow, if they don't.

A counter-anchor in this case may have reduced the award by millions, if not tens of millions, of dollars. Without it, the jury was unfettered to express its outrage, anchoring its award only on the plaintiff's suggested amounts.

One final point, the jury in *Diaz v. Tesla Motors, Inc.* wanted to get Tesla's attention. They likely succeeded, despite Judge Orrick's reduction. They wanted Tesla to know that what they saw in the evidence was a crisis, to which Tesla was obligated to react. Tesla's thoroughgoing denials told the jury that it has no plans to change *anything.* This may have been the last straw.

Conclusion: Not every case holds the possibility of a runaway verdict, but this cautionary advice holds true in nearly all cases.

- Don't just deny the claims. Come up with an effective story of "what

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Lisa Perrochet

Notes on Recent Decisions

Emily Cuatto

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact: ***LPerrochet@horvitzlevy.com*** or ***ECuatto@horvitzlevy.com***

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

ATTORNEY FEES AND COSTS

Even where a statute mandates an attorney fee award, the trial court retains discretion to deny fees for trivial victories.

Riskin v. Downtown Los Angeles Property Owners Association (2022) 76 Cal.App.5th 438.

Plaintiff filed a request under the California Public Records Act (CPRA) seeking various categories of documents from a business improvement district. The trial court ordered production of emails consisting of only 20 sentences. Plaintiff then moved for $123,199.11 in attorney fees and costs. The trial court awarded plaintiff $71,075.75 in fees, reasoning that it had no discretion to deny the fee motion because the CPRA provides that the prevailing party "shall" be entitled to attorney fees.

The Court of Appeal (Second Dist., Div. Three) reversed and remanded for reconsideration of whether plaintiff was entitled to any fees. Even when attorney fee statutes prescribe a mandatory attorney fee award to the prevailing party, trial courts retain discretion to award no fees if the victory is of little or no value; trivial victories may not be used to obtain substantial attorney fee awards. Thus, where the documents ordered pursuant to a CPRA request are minimal or insignificant, the court has discretion to deny fees.

But see *City of Los Angeles Department of Airports v. U.S. Specialty Insurance* (2022) __ Cal.App.5th __ (First Dist., Div. Five) [Petition for Review pending: trial court had discretion to find that neither side of contract dispute was the prevailing party for purposes of a contractual attorney fee provision, thus denying fees to the defendant, even though the plaintiff, who sought $3.4 million, obtained only $1 in nominal damages; the outcome cannot readily be squared with cases like See *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109, which the court did not address, and *Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876, holding that "when the results of the litigation on the contract claims are not mixed – that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other – the Courts of Appeal have recognized that *a trial court has no discretion to deny attorney fees* to the successful litigant."]

CIVIL PROCEDURE

Whether a Doe amendment "relates back" is determined by facts plaintiffs actually know at the time the complaint was filed, not facts they should have known.

Hahn v. New York Air Brake LLC (2022) 77 Cal. App. 5th 895.

A transportation worker brought an asbestos personal injury action against various defendants not including Air Brake, even though plaintiff's counsel took a deposition in which a witness identified Air Brake as having designed the braking system for the vehicles used at the time of plaintiff's employment. After plaintiff's death, his heirs sued various "Doe" defendants, again not naming Air Brake. After additional discovery, the heirs filed an amended complaint substituting Air Brake for one of the Doe defendants. Air Brake moved for summary judgment on the ground the wrongful death suit was untimely, and that the heirs could not take advantage of Code of Civil Procedure § 474 (allowing amendment to specify name of Doe defendant to relate back to initial filing of complaint) because the heirs should have known its true name earlier. The trial court granted the motion.

The Court of Appeal (First District, Div. Five) reversed. "Compliance with section 474 is determined by the facts that a plaintiff actually knew at the time she filed the complaint, not the facts she should have known." Section 474 does not impose a duty on the plaintiff "to exercise reasonable diligence to obtain facts that she 'should have known.'" Here, the prior testimony identified the defendant, but it did not establish all the facts necessary to make out a negligence or products liability claim against it. Accordingly, the defendant did not meet its burden to show that the heirs were actually aware of the basic facts giving rise to a claim against Air Brake when they filed their wrongful death complaint.

A plaintiff may still accept an unexpired Rule 68 offer of judgment even after the district court enters a non-final order granting summary judgment.

Kubiak v. County of Ravalli (9th Cir. 2022) 32 F.4th 1182.

In this federal civil rights action, the defendant County filed a motion for summary judgment. Weeks later, while the motion was still pending, the County made a Federal Rule of Civil Procedure Rule 68 offer of judgment for $50,000 plus costs and attorney's fees. Before the Rule's 14-day period for acceptance had closed, the district court granted the motion. The plaintiff immediately accepted the County's offer and requested entry of judgment. Over the County's objections, the district court entered judgment for plaintiff under the terms of the offer, reasoning that under Rule 68, it was bound by the offer of judgment and the time period for acceptance was not cut short by the summary judgment order indicating that judgment would be entered for the County. The County appealed.

The Ninth Circuit affirmed. Rule 68 requires the clerk to enter judgment if an offer is accepted within the 14-day period. The rule is mechanical and mandatory. Nothing in the rule creates an exception to its application for a situation where a trial court enters a non-final order granting summary judgment. The court noted that it expressed no view on whether an entry of a *final* judgment would nullify an outstanding Rule 68 offer. The court also noted that it was not deciding "the fate of Rule 68 offers in 'exceptional factual situations,' such as when the plaintiff's claim is fraudulent.'"

A trial court may not impose a jury trial waiver as a sanction for failure to comply with local rules regarding pretrial document submission.

Amato v. Downs (2022) 78 Cal.App.5th 435.

After selling his house, the plaintiff sued the listing broker and the brokerage company alleging that they convinced him to sell his house for less than its value. On the day of trial, the court found that plaintiff had waived his right to a jury trial by failing to comply with a local court rule regarding pretrial preparation of joint documents. The case proceeded to a bench trial in which the court found for the defendants.

The Court of Appeal (Fourth Dist., Div. Two) reversed. While the record amply supported the trial court's conclusion that plaintiff failed to comply with local rules, the trial court's sanction in form of waiver of the right to a jury trial was not appropriate. The right to a jury trial is constitutionally protected, and may be waived only as specified in Code of Civil Procedure 631 (outlining grounds for civil jury trial waiver). Noncompliance with local rules governing preparation of pretrial documents is not included.

Special statute of limitations enabling the victim of a felony to bring actions for damages against the person convicted of that felony does not apply to the felon's employer in an action based on respondeat superior.

Cardenas v. Horizon Senior Living, Inc. (2022)
78 Cal.App.5th 1065 (petition for review pending)

A nursing home resident suffered from dementia. One night, the resident left the facility unsupervised and was hit by a car and killed. The director and manager of the facility were convicted of felonies. More than two years after the incident, the heirs brought wrongful death and other claims against the facility, the director, and the manager. The facility demurred to the complaint on the ground that it was barred by the two-year statute of limitations The heirs opposed the demurrer, arguing that because the facility's liability was vicarious based on the director's and manager's felonious conduct, Code of Civil Procedure § 340.3 [extending the statute of limitation

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for personal injury or wrongful death against the person convicted of a felony] extended the statute of limitations against the facility to the same extent it extended the statute against the individuals. The trial court disagreed and sustained the facility's demurrer without leave to amend.

The Court of Appeal (Second District, Div. Six) affirmed. The extended statute of limitations for the victim of a felony to bring an action for personal injury or wrongful death against the person convicted of that felony applies to the person convicted; it does not apply to the employer of the felon in an action based on the doctrine of respondeat superior. Because the facility was not convicted of any felony, section 340.3 did not apply to it and plaintiffs' action was untimely. ▼

A plaintiff cannot demonstrate disputed issues of fact to defeat summary judgment based on facts that should have been but were not disclosed during discovery.

Field v. U.S. Bank National Association (2022) 79 Cal.App.5th 703.

In this wrongful foreclosure case, plaintiff responded to the defendant bank's interrogatories that she was "unsure" she had ever been served with a notice of proposed trustee sale. The bank moved for summary judgment on the ground that plaintiff could not establish various elements of a wrongful foreclosure claim. Plaintiff opposed the motion, submitting a declaration stating she never received the notice. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed. Plaintiff had an obligation to provide a diligent and straightforward response to the bank's interrogatory; the "unsure" response did not satisfy that obligation. "California's civil discovery process aims to unearth the truth of the case, thus facilitating settlement on the basis of the mutually expected value of the suit. Evasive discovery responses frustrate this goal by concealing the truth. A party cannot evade discovery duties and then try to defeat summary judgment by adding factual claims to create last-minute disputed issues." ▼

EVIDENCE

The hearsay exception for testimony from prior cases generally does not apply to a plaintiff's attempt to introduce discovery testimony from the defendant's employees or others aligned with the defense because counsel seldom have a motive and interest to cross-examine their own witnesses at deposition.

Berroteran v. Superior Court (Ford Motor) (2022) 12 Cal.5th 867.

The plaintiff in a lemon law case sought to introduce deposition testimony from defense witnesses taken in non-California cases years earlier. The trial court excluded the deposition testimony as hearsay, finding it did not fall within the exception under Evidence Code 1291 for prior testimony taken in a case where the objecting party had a similar motive and interest to cross-examine the witnesses as it would have if the testimony were offered live in the current proceeding. Plaintiff sought a writ of mandate. The Court of Appeal (Second Dist., Div. One) issued the writ, concluding that the defendant had not disproven that it "had the right and opportunity to cross-examine its employees and former employees with a similar motive and interest as it would have in the instant case" and therefore holding that the depositions were admissible under section 1291.

The California Supreme Court reversed the Court of Appeal. Evidence Code section 1291(a)(2) creates a general rule against admitting testimony from a prior civil discovery deposition taken of a witness who was aligned with the defending party. During a discovery deposition, the party with whom the witness is aligned presumably lacks a "similar" "interest and motive" to examine the witness than it would later have at trial. The burden of establishing that the conditions for admitting deposition testimony under section 1291 rests with the party proposing that the testimony be admitted, and that burden cannot be satisfied merely by demonstrating that the issues in the two proceedings are similar. A plaintiff who wishes to preserve testimony from defense witnesses may do so through depositions taken for the case at hand, as a different hearsay exception allows for admission of such testimony if the witness becomes unavailable.

But see *Bowser v. Ford Motor Co.* (2022) 78 Cal.App.5th 587 (Fourth Dist., Div. Two) [trial court could reasonably conclude that defendant had similar motive and opportunity to examine friendly witnesses during depositions in prior case where it was known at the time of the deposition that the witnesses would not be available for the defendant to call at trial to present live testimony]. ▼

An adverse expert may be cross-examined about a publication established as reliable authority, regardless whether the expert considered the publication in forming his or her opinions.

Paige v. Safeway (2022) 74 Cal.App.5th 1108.

Plaintiff fell in the crosswalk of a wet grocery store parking lot. During the trial on her subsequent lawsuit against the store, her counsel sought to ask the store's expert about the American Society of Testing and Materials (ASTM) standards for safe walking surfaces. The store moved in limine to preclude the questioning, arguing that the ASTM standards were inadmissible hearsay and plaintiff could not ask the store's expert about them because the expert had not relied on them in forming his opinions. The court granted the in limine motion. The jury found for the defendant store.

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The Court of Appeal (First. Dist., Div. Three) affirmed, concluding that the trial court did err in precluding the cross-examination. Under Evidence Code section 721(b)(3), a party can cross-examine the adverse party's expert with materials that are established as reliable authority by either any expert in the case or by judicial notice. There is not requirement that the *adverse expert* have relied on the materials. Indeed, the purpose of section 721(b)(3) is to allow an adverse expert to be confronted with reliable materials he or she did not consider. Here, the ASTM standards qualified as reliable authority under section 721(b)(3) here because the expert had testified at deposition that the standards "are founded on good science, [and] well-recognized and accepted in the scientific community." The error in excluding the questioning was harmless, however, because there was no evidence that any failure to comply with the ASTM standards was a substantial factor in causing plaintiff's fall. V

The defense is not required to prove alternative causation to a reasonable degree of medical probability before it may present evidence of possible alternative causes to challenge the plaintiff's prima facie case.

Kline v. Zimmer (2022) 79 Cal.App.5th 123.

In this products liability suit, plaintiff claimed a hip implant manufactured by the defendant was defective and caused his continued pain. Defendant sought to offer an expert who would testify to "possible" alternative causes of plaintiff's hip pain, and to cross-examine plaintiff's expert about alternative causes of plaintiff's pain. The trial court excluded "all medical opinions that were expressed to less than a reasonable medical probability." As a result, the defendant was prevented from offering any expert testimony to rebut plaintiff's evidence of causation. The jury found for the plaintiff.

The Court of Appeal (Second Dist., Div. Eight) reversed for a new trial. While the plaintiff in a personal injury case has the burden of establishing medical causation to a degree of reasonable medical probability, "[t]he same does not apply to a defendant's efforts to challenge or undermine the plaintiff's prima facie case." A defendant has no obligation to put on any evidence, and only needs to demonstrate that the plaintiff's evidence is insufficient to prove his injuries were more likely than not caused by the defendant. The defendant thus "should have been permitted to do so by offering expert opinions offered to less than a reasonable medical probability that [plaintiff's] injuries may have been attributable to other causes." "Such defense expert opinions could cast doubt on the accuracy and reliability of a plaintiff's expert." V

Police reports are admissible as long as each layer of hearsay qualifies for an exception.

Doe v. Brightstar (2022) 76 Cal.App.5th 171.

The plaintiff, a developmentally disabled adult living in the defendant's care facility, was sexually assaulted by a handyman hired to do work at the facility. The plaintiff sued the defendant, alleging that the defendant knew or should have known of the risk posed by the handyman. To support her claim that the attack was foreseeable, the plaintiff sought to introduce the police report from the incident. The report reflected that the head of the facility knew the handyman had a history of loitering and harassing female employees. It also reflected that various employees of the facility had reported that the handyman had acted in a disturbing manner. The trial court excluded the police report, and then granted summary judgment for the defense.

The Court of Appeal (Second Dist., Div. Eight) reversed. The police report is hearsay but is an official record and is therefore admissible under Evidence Code section 1280. The facility head's statements recorded in the police report were hearsay but were admissible as party admissions under Evidence Code sections 1200 and 1222. The employees' statements about the handyman's disturbing conduct were hearsay but were admissible because they were offered to show the facility was on notice that the handyman was acting inappropriately, rather than for the truth of those statements.

Counsel should note that "notice" evidence not offered for the truth of the statement is arguably inadmissible unless *independently admissible evidence* will establish the fact as to which "notice" is offered. Otherwise, the "notice" evidence is irrelevant, as the event about which the defendant arguably had notice is not shown to have in fact occurred, and relevance in that situation could derive only from impermissibly accepting the truth of the matter asserted in the hearsay evidence. V

TORTS

An employer's duty to provide a safe place to work does not include ensuring that an employee's private residence is safe from third party criminal conduct.

Colonial Van & Storage v. Superior Court (Dominguez) (2022) 76 Cal.App.5th 487.

Without warning, a war veteran suffering from PTSD shot several people inside his mother's home, including his mother's coworker and a business associate. The coworker and business associate sued the mother and her employer, claiming that they were engaged in work-related activities while visiting the mother's home and the employer therefore had a duty to protect them from the shooter. The employer

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moved for summary judgment, arguing it owed no such duty. The trial court denied the motion, concluding there were factual issues about the employer's duty. The employer sought a writ of mandate.

The Court of Appeal (Second Dist., Div Two) granted the writ and directed judgment for the employer. The fact the employer derived some financial benefit from its employees' work at home was insufficient to support a duty where no evidence showed the employer had control of the mother's private home. The "special relationship" between an employer and employee, which may give rise to a duty to protect from third-party crime in some cases, did not extend to an after-hours event in an employee's home. Even if there were a "special relationship," public policy precludes imposing a duty on employers to protect their employees and guests from third-party crime in employees' private homes, which would force employers to invade their employee's privacy rights.

See also *Doe v. Anderson Union High School District* (2022) formerly published at 78 Cal.App.5th 236 (Third Dist.) (review granted) [school district did not have a duty to use security cameras or alarms to supervise teachers absent evidence suggesting reasonably foreseeable risk that teacher would harm student; Supreme Court granted review on its own motion, depublishing the opinion and remanding for reconsideration by the Court of Appeal.]

See also *Doe No. 1 v. Uber Technologies* (2022) 79 Cal.App.5th 410 (Second Dist., Div. One) (petition for review pending) [Uber did not owe duty of care to prevent criminals from posing as Uber drivers and assaulting passengers.]

But see *Achay v. Huntington Beach Union High School District* (2022) __ Cal.App.5th __ (Fourth Dist., Div. Three) (petition for review pending) [school district had a duty to protect student from stabbing in school parking lot while afterschool activities were ongoing.] V

Employer of overnight security guard not vicariously liable for accident that occurred while security guard fell asleep at the wheel on her way home.

Feltham v. Universal Protection Service (2022) 76 Cal.App.5th 1062.

Defendant's employee, a security guard who worked 8-hour overnight shifts, fell asleep at the wheel while driving home. The guard's vehicle struck plaintiff, causing severe injuries for which plaintiff sued the guard's employer. The employer moved for summary judgment under the "going-and-coming" rule, which provides that an employer is generally not liable for its employee's accidents while communizing to and from work. Plaintiff opposed the motion, arguing that the employer knew the guard had a baby at home during the day and would therefore be unlikely to sleep during the day, and was thus vicariously responsible for the "special risk" of the guard's fatigued driving, as well as directly negligent for negligent hiring. The trial court granted summary judgment for the guard's employer.

The Court of Appeal (First Dist., Div. Three) affirmed. Given that the guard had finished her shift and was on her way home in her personal vehicle at the time of the accident, the going-and-coming rule applied. Absent evidence that the guard's employer caused her to work excessive hours or a schedule that would have inherently caused her to be fatigued – beyond merely working a night shift – the special risk exception did not apply. Further, the negligent hiring argument was not raised in plaintiffs' complaint and was therefore waived. V

Property owner owed no duty of care to jogger running on the property.

Rucker v. WINCAL, Inc. (2022) 74 Cal.App.5th 883.

While training for a half-marathon on defendant's property, plaintiff encountered a homeless encampment blocking her path, entered the bicycle lane to avoid it, and was stuck by a car. Plaintiff sued the property owner for negligence and premises liability. The property owner successfully moved for summary judgment on the ground that jogging is a recreational activity within meaning of Civil Code section 846 (providing that an owner of real property, with certain exceptions, "owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose"). The property owner was therefore immune from liability to plaintiff.

The Court of Appeal (Second Dist., Div. Five) affirmed. Jogging for "pleasure or exercise" meets the definition of recreational activity under Civil Code section 846 even though the statute does not mention "jogging" specifically as an example of a recreational activity. Thus, jogging to train for a half-marathon (as opposed to running to avoid being late for work) has a "recreational purpose," triggering immunity.

But see *Hassaine v. Club Demonstration Services, Inc.* (2022) 77 Cal. App.5th 843 (Fourth Dist., Div. One) (review denied with Justice Groban voting to grant) [food sample vendor inside Costco had a duty to keep floor safe for patrons.] V

Student's claims arising out of injuries during football game were barred by release.

Brown v. El Dorado Union High School District (2022) 76 Cal.App.5th 1003.

A high school football player and his father signed a comprehensive release agreement under which they expressly assumed the risk of injury during all football-related activities. The student player suffered a head injury during a game. He sued the school district, claiming the school's coaches did not properly educate him about the risks of a head injury, did not supervise him properly during the game, and allowed him to play too long. He also claimed that the school provided inadequate medical care once his injury became apparent. The school district successfully moved for summary judgment on the grounds that the student's claims were barred by the release of liability and the common law doctrine of primary assumption of risk.

The Court of Appeal (Third Dist.) affirmed. A liability release is enforceable except where a plaintiff proves gross negligence, which requires the defendant to have acted with "so slight a degree of care as to raise a presumption of conscious indifference to the consequences." Here, the student failed to create a triable issue of fact under this standard because it was undisputed that the district's coaches monitored plaintiff during the game and plaintiff was provided adequate medical care after he collapsed.

See also *Joshi v. Fitness International* (2022) __ Cal.App.5th __ (Sixth Dist.) [release precluded gym patron from bringing claims against fitness club arising from patron's slip and fall in sauna]. V

A punitive damages claim against a healthcare provider cannot be added to a complaint without timely leave of court even where the claim is based on conduct allegedly falling outside the scope of the defendant's medical license.

Divino Plastic Surgery v. Superior Court (Espinoza) (2022) 77 Cal.App.5th 874.

Plaintiff's wife died after she had a heart attack during a surgical procedure in which the doctor and nurses who administered the anesthesia were not licensed to do so and were not supervised by a licensed anesthesiologist. Plaintiff' sued the doctor, clinic, and assisting nurses. The initial complaint did not include a prayer for punitive damages, but plaintiff later moved to amend to add a punitive damages claim based on allegations that the doctor had fraudulently misrepresented his credentials. The defendants argued that under Code of Civil Procedure section 425.13, no claim for punitive damages arising out of the professional negligence of a health care provider may be included in a complaint unless the court allows it in an amended pleading within two years of the lawsuit's filing. The trial court granted leave to amend, ruling that plaintiff's intentional tort claims were not based on conduct arising out professional negligence of a healthcare provider and section 425.13's timing limitations therefore did not apply. Defendants filed a petition for writ of mandate.

The Court of Appeal (Fourth Dist., Div. One) granted writ relief. The doctor's alleged misrepresentations about his credentials and the doctor's and nurses' administration of anesthesia without proper supervision were all directly related to the manner in which professional services were provided. Defendants retained their status as health care providers despite allegedly acting in a manner outside the scope of their professional licenses, and even plaintiff's claims alleging intentional torts and misrepresentation arose out of conduct directly related to the provision of medical services. Section 425.13 and its timing limitations therefore applied. V

INSURANCE

Discovery orders in uninsured-motorist arbitration proceedings are reviewable exclusively by writ of mandamus.

State Farm Mutual Automobile Insurance v. Robinson (2022) 23 Cal.App.5th 953.

In connection with an uninsured motorist (UM) arbitration, State Farm propounded requests for admission. The insured failed to provide timely answers. Since under Insurance Code section 11580.2, subdivision (f), discovery disputes in UM proceedings are resolved by the trial court (not the arbitrator), State Farm moved in the trial court to have the requests deemed admitted. The trial court granted the motion. With the insured's admissions in hand, State Farm prevailed in the arbitration. The trial court confirmed the arbitration award, and the insured appealed the resulting judgment, arguing that the trial court erred in granting State Farm's discovery motion.

The Court of Appeal (First Dist., Div. One) affirmed. Code of Civil Procedure section 1286.2's strict limitations on appellate review of arbitration awards apply to UM arbitrations. Arguments that the trial court erred in ruling on discovery matters, and that the arbitrator erred in accepting the trial court's rulings, are based on asserted legal error and are not reviewable in connection with a challenge to the arbitration award. The only way to obtain appellate review of an erroneous trial court discovery order in UM proceedings is to seek writ relief at the time the trial court ruling is made, rather than waiting for the outcome of the arbitration. V

Property insurance policies do not cover economic losses flowing from COVID-19-related business closures even where the insured alleges the virus was present on its premises.

United Talent Agency v. Vigilant Insurance Co. (2022) 77 Cal.App.5th 821.

United Talent Agency sued its property insurer seeking coverage for losses due to cancelled events and loss of use of its property during

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the COVID-19 pandemic. It alleged that the virus was present on its premises and its premises were therefore damaged by the virus contamination. The insurer successfully demurred to the complaint and United Talent appealed.

The Court of Appeal (Second Dist., Div. Four) affirmed. Following the recent decision *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 699, which is consistent with innumerable coverage opinions across the country, the court held that "[i]t is now widely established that temporary loss of use of a property due to pandemic-related closure orders, without more, does not constitute direct physical loss or damage" as is required to trigger coverage under a standard property policy. Resolving a question potentially left open by *Inns-by-the-Sea*, the court further held that the *presence* of a virus at the insured premises does not constitute property damage for purposes of a first-party property policy. Distinguishing environmental contamination cases, the court explained that "the virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks. Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space."

See also *Musso & Frank Grill v. Mitsui Sumitomo Insurance* (2022) 77 Cal.App.5th 753 [holding similarly, and that a standard virus exclusion bars coverage for COVID-19-related losses].

ARBITRATION

Federal Arbitration Act preempts the California rule that PAGA actions cannot be divided into individual and representative actions.

Viking River Cruises, Inc. v. Moriana (2022) 142 S.Ct. 1906.

In this putative wage and hour suit brought under the California Private Attorneys General Act (PAGA), the defendant moved to compel arbitration per the parties' arbitration agreement. Applying the rule of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, under which categorical waivers of PAGA standing are unenforceable and arbitration of just an employee's individual PAGA claim is not allowed, the trial court denied the motion. The California Court of Appeal affirmed and the California Supreme Court denied review.

The United States Supreme Court reversed the Court of Appeal. While the FAA does not prohibit California from voiding wholesale waivers of PAGA claims as against public policy, and therefore does not preempt the *Iskanian* rule that categorical waivers of PAGA claims are unenforceable, the FAA does preempt the *Iskanian* rule precluding "division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." The latter rule interferes with the parties' freedom to choose arbitration. The plaintiff's individual PAGA claim was subject to arbitration, and her representative claim had to be dismissed for lack of standing to pursue it in court.

When the plaintiff demonstrates inability to pay arbitration costs, a trial court that granted a defendant's petition to compel arbitration has jurisdiction to lift the stay and consider whether to require the defendant either to pay all arbitration costs or to waive the right to arbitrate.

Aronow v. Superior Court (Emergent) (2022) 76 Cal.App.5th 865.

After the trial court granted defendants' motion to compel arbitration and stay court proceedings, plaintiff moved for a waiver of arbitration fees and costs or for a lifting of the stay because he was unable to pay the fees. The trial court denied the motion but certified to the Court of Appeal the question whether it had jurisdiction to lift a stay of court proceedings under such circumstances.

The Court of Appeal (First Dist., Div. Four) accepted review and held that when the party opposing arbitration demonstrates inability to pay anticipated arbitration costs, the trial court may lift a stay of court proceedings and require the party seeking arbitration to either pay the opposing party's share of arbitration costs or waive the right to arbitrate. Acknowledging a split of authority on the issue, the court followed Roldan v. Callahan & Blaine (2013) 219 Cal.App.4th 87, noting that the Supreme Court had approved the rationale of Roldan in Jameson v. Desta (2018) 5 Cal.5th 594. The party seeking arbitration may conduct limited discovery regarding the opposing party's finances.

In federal court, waiver of the right to arbitrate by participating in the litigation turns on ordinary waiver analysis, not a prejudice analysis.

Morgan v. Sundance (2022) 142 U.S. 482

This was a wage and hour class action brought under the federal Fair Labor Standards Act. After eight months of litigation, the defendant moved to compel arbitration under the Federal Arbitration Act. The named plaintiff argued that the defendant had waived its right to arbitrate by participating in the litigation. The district court agreed with the plaintiff and held that the defendant had waived its right to arbitrate by acting inconsistently with the right and prejudicing the plaintiff by its actions. The Eighth Circuit reversed, concluding that while the defendant had acted inconsistently with its arbitration right, the plaintiff had failed to demonstrate prejudice since discovery had not begun and no significant litigation on the merits had occurred.

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The United States Supreme Court reversed for further proceedings, holding that it was error for the courts below to insert the prejudice element into the waiver analysis. Federal waiver analysis depends on whether the party asserting a right has knowingly relinquished it by acting inconsistently with the right. It does not include a prejudice element. While several circuits had imposed a prejudice requirement in furtherance of the policy of favoring arbitration, that was not appropriate. "[T]he text of the FAA makes clear that courts are not to create arbitration-specific procedural rules." "[A] court may not devise novel rules to favor arbitration over litigation."

But see *Quach v. California Commerce Club* (2022) 78 Cal.App.5th 470 (Second Dist., Div. One) [in state court, a party resisting arbitration on the ground the party seeking arbitration has waived it by participating in litigation must show prejudice, and the prejudice must go beyond merely having incurred some costs and fees.]

CLASS ACTIONS

There is no right to a jury trial on PAGA claims.

LaFace v. Ralphs Grocery Company (2022) 75 Cal.App.5th 388.

Plaintiff sued defendant under the Private Attorneys General Act (PAGA) for alleged violations of workplace seating requirements. Defendant moved for a bench trial, arguing that PAGA actions are equitable in nature and not triable to a jury. The court agreed and held a bench trial. The court found for the defendant. Plaintiff appealed, arguing she was entitled to a jury trial.

The Court of Appeal (Second Dist., Div. Four) affirmed. Plaintiffs do not have the right to a jury trial for PAGA claims. First, PAGA is essentially a hybrid administrative enforcement action and to provide a right to a jury trial for private parties would give them a right that is unavailable to administrative agencies and employers. Second, Labor Code violations, which give rise to PAGA claims, are based on rights that were not in existence when the California Constitution was adopted in 1850 and, thus, are ineligible for the presumption of entitlement to a trial by jury.

Only named parties to a PAGA action may appeal settlement approval.

Saucillo v. Peck (9th Cir. 2022) 25. F.4th 1118.

The parties to this wage and hour class and California Private Attorneys General Act (PAGA) action reached a settlement. An individual who was not one of the two private plaintiffs who had brought the suit objected to the PAGA portion of the settlement. Another individual, also not a named plaintiff, objected to the monetary award for the class claims as unfair and unreasonable. The district court overruled the objections and approved both the PAGA settlement and the class action settlement.

The Ninth Circuit affirmed the settlement as to the PAGA claims but reversed as to the class claims. Unlike absent class members in class action lawsuits, objectors to a PAGA settlement are not deemed to be "parties" to the PAGA action. Thus, because the appealing individual was not a "party" to the underlying PAGA action, the PAGA settlement could not be appealed. The district court applied the wrong legal standard when evaluating the class claims portion of the settlement, however, so approval for that portion of the settlement required reconsideration.

See also *Callahan v. Brookdale Senior Living Communities* (9th Cir. 2022) __ F.4th __ [where district court properly denied worker's motion to intervene in PAGA action because her interests were adequately represented by the named plaintiff, she was not a party and thus could not appeal the district court's approval of the settlement.]

See also *Shaw v. Superior Court (Beverages & More)* (2022) 78 Cal. App.5th 245 (First Dist., Div. Four) [courts may apply the exclusive concurrent jurisdiction rule to stay a later-filed PAGA action resting on the same facts and theories of an earlier-filed PAGA action.]

See also *Hutcheson v. Superior Court (UBS Financial Services Inc.)* (2022) 74 Cal.App.5th 932 (First Dist., Div. Two) [where the claims raised by a second employee in an amended PAGA complaint rest on the same general set of facts, involve the same injury, and refer to the same instrumentality as the claims in an original complaint brought by another employee, then the judicially-created doctrine of relation back may apply, thus extending the time period for which the employer may be liable for wage and hour violations.]

ANTI SLAPP

Anti-SLAPP statute did not support dismissal of extortion claims against attorney based on pre-litigation settlement demands.

Falcon Brands, Inc. v. Mousavi & Lee, LLP (2022) 74 Cal.App.5th 506.

During prelitigation settlement negotiations in an employment case, the plaintiff's attorney accused the defendant of having engaged in illegal activities unrelated to the employment claims at issue, and stated that if she did not receive a response to her settlement demands, she would communicate those accusations to a company set to merge with the defendant. Plaintiff's attorney eventually did send the allegations of illegal activity to the acquiring company, which then sued to rescind its merger agreement with the defendant. After the employment lawsuit was filed, the defendant cross-complained against the plaintiff's attorney alleging that the attorney's prelitigation communications constituted extortion and intentional interference.

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The attorney moved to strike the cross-complaint under the anti-SLAPP statute (Civ. Code, § 425.16), arguing that her statements were made during settlement negotiations and thus were protected activities. The trial court granted the motion to strike as to both causes of action.

The Court of Appeal (Fourth Dist., Div. Three) reversed as to the extortion cause of action. The attorney's pre-litigation statements linking a monetary demand with a threat to reveal damaging information constituted illegal extortion and were therefore beyond the protection of the anti-SLAPP statute. In so holding, the court reasoned that it was bound to follow the California Supreme Court's decision *Flatley v. Mauro* (2006) 39 Cal.4th 299 [some demands letters can be so extreme as to constitute extortion as a matter of law and thus, not protected by the anti-SLAPP law], and declined to follow *Malin v. Singer* (2013) 217 Cal.App.4th 1283 [holding similar letter not to be extortion as a matter of law].

See also *Clarity Co. Consulting v. Gabriel* (2022) 77 Cal.App.5th 454 (Second Dist., Div. Six) [anti-SLAPP statute does not support dismissal of claims based on allegedly fraudulent representations made by an attorney while negotiating a contract; such statements are not statements in anticipation of future litigation or settlement negotiations.]

But see *Pech v. Doniger* (2022) 75 Cal.App.5th 443 (Second Dist., Div. Five) [anti-SLAPP motion properly granted to dismiss attorney's intentional inference suit against his former client client's subsequent attorneys who advised the client against filing the complaint the plaintiff attorney had prepared under a contingency fee agreement; the defendant attorneys' legal advice to the client was protected activity in connection with anticipated litigation.]

CONSUMER PROTECTION

The federal Holder Rule does not bar a an auto purchaser who sues a lender from recovering attorney fees in addition to the vehicle purchase price.

Pulliam v. HNL Automotive (2022) 13 Cal.5th 127.

When plaintiff purchased a car from a dealership, she entered a retail installment sales contract that included consumer protection language mandated by federal law—16 Code of Federal Regulations part 433.2. That federal regulation, known as the Holder Rule, provides that consumers who buy goods on credit may stop making payments on a loan and sometimes may obtain a refund of payments already made in certain circumstances involving the sale of defective goods. TD Auto Finance accepted assignment of the loan contract and became the "holder" subject to plaintiff's rights under the Holder Rule. Plaintiff then sued on lemon law claims, recovering $22,000, and successfully asserted a statutory fee claim for $170,000. The defendants appealed the fee award, arguing that they are not liable for attorney fees under the Holder Rule, which provides that a "recovery" against a holder in due course of an installment contract cannot be more than the purchase price of the contract. The Court of Appeal (Second Dist., Div. Five) affirmed the award, holding that "recovery" does not include fees: "the Holder Rule does not limit the attorney's fees that a plaintiff may recover from a creditor-assignee."

The California Supreme Court affirmed. "[T]he Holder Rule does not limit the award of attorney's fees where, as here, a buyer seeks fees from a holder under a state prevailing party statute. The Holder Rule's limitation extends only to 'recovery hereunder.' This caps fees only where a debtor asserts a claim for fees against a seller and the claim is extended to lie against a holder by virtue of the Holder Rule. Where state law provides for recovery of fees from a holder, the Rule's history and purpose as well as the Federal Trade Commission's repeated commentary make clear that nothing in the Rule limits the application of that law."

See also *Anderson v. Ford Motor* (2022) 74 Cal.App.th 946 (Third Dist.) [a plaintiff can recover a statutory civil penalty under the Song-Beverly Consumer Warranty Act for willful failure to repair a malfunction within a reasonable number of repair attempts, and punitive damages for fraud in connection with the sale of a vehicle, and violation of the Consumer Legal Remedies Act even if both penalties are based on substantially the same conduct]. V

LABOR & EMPLOYMENT

At-will employees may state a claim for wrongful solicitation of employment based on misrepresentations about the nature and character of the work to be performed.

White v. Smule, Inc. (2022) 75 Cal.App.5th 346.

The plaintiff moved from Washington to California for a job with defendant. The plaintiff knew his employment would be at will, but defendant had led him to believe that his job would entail being a project manager responsible for expanding the business in anticipation of an initial public offering several years in the future. The defendant terminated the plaintiff after five months. The plaintiff sued under Labor Code 970, which "prohibits employers from inducing employees to relocate and accept employment by way of knowingly false representations regarding the kind, character, or existence of work, or the length of time such work will last." The defendant move for summary judgment, arguing that the plaintiff knew his employment would be at will and he therefore could not establish that he reasonably relied on any representations about the duration of his employment. The plaintiff opposed, arguing that the defendant had apparently intended only to obtain the benefit of his advice about the business's deficiencies and then terminate him, rather than hire him for the senior project management role described to him. The trial court granted the motion.

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The Court of Appeal (First Dist., Div. Four) reversed. Plaintiff's allegations that the defendant had misrepresented the scope and nature of the work the plaintiff was being hired to do were distinct from the allegations that the defendant had misled the plaintiff about the duration of the employment. While the plaintiff could not establish reasonable reliance on statements about the job's duration given his knowledge that the job was at-will, there were triable issues on whether he reasonably relied on the defendant's statements about the scope and nature of his work, which he alleged led him to believe that his employment would last longer. V

In whistleblower retaliation claims, an employer cannot obtain summary judgment merely by showing a nondiscriminatory reason for an adverse employment action; if retaliation is shown to be a contributing factor, the employer must produce clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons.

Lawson v. PPG Architectural Finishes, Inc. (2022) 12 Cal.5th 703.

The plaintiff complained to his employer that his supervisor was directing him to engage in unlawful conduct. He began receiving low performance scores and was eventually terminated. He filed claims of (1) wrongful termination in violation of public policy and (2) retaliation in violation of California Labor Code section 1102.5 (whistleblower protection). The federal district court granted summary judgment for the defendant, applying the *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 [93 S.Ct. 1817, 36 L.Ed.2d 668] burden-shifting framework. Under that test, the plaintiff must first establish, by a preponderance of the evidence, a prima facie case of retaliation, at which point the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Here, the employer showed a legitimate reason for the action (poor performance) and was therefore entitled to summary judgment. The plaintiff appealed, arguing that the *McDonnell Douglas* test does not apply to his section 1102.5 retaliation claim. Rather, the evidentiary standard set forth in Labor Code section 1102.6 should apply. Under that section, "once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons." The Ninth Circuit certified the question of whether the evidentiary standard set forth in section 1102.6 of the California Labor Code replaced the *McDonnell Douglas* test.

The Supreme Court answered the question in the affirmative. Labor Code section 1102.6 provides the governing framework for presentation and evaluation of whistleblower retaliation claims. Employee plaintiffs do not need to satisfy the three-part burden-shifting framework of *McDonnell Douglas*. V

CALIFORNIA SUPREME COURT PENDING CASES

Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

Addressing whether the economic loss rule bars a contracting party from seeking tort remedies against the contracting partner for alleged fraudulent concealment.

Rattagan v. Uber Technologies, Case No. S272113 (certification granted Feb. 9, 2022).

Uber hired attorney Michael Rattagan to represent it in foreign business matters. After law enforcement raided Rattagan's home and charged him with crimes in connection with the business operations, Rattagan sued Uber in federal district court, alleging tort claims including negligence, breach of the implied covenant of good faith, and fraudulent concealment. He alleged that Uber concealed its plans from him despite knowing that he could be held personally liable for the company's violations of foreign law. Uber moved to dismiss Rattagan's fraudulent concealment claims under the economic loss rule, which prevents a party to a contract from recovering tort damages resulting from breach of contract. The district court granted the motion. Rattagan appealed, arguing that fraudulent concealment claims are exempt from California's economic loss rule, just as fraud by affirmative misrepresentation has been held to be exempt.

The California Supreme Court granted Ninth Circuit's certification request to address whether concealment during the contracting process (as opposed to affirmative misrepresentation) constitutes an independent tort exempt from the economic loss rule.

See also *Kia America v. S.C. (Spellman)*, Case No. S273170 (review granted and held Apr. 20, 2022) [holding lemon law case for consideration "of whether the economic-loss rule applies to bar omission claims asserted along with breach-of-express warranty claims in cases involving allegedly defective products" pending Rattagan].

See also *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905 [holding that lender does not owe a borrower a tort duty sounding in general negligence principles to process, review and respond carefully and completely to a borrower's loan modification application, such that upon a breach of this duty the lender may be liable in tort for the borrower's economic losses; the economic loss doctrine limits the borrower to contract remedies]. V

Addressing whether, in cases of multiple years of insurance coverage with multiple layers of coverage, primary insurance carriers may seek contribution from excess carriers before all primary policies have been exhausted.

Truck Insurance Exchange v. Kaiser Cement, Case No. S273179 (review granted Apr. 13, 2022).

After making $50 million in indemnity payments to resolve its insured Kaiser Cement's asbestos liabilities, Truck Insurance Exchange commenced this action in 2001 seeking declaratory relief that its primary coverage had been exhausted and that it had no further duty to defend or indemnify Kaiser. Truck also sought equitable contribution from Kaiser's excess insurers. Kaiser cross-claimed against Truck and the excess insurers, seeking declarations concerning coverage. After a multiphase trial, the trial court found, among other things, that not all of Truck's primary policies had exhausted and no excess insurers had a duty to "drop down" and equitably contribute to Truck before all primary policies exhausted ("horizontal exhaustion"). The trial court rejected Truck's argument that as long as one primary policy had exhausted, the excess policies above that exhausted primary policy were triggered ("vertical exhaustion") and the excess carriers were therefore obligated to contribute. Truck appealed, and the Court of Appeal (Second Dist., Div. Four), affirmed, following *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329 and disagreeing with *SantaFe Braun, Inc. v. Insurance Co. of North 65 America* (2020) 52 Cal.App.5th 19, which held that primary insurance need not be horizontally exhausted across all policy years before excess coverage in a particular policy year is triggered.

The Supreme Court granted review to address this issue: "May a primary insurer seek equitable contribution from an excess insurance carrier after the primary policy underlying the excess policy has been exhausted (vertical exhaustion), or is equitable contribution from an excess insurance carrier available only after all primary policies have been exhausted (horizontal exhaustion)?" This decision will answer whether the rule announced in *Montrose Chemical Corp. v. Superior Court of Los Angeles County* (2020) 9 Cal.5th 21, that the vertical exhaustion rule applies to excess policies, also applies to primary policies. V

Addressing whether entities acting as investigative agents of an employer during the hiring process can be directly liable for employment discrimination.

Raines v. U.S. Healthworks Medical Group, S273630 (certification request granted Mar. 16, 2022).

In this putative class action, plaintiffs seek to hold defendants liable under FEHA for asking impermissibly intrusive questions while conducting their pre-employment medical screenings for plaintiffs' prospective employers. The district court dismissed plaintiffs' complaint on the ground that FEHA does not impose direct liability on agents of the employer. On appeal, the Ninth Circuit observed that FEHA defines "employer" to include the employer's "agents," but case law had limited the application of that term and excluded nonemployer individuals acting as agents of the employer. The Ninth Circuit therefore concluded the statute is ambiguous about whether a business entity acting as an agent of the employer in the hiring process can be liable under FEHA.

The Supreme Court agreed to answer the Ninth Circuit's certified question: "Does California's Fair Employment and Housing Act, which defines 'employer' to include 'any person acting as an agent of an employer,' Cal. Gov't Code § 12926(d), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?" V

Addressing the standard for causation for failure to warn claims.

Himes v. Somatics (Mecta Corporation), S273887 (certification granted June 15, 2022).

Plaintiffs sued Somatics alleging that the company's misbranding and failure to warn about certain risks of its electroconvulsive therapy device caused them injury. The district court granted Somatics's summary judgment motion, concluding that plaintiffs failed to establish causation because they did not present evidence that stronger warnings would have affected their doctors' decision to prescribe the treatment. Plaintiffs appealed, contending that they had established causation through testimony of prescribing physicians that, had Somatics issued stronger warnings, they would have communicated these warnings to their patients, who in turn would have declined the treatment. With respect to one of the plaintiffs, the Ninth Circuit concluded that whether triable issues existed on causation turned on whether the causation standard requires a showing that the doctor would have made a different treatment recommendation, or was satisfied where the doctor would have made the same recommendation, but would have communicated the warnings to the plaintiff and the plaintiff would have then declined the recommended treatment.

The California Supreme Court granted the Ninth Circuit's certification request to answer the following questions: Under California law, in a claim against a manufacturer of a medical product for a failure to warn of a risk, is the plaintiff required to show that a stronger risk warning would have altered the physician's decision to prescribe the product? Or may the plaintiff establish causation by showing that the physician would have communicated the stronger risk warnings to the plaintiff, either in their patient consent disclosures or otherwise, and a prudent person in the patient's position would have declined the treatment after receiving the stronger risk warning? V

Addressing whether a used car purchaser cannot invoke the Song-Beverly Act's restitutionary buyback remedy against a manufacturer who did not sell the car to the plaintiff, such that the plaintiff can pursue only contractual breach of contract remedies where the dealer owed continuing duties under an unexpired warranty.

Rodriguez v. FCA US (2022) 77 Cal.App.5th 209
(review granted July 13, 2022, no. S274625.)

Plaintiffs bought a pickup truck with over 55,000 miles on it from a used car dealership. Claiming that the pickup was a "lemon" with unfixable malfunctions, they sued the pickup manufacturer, asserting that under the "lemon law" (Song-Beverly Act), the manufacturer (who was not involved in the sale transaction) was required to repurchase the truck for a full refund of the purchase price paid to the used car dealer. The manufacturer moved for summary judgment, arguing that the Song-Beverly Act's "repurchase-or-replace" remedy applies only to "new motor vehicle[s]" and used motor vehicle do not qualify even if the sale carries with it the balance of the manufacturer's unexpired warranty. The trial court agreed and granted the motion.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. The Song-Beverly Act's definition of "new motor vehicle" includes dealer-owned vehicles, demonstrators, and other *essentially* new "motor vehicle[s] sold with a manufacturer's new car warranty" that may have seen some usage before being sold for the first time to a consumer. But that definition is not reasonably subject to a construction that included any used car that came with the remainder of the original owner's warranty. Used car buyers still have legal recourse against the manufacturer under the California Uniform Commercial Code for breach of express warranty to repair defects.

Addressing whether a good faith settlement determination is reviewable on appeal after the objecting party filed a timely petition for writ of mandate that was summarily denied.

In re Pacific Fertility Cases (2022)
78 Cal.App.5th 568 (review granted August 17, 2022, no. S275134.)

Following the failure of a cryogenic storage tank used to store patients' reproductive material, fertility clinic patients sought recourse against the tank's manufacturer and the fertility clinic. The clinic reached a settlement with plaintiffs, and the trial court found the settlement was in good faith within the meaning of Code of Civil Procedure § 877.6, thus barring any indemnity claim by the manufacturer against the clinic. The manufacturer sought a petition for writ of mandate to challenge the good faith determination. After the petition was summarily denied, and the manufacturer lost at trial, the manufacturer appealed from the judgment, challenging the interlocutory good faith determination as to which appellate review had been sought but rejected. The Court of Appeal (First District, Div. One) dismissed the appeal, holding that the unsuccessful writ petition was the only means of obtaining appellate review.

The California Supreme Court granted review to address the following question: "Whether a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement under Code of Civil Procedure section 877.6."

Addressing whether trial courts may dismiss PAGA claims as unmanageable.

Estrada v. Royalty Carpet Mills (2022)
76 Cal.App.5th 685 (review granted June 22, 2022, S274340).

Plaintiff employees brought a Private Attorneys General Act (PAGA) representative claim against their employer for Labor Code violations, including meal period violations. After a bench trial, the trial court dismissed the meal period portion of the PAGA claim on grounds that individualized issues made the claim unmanageable. The Court of Appeal (Fourth Dist., Div. Three) reversed. Declining to follow *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, the court held that courts cannot dismiss a PAGA claim based on whether it is unmanageable.

The California Supreme Court granted review to resolve the split among the appellate courts on the following issue: "Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act (Lab. Code, § 2698 et seq.) will be manageable at trial, and to strike or narrow such claims if they cannot be managed?"

See also *Hamilton v. Wal-Mart Stores* (9th Cir. 2022) __ F.4th __ [employee need not satisfy Federal Rule of Civil Procedure 23's manageability requirement to pursue a representative PAGA action].

really happened" and tell it starting with the judge's neutral statement, and even before.

- "Legally, we've done nothing wrong," is not a story.
- Jurors like and relate to underdogs, so never attack the plaintiff if you're a more powerful defendant. The ad hominem attack has little upside compared to its potential downside.
- Be cognizant of the power dynamic. If you are the powerful one, remember that the jurors want you to take some responsibility, even if you are not liable.
- Avoid legalese or any other types of jargon. Keep it simple and commonsensical.
- Remember that the trial is a reenactment of the incidents at issue. Don't fall into the trap of appearing how the other side is trying to portray you.
- With very few exceptions, always consider that you might lose, offer a counter-anchor, and explain why it's fair and reasonable.
- Let the jury know that regardless of the outcome, the defendant has learned from the trial and vows to change and improve. This will reduce the need to "send a message."

As a litigation consultant, I work with lawyers and their corporate and institutional clients throughout the litigation and trial process to provide suggestions and feedback on the overall approach to a case. This includes how factfinders will understand our trial strategies, witnesses, and trial graphics and how to improve them. I am also occasionally asked to support counsel in persuading clients not to take an approach that is likely to be ineffective or counterproductive. With hindsight and looking forward to its new trial on damages, the first suggestions for Tesla in the *Diaz* case would be: Organize your case into a story the jury may at least consider, rather than just picking apart the opponent's case, don't assume that jurors see the world as you do, but most of all, "don't piss off the jury."

"Success is a process that continues, not a status that you reach. If you are alive, there are lessons to be learned."

— Denis Waitley

John G. McCabe, Ph.D

John G. McCabe, Ph.D. is the Founder of John G. McCabe Consulting, Inc. Having worked in litigation consulting for 17 years, he specializes in preparing witnesses to testify. John also designs and performs a wide variety of studies (surveys, focus groups, mock trials, etc.) related to jury behavior. Results from these studies have informed trial strategy in a wide range of civil and criminal cases. He earned his Ph.D. from Claremont Graduate University, where his research focused exclusively on juror and jury behavior, bias, and the impact of emotions on legal decision-making.

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Lien Service Medical Care Is Potentially Actionable Insurance Fraud

H. Thomas Watson, Horvitz & Levy LLP

The use of medical lien services for the purpose of inflating medical expense tort damages may be actionable as insurance fraud. Medical services provided on a lien basis may be appropriate in some cases, but California defense counsel are seeing a troubling trend of medical services being provided on a lien basis to tort plaintiffs who have access to medical services through health insurance and/or Medicare eligibility. These medical liens are then asserted by the plaintiffs as the measure of their medical expense damages, even though they often far exceed (often by factors of more than 5 to 10 times) amounts that would have been paid for the same services by the plaintiffs' health insurers had the plaintiffs elected to use the available health insurance, with the expectation that the inflated medical expense damages claims will be paid in full by the defendants' liability insurers.

The obvious aim of inflated medical expense damages claims based on unpaid lien services is to avoid the rule of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566 (*Howell*) and its progeny limiting such damages to the *lesser* of the amount actually paid or the *market value* (i.e., the amount *typically paid*) for necessary health care services. Such tactics may be actionable as insurance fraud, since the scheme attempts to improperly inflate the amount of money that defendants' liability insurers must pay.

Reflecting California's strong public policy against insurance fraud, the Insurance Frauds Prevention Act expressly allows insurers to bring qui tam actions to enforce it.

The California Legislature "is vested with the responsibility to declare the public policy of the state." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71.) It did so when the "Legislature created the Insurance Fraud[s] [Prevention] Act (IFPA) to combat insurance fraud." (*State ex rel. Aetna Health of California, Inc. v. Pain Management Specialist Medical Group* (2020) 58 Cal.App.5th 1064, 1067 (*Pain*); see Ins. Code, § 1871 et seq.) The Legislature declared that "[i]nsurance fraud is a particular problem for automobile policyholders" (Ins. Code, § 1871, subd. (b)) and that the "[p]revention of automobile insurance fraud will significantly reduce the incidence of severity and automobile insurance claim payments and will therefore produce a commensurate reduction in automobile insurance premiums" (*id.*, § 1871, subd. (c)). Indeed, insurance fraud is so contrary to California public policy that it may trigger both criminal and civil penalties under the IFPA. (See Pen. Code, § 550; Ins. Code, § 1871.7, subds. (b) & (c); see also *People ex rel. Allstate Insurance Co. v. Muhyeldin* (2003) 112 Cal.App.4th 604, 606 (*Muhyeldin*) [Insurance Code section 1871.7's civil penalties are "'in addition to any other penalties that may be prescribed by law'"].)

"The Legislature enacted the IFPA to combat insurance fraud committed against insurers by individuals, organizations, and companies." (*Pain, supra*, 58 Cal.App.5th at p. 1069, citing *People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 548–549 (*Weitzman*); see *People ex rel. State Farm Mutual Automobile Ins. Co. v. Rubin* (2021) 72 Cal.App.5th 753, 762 (*Rubin*) [the IFPA was amended in 1994 "'"to enact a comprehensive package of laws to assist in the prevention, identification, investigation, and prosecution of insurance fraud"'"]; *People ex rel. Government Employees Ins. Co. v. Cruz* (2016) 244 Cal.App.4th 1184, 1192 (*Cruz*) [the purpose of Insurance Code section 1871.7 "is 'to deter fraudulent automobile insurance claims and to facilitate the investigation and prosecution of insurance fraud'"].) Given its remedial purpose of furthering the public interest in deterring insurance fraud, section 1871.7 is construed broadly. (See *State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 601–602 (*Wilson*).)

"'Any interested persons, including an insurer, may bring a [qui tam][1] civil action for a violation of [Insurance Code] section [1871.7] for the person and for the State of California.'" (*Muhyeldin, supra*, 112 Cal.App.4th at p. 608, emphasis omitted.) Insurers, in particular, are encouraged to bring qui tam actions to enforce the IFPA. (*Rubin, supra*, 72 Cal.App.5th at p. 762 [the purpose of the IFPA's 1994 amendment "was ' "[t]o help state and local law enforcement agencies *and insurers* to fight insurance fraud" ' "]; *Cruz, supra*, 244 Cal.App.4th at p. 1192 ["Section 1871.7 'has been repeatedly amended specifically to

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authorize *and encourage* insurers to bring fraud actions under the section.'"].) This is because "[i]nsurers are the direct victims of the fraud; insureds are the indirect victims who pay higher premiums due to insurance fraud. [Citation.] 'It is in the government's interest to have insurers investigate and prosecute [qui tam] proceedings. The government serves to gain both in terms of fraud prevention and financially from such actions, especially given limited investigative and prosecutorial resources available to it.'" (*Pain, supra*, 58 Cal. App.5th at p. 1069, citing *Weitzman, supra,* 107 Cal.App.4th at p. 562.)

Attorneys, experts, and litigants may be liable for insurance fraud even though they are not themselves policyholders.

Under the IFPA, "'"*[e]very person*" who engages in insurance fraud ... is subject to penalties and assessments.'" (*Rubin, supra*, 72 Cal.App.5th at p. 762, emphasis added, quoting Ins. Code, § 1871.7, subd. (b).) "[T]he fact that the person making a false claim to an insurance company is not the policyholder, and is not, therefore, in a contractual relation with the insurance company to which the false claim is presented, does not make such person immune from prosecution. Thus, the statute extends to the acts of an attorney in knowingly presenting a fraudulent claim on behalf of a client" in litigation against a defendant who has liability insurance coverage. (39A Cal.Jur.3d (2022) Insurance Contracts, § 641, fns. omitted, citing *People v. Booth* (1996) 48 Cal.App.4th 1247 (*Booth*) [tort plaintiff defrauded defendant's liability insurer by manufacturing false medical and wage loss damages] and *People v. Benson* (1962) 206 Cal.App.2d 519 [plaintiff's attorney and health care provider defrauded defendant's liability insurer by seeking tort recovery based on deceitful medical bills], disapproved on another ground in *People v. Perez* (1965) 62 Cal.2d 769, 776 & fn. 2; accord, *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628–629; *People v. Scofield* (1971) 17 Cal. App.3d 1018, 1026 (*Scofield*).)

Similarly, a health care provider whose bills are presented in support of a fraudulent medical expense claim tendered by another party can be liable for causing the presentation of the fraudulent insurance claim. (*People v. Singh* (1995) 37 Cal. App.4th 1343, 1369–1370 (*Singh*).) And liability may be imposed on any person or entity that aids and abets with a scheme to present fraudulent or deceitful claims. (Pen. Code, § 550, subd. (a); *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, 36–37 (*Thompson*); *Booth, supra*, 48 Cal.App.4th at pp. 1254–1255.) Such liability could potentially extend to expert witnesses who opine on the "reasonableness" of medical bills that vastly exceed the fair market value of the services provided.

Neither the litigation privilege nor collateral estoppel bars a subsequent action for insurance fraud.

In light of the strong public policy favoring actions to deter insurance fraud, neither the litigation privilege nor the workers' compensation exclusive remedy rule may be asserted as a bar to a qui tam action under the IFPA. (*People ex rel. Alzayat v. Hebb* (2017) 18 Cal.App.5th 801, 807–808, 827–831; see *Thompson, supra*, 136 Cal.App.4th at pp. 29–31 [workers' compensation exclusive remedy rule does not preclude insurance fraud action].) Similarly, the anti-SLAPP statute's public interest exception applies to qui tam actions for insurance fraud. (2 Witkin, Summary of Cal. Law (11th ed. 2017) Insurance, § 446, pp. 715–719, citing *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 814, 823, 828 and *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 502–503.) Moreover, the mere fact that a fraudulent claim was successfully asserted in other litigation (such as a tort action against an insured defendant) does not bar a subsequent action for insurance fraud under principles of res judicata or collateral estoppel. (See *Thompson*, at pp. 31–32.)

Inflating medical expense damages claims may trigger liability for insurance fraud.

Insurance Code section 1871.7, subdivision (b), expressly incorporates Penal Code sections 549, 550, and 551, and authorizes civil penalties (in addition to other penalties) for violation of those statutes. "The elements generally necessary to find a violation of Penal Code section 550 are (1) the defendant's knowing presentation of a false claim, (2) with the intent to defraud." (*Cruz, supra*, 244 Cal.App.4th at p. 1193.) Thus, section 550 liability is created when " 'a false claim for payment of loss is presented to an insurance company or a false writing is prepared or presented with intent to use it in connection with such a claim whether or not anything of value is taken or received.' " (*Ibid.*; see id. at pp. 1193–1194 [" 'It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts' "], 1199 [section 550 "does not require that a fraudulent claimant's scheme be successful to establish her liability; she need only knowingly present a false claim with the intent to defraud"].) Intent to defraud "may

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be determined by consideration of all the circumstances in evidence." (*Singh, supra*, 37 Cal.App.4th at p. 1371.)

Penal Code section 550, subdivision (b)(1) makes it "unlawful to '[p]resent or *cause to be presented any written or oral statement as part of, or in support of … a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact' or to 'knowingly assist or conspire with any person' to do so." (Martinovsky v. County of Alameda* (2017) 82 Cal.Comp. Cases 227, 238 (*Martinovsky*), emphasis added.) "For assessment of penalties under [Insurance Code section] 1871.7, the alleged misconduct need only be 'in some manner deceitful' and insurance claims need not necessarily contain express misstatements; causation may be established under the standard substantial-factor test, and application of a 'but-for' test is not required." (2 Witkin, Summary of Cal. Law, *supra,* Insurance, § 446, p. 716; accord, *Wilson, supra,* 227 Cal.App.4th at pp. 586, 592, 594 [the " 'fraudulent claim' requirement refers broadly to claims that are in some manner deceitful, and is not limited to claims that contain an express misstatement of fact"], 601 [insurance fraud "must be interpreted broadly, to encompass not just claims that can be shown to themselves contain fraudulent statements, but also those characterized in any way by deceit" including any "dishonesty, or trickery perpetrated to gain some unfair or dishonest advantages"], 602 [same], 604, 607–609.)

Making a direct claim for payment from an insurer based on fraudulent and/or inflated bills is plainly actionable as insurance fraud. For example, evidence that treating physicians "intentionally and knowingly us[ed] improper billing codes – Current Procedural Technology (CPT) Codes – to inflate their bills" and "knowingly billed for services that were never performed" led to an insurance judgment in excess of $7 million that was affirmed on appeal. (*Muhyeldin, supra,* 112 Cal.App.4th at pp. 606–608, 612; see *Cruz, supra,* 244 Cal.App.4th at pp. 1186–1187, 1198–1199 [reversing summary judgment for defendant physician because triable issues of material fact existed regarding physician's upcoding and billing for services never rendered which could support qui tam action for violation of Penal Code section 550]; *Thompson, supra,* 136 Cal.App.4th at pp. 27–28, 39;"]; *Scofield, supra,* 17 Cal.App.3d at pp. 1022–1026; *Martinovsky, supra,* 82 Cal.Comp.Cases at p. 230 [physicians criminally prosecuted for insurance fraud based on billing for services that were not provided and presenting payment claims that "'contained false and misleading information'" regarding a material fact]; *Singh, supra,* 37 Cal.App.4th at pp. 1356–1357, 1360–1362, 1371 [health care provider's insurance fraud liability was based on "overtreat[ing] his patients by using medically unnecessary diagnostic

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tests ... and pain therapies" and for overcharging for the pain therapy], 1374 [rejecting provider's argument that "he was free to charge whatever he wanted in personal injury cases; see also *Rubin, supra,* 72 Cal.App.5th at pp. 764–767 [reversing a dismissal under the first to file rule in connection with an alleged insurance fraud scheme involving inflated medical bills and misused CPT codes]; *United States v. United Healthcare Insurance Company* (9th Cir. 2016) 848 F.3d 1161, 1175 [improper diagnosis codes submitted by Medicare Advantage organizations support federal False Claims Act (FCA) claim].)

Evidence of fraudulent health service billing has come from expert witnesses, patients, and former employees of the health care provider who have testified regarding such fraudulent activity as upcoding bills to recoup greater payments than warranted, billing for services that were not provided, and the routine practice of providing services to subsets of patients with insurance coverage that are not provided to patients paying cash. (See, e.g., *Cruz, supra,* 244 Cal.App.4th at pp. 1198–1199; *Muhyeldin, supra,* 112 Cal.App.4th at p. 607; *Singh, supra,* 37 Cal.App.4th at pp. 1360–1362, 1371–1372; *Scofield, supra,* 17 Cal.App.3d at pp. 1023–1024.)

In contexts other than medical services, claims seeking insurance proceeds that greatly exceed the fair market value of a loss have supported liability for insurance fraud. (See *People v. Kanan* (1962) 208 Cal. App.2d 635, 636–637, 638 ["If the valuation set forth in the claim filed by the defendant is so grossly disproportionate to what is shown to have been the actual value of the property destroyed ... then clearly there was a showing of an intent to defraud"]; see also *People v. De Caro* (1981) 123 Cal.App.3d 454, 457–458, 459 [evidence supporting insurance fraud conviction included evidence the claimant "had listed a number of [allegedly lost] items at *greatly inflated (25%)* prices" (emphasis added)].)

Under Penal Code section 550, subdivision (b)(1), seeking to recover medical expense damages in a tort action that greatly exceed the fair market value for such services may

be actionable as insurance fraud where the defendant is covered by liability insurance. This is because such conduct arguably will "cause to be presented any written or oral statement as part of, or in support of ... a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact" and/or "knowingly assist or conspire with any person" to do so. (*Ibid.*)

A tort plaintiff's medical expense damages must be measured by the fair market value of the needed services and not by highly inflated unpaid medical bills. (*Howell, supra,* 52 Cal.4th at pp. 555, 561–562, 567; *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 179; *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050–1051; *Ochoa v. Dorado* (2014) 228 Cal. App.4th 120, 135–139; *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal. App.4th 1463, 1471–1473; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330–1331, 1333.) The Restatement Second of Torts, "[s]ection 911 articulates a rule, applicable to recovery of tort damages generally, that the value of property or services is ordinarily its 'exchange value,' that is, its market value or the amount for which it could usually be exchanged." (*Howell,* at p. 556; accord, *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1329 ["*Howell* endorsed 'a rule, applicable to recovery of tort damages generally, that the value of property or services is ordinarily its "exchange value," that is, its market value or the amount for which it could usually be exchanged'"]; *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 542 ["The scope of the *rates accepted by or paid to* Hospital by other payors indicates the value of the services in the marketplace" (emphasis added)], disapproved on another ground in *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 986, fn. 15; *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1275 ["reasonable market value of the services at issue, i.e., the price that would be agreed upon by a willing buyer and a willing seller negotiating at arm's length"], superseded by statute on another ground as stated in *Dignity Health v. Local Initiative Health Care Authority of Los Angeles County* (2020) 44 Cal.App.5th 144, 160.)

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FCA decisions are persuasive authority regarding the scope of the IFPA. (*Rubin, supra,* 72 Cal.App.5th at pp. 769–770 [because the IFPA "was modeled after the California False Claims Act [citation], which was '[p]atterned after the federal False Claims Act'" and because "the IFPA and FCA share a similar design and purpose," it is appropriate to consider authority construing the FCA when construing the IFPA].) Federal courts uniformly recognized the validity of FCA claims against drug manufacturers and pharmacies that use schemes to report inflated "usual and customary" (or "average wholesale") prices in order to increase reimbursements for the sale of prescription drugs to Medicare beneficiaries – usually by ignoring the low cash price available for the drugs. (See *United States ex rel. Garbe v. Kmart Corporation* (7th Cir. 2016) 824 F.3d 632, 635–644; *United States ex rel. Shemesh v. CA, Inc.* (D.D.C 2015) 89 F.Supp.3d 67, 69–80; *United States ex rel. Streck v. Takeda Pharmaceuticals America, Inc.* (N.D.Ill. 2019) 381 F.Supp.3d 932, 934–940; *United States v. Supervalu, Inc.* (C.D.Ill. 2016) 218 F.Supp.3d 767, 770–775; *United States ex rel. Garbe v. Kmart Corporation* (S.D.Ill. 2013) 968 F.Supp.2d 978, 981–990; *U.S. ex rel. Ven-A-Care v. Actavis Mid Atlantic LLC* (D.Mass. 2009) 659 F.Supp.2d 262, 264–271.) This federal authority holding that the FCA is violated by using inflated "usual and customary" prices to obtain excessive Medicare reimbursements supports the analogous claim that the IFPA is violated by using inflated usual and customary medical expenses to recover damages that an insurer is obligated to pay.

Where tort plaintiffs and their counsel are on notice that the defendant has liability insurance, they may be liable for insurance fraud under the above authority for inflating medical expense damages claims by presenting evidence regarding unpaid medical bills from lien providers that greatly exceed the fair market value for the health care services provided to the plaintiffs. The plaintiffs' treating health care providers, life care planners, and other experts used to support the recovery of excessive medical expense damages awards could be liable as well for aiding and abetting the commission of insurance fraud. Imposing such liability would be consistent with the authority cited above, and would further California's strong public policy against insurance fraud.

Using runners and cappers also triggers insurance fraud liability.

It is unlawful "to knowingly employ runners, cappers, steerers, or other persons ... to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer." (Ins. Code, § 1871.7, subd. (a).) "Subdivision (a) is

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violated by the employment of others with that objective; it does not make proof of that result a prerequisite to its violation." (*Wilson, supra,* 227 Cal.App.4th at p. 593 ["there can be a violation of subdivision (a) without proof that the item or service of value provided or promised to the physician caused a particular" item or service to be provided]; see *id.* at p. 594 ["Certain conduct is defined as unlawful by Insurance Code section 1871.7, subdivision (a) and by Penal Code section 550, without regard to any result the conduct may or may not cause"].) Moreover, "there can be a violation of subdivision (a) even if the claim contains no express misstatement of fact and does not disclose the unlawful conduct." (*Id.* at p. 594.)

Evidence of a financial relationship between a health care provider and an attorney referring patients to the provider for treatment on a lien basis could support liability under Insurance Code section 1871.7, subdivision (a). For example, liability could be based on evidence the attorney purchased an inflated medical lien, either directly or through a "factor" owned or controlled by the attorney, at a fraction of the lien amount, thereby allowing the provider and the attorney to share the excessive proceeds recovered from a liability insurer by operating a scheme to inflate medical expense damages. (Cf. *Cruz, supra,* 244 Cal.App.4th at p. 1198 [liability for unlawful referral agreement may be supported by evidence the physician pays "rent" to referring physician in excess of "fair market value" of the rented space].) The imposition of such liability would likewise further California's strong public policy against insurance fraud.

Inflating medical expense damages claims also may trigger liability under the Unfair Competition Law.

The purpose of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) is to prohibit " 'unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179 (*Cel-Tech*).) The UCL "focuses solely on conduct and prohibits ' "anything that can properly be called a business practice and that at the same time is forbidden by law."' [Citations.] 'As a result, to state a claim under the [UCL] one need not plead and prove the elements of a tort. Instead, one need only show that "members of the public are likely to be deceived."'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 827.)

"Under the UC[L], unfair competition means and includes 'any unlawful, unfair or fraudulent business act or practice.' The act authorizes courts to enjoin such conduct and order restitution of money or property obtained by means of unfair competition. Actions for relief under the UC[L] can be prosecuted 'by any person acting for the interests of itself, its members or the general public.'" (*Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 968–969, emphasis and citations omitted.) "An unlawful business practice or act is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." (*Id.* at p. 969, citing *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.) "Virtually any law can serve as the predicate for a [Business and Professions Code] section 17200 action." (*Ibid.*) "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech, supra,* 20 Cal.4th at p. 180.)

Thus, counsel for plaintiffs, lien providers, and expert witnesses who have a business practice of inflating medical expense damage claims in violation of the IFPA (Ins. Code, § 1871.7; Pen. Code, § 550) may be enjoined from continuing that practice and ordered to disgorge money obtained through the unfair or unlawful business practices under the UCL (see *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144). V

Endnotes:

1 "The phrase 'qui tam' is taken from the longer Latin expression 'qui tam pro domino rege quam pro se ipso in hac parte sequitur,' meaning 'who brings the action for the king as well as for himself.' " (U.S. ex rel. Davis v. Prince (2011) 753 F.Supp.2d 569, 573, fn. 1, citing 3 Blackstone's Commentaries 160.) (If you've read this far, you probably wanted to know that.)

H. Thomas Watson

H. THomas Watson is a partner at the California appellate law firm, Horvitz & Levy LLP, the largest firm in the nation specializing in civil appeals. He regularly consults with trial counsel concerning the development of medical damages evidence and the preservation of medical damages legal issues for appellate review.

Jan Roughan
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From the Other Side - Surety Insight for Appeal Bonds

Conway Marshall, International Sureties, Ltd.

As a general overview, what does the process of getting an appeal bond look like?

Every case is different, and you'll hear that a lot, but at its most basic, the process can be boiled down to two stages.

We start by gathering underwriting information, which will largely be done from a financial review perspective. The insurance details, latest annual financial statements, or other information related to the judgment debtor's situation are to be provided.

Once a surety has enough underwriting information, it will offer terms, which is where things get interesting and the second, potentially more time-consuming stage begins. Terms can vary anywhere from immediate willingness to issue the bond to a requirement for collateral – typically cash or a letter of credit (LOC), but sometimes other options are available. The ball is back in the requesting party's court at that point to decide how to proceed and meet the terms.

How does a surety decide what type of underwriting information to review?

There are three types of cases: insured cases, uninsured cases for companies, and uninsured cases for individuals.

If a reputable insurance carrier is willing to indemnify for the bond, then underwriting is likely limited to the insurer's credit rating. These bonds are simple and easy.

For uninsured cases for companies, the company will have to undergo a financial review to determine if it qualifies for the bond being requested on an uncollateralized basis.

And for uninsured cases for individuals, collateral is nearly always required.

What does the surety look for in the financial statements to decide if a company qualifies?

An underwriter will want to determine that the company is a) solvent without any risk of bankruptcy looming and b) sufficiently liquid to pay the judgment. The balance sheet, income statement, and cash flows statement play defining roles that demonstrate if a certain bond amount can be easily paid without the loss affecting the company's operations.

Underwriters prefer reviewing audits, which are reliable and accurate, but not every company has an annual audit, which is fine. CPA or third-party prepared statements are the next best thing, whereas internally prepared excel spreadsheets leave the door open to questionability because they can be drafted by anyone to say anything. Tax returns unfortunately do not provide all the underwriting info needed for an appeal bond though.

The bond amount dictates the level of underwriting. Higher bond amount requests receive more scrutiny.

How long does the financial review take and how quickly can the bond be issued?

The financial review should be done the same day the numbers are submitted, but a larger bond might require more time.

The whole appeal bond process can take anywhere from a few minutes to a week or longer depending on what is required of the principal. Sureties move quickly and terms can be given in a day, but if collateral is required then the procedure will take time.

The financial review is the critical "jumping off point" to learn about cost, indemnity requirements, and whether or not collateral is necessary. This can be done unofficially from a high-level perspective by having a conversation with an industry professional or by formally submitting the underwriting information to obtain official terms from the market.

It is good to hear that the process can move swiftly in some situations, but how do we know if it will take one day or one week or more?

Speed of issuance depends on the underwriting. A large company that qualifies easily for a small bond because of its financial wherewithal is more reliable to pay the judgment than an individual without any assets, and the surety's requirements will reflect that.

With a lower bar to clear, the attorney might only need to prepare the bond wording. In other cases, various types of indemnity or counter security will need to be given where it can take time to get the appropriate signature. Of course, for individuals and companies that do not qualify on an unsecured basis, there is also the 800-pound gorilla in the room: Collateral.

Continued on page 36

Bonds issued based on cash collateral can still be done in a day by simply wiring the funds and signing the necessary supporting documentation. Securing a bond with an LOC will take more time because banks tend to move at their own pace. We find that clients need from one day to a week or more depending on their bank to arrange for an LOC.

What if someone does not qualify for the bond based on financials? What options might they have?

The surety can always issue an appeal bond by holding 100% collateral – typically cash or a letter of credit. Real estate is an option in some instances, but it is expensive and a slow process that requires up front costs. Joint collateral control over a brokerage account can be arranged so that marketable securities do not have to be sold. This can also be expensive and significantly more collateral must remain in the account than the bond amount to protect the surety from any market fluctuations.

Mostly all bonds secured by collateral are done with cash or a letter of credit.

You mentioned individuals earlier. What does the situation look like when an individual takes a judgment personally without any insurance?

For the most part, individuals must post full collateral. There are situations of high net worth individuals getting away without that, but that is certainly the exception and not the rule. I hesitate to even mention it, but it can happen.

What if a judgment is likely to be overturned upon appeal? Would the surety make considerations?

The arguments of the case are not considered during surety underwriting because judgments in general are less often overturned than upheld. It is also important to note that typical appeal bond claims result in full payment of the bond. They are not often made on a partial basis.

It is assumed that each appeal will be lost with the full bond amount to be paid by the judgment debtor, so the question is not If they *have* to pay, but rather If they *can* pay.

Please clarify the purpose of the bond because clients occasionally ask if the bond will pay the judgment.

Bonding companies are licensed third-party guarantors that provide surety to an obligee that *another party* (the bond principal/judgment debtor) will, in fact, pay the judgment upon appeal if required to do so. If the judgment creditor demonstrates that it cannot timely collect the judgment because of the judgment debtor's insolvency or some other reason, then the surety will at that time step in to pay.

Bond rates are only a paltry sum – think somewhere near 1% and not 10% – and their obligations more closely resemble a letter of credit than an insurance policy. They are not designed to pay the judgment in the first instance, whereas an insurance policy would.

What further information should attorneys and insurance carriers be aware of?

Insurance carriers would be best served by developing their own surety relationships. They do not typically need to provide financial information when they are responsible for a judgment, and their requests can be quickly reviewed.

Attorneys should be aware of the party that is responsible for paying the judgment and whether or not an insurance carrier has confirmed responsibility. If punitive damages are being assessed, then the surety will want to know about that up front.

Non-insurance companies should be prepared to disclose as much financial information as possible for fastest turnaround and best rates. Underwriters are much more comfortable approving a bond when they feel like they have all the details.

Also, bond costs are recoverable in some states including California. This knowledge can be used as a negotiating tactic if your opponent is uncertain if his judgment will remain intact.

Most importantly, bond agents are available to discuss a case either in detail or simply in general to give you an idea if a party can qualify for an appeal bond on an uncollateralized basis and what the path forward might look like. A brief, 5-minute conversation can go a long way.

Conway Marshall as been practicing insurance and risk management for over 8 years as a Surety Bond Broker with International Sureties, Ltd.

Conway Marshall

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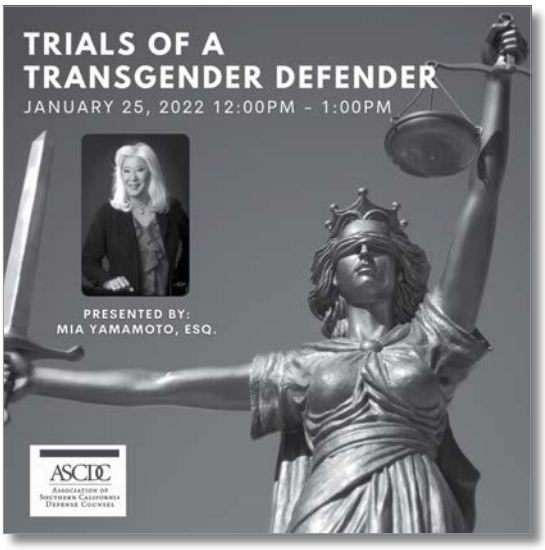


Trials of a Transgender Defender

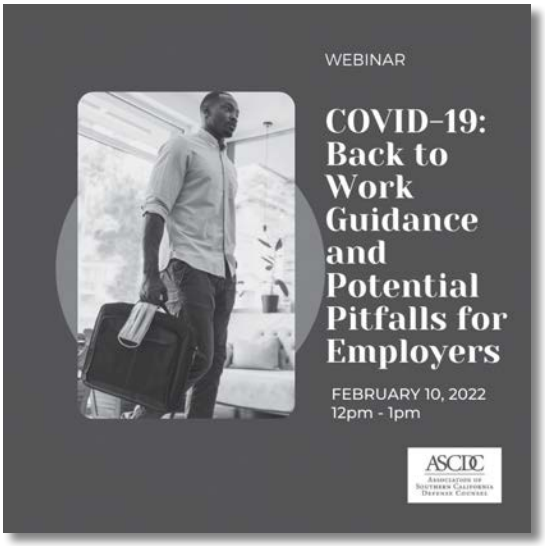
On January 25, 2022: One lawyer's experience as a transgender criminal defense trial lawyer, the history of LGBT lawyers and clients in the courts, and the current state of Civil Rights for transgender clients and lawyers in 2022.

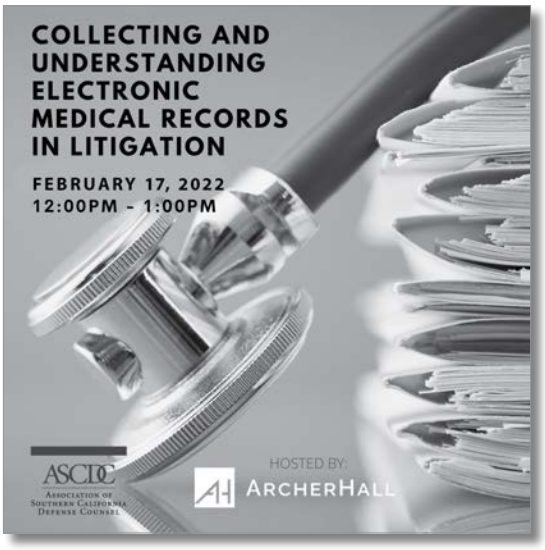
For more information contact:
Mia Yamamoto, Esq. | *myambone@aol.com*

COVID-19: Back to Work Guidance and Potential Pitfalls fo EMployers

On February 10, 2022: This webinar will walk through COVID-19 related obligations for employers in an ever fluid and developing area of employment law. Against this educational backdrop will be a discussion regarding observed trends and case studies that are currently impacting employers. Do not miss an opportunity to quarantine for this one-hour event with attorneys Eric C. Schwettmann of Ballard, Rosenberg, Golper & Savitt, LLP and David A. Napper of Chapman, Glucksman, Dean and Roeb!

For more information contact:
Eric C. Schwettmann, Esq. | *eschwettmann@brgslaw.com*
David A. Napper, Esq. | *dnapper@cgdrlaw.com*





Collecting and Understanding Electronic Medical Records in Litigation

On February 17, 2022: Electronic Medical Records (EMR) are governed by a strict regulatory framework, but they contain remarkably detailed information that is important in a wide variety of cases from malpractice to fraud to criminal prosecution. This data is frequently produced in paper or PDF reports, leaving much of the potentially relevant data behind. This presentation discusses the types of information that are contained in EMR systems and how to approach discovery requests to comply with the law and avoid missing responsive data. Using examples from actual cases, many of which our experts worked on directly, we discuss the ways parties withhold, modify, or obfuscate electronic medical record data, and how to ensure it is all collected or produced.

For more information contact:
Brian Chase | *bchase@archerhall.com* | Director of Digital Forensics, Archer Hall

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Preparing For the Impending Mediation Tsunami

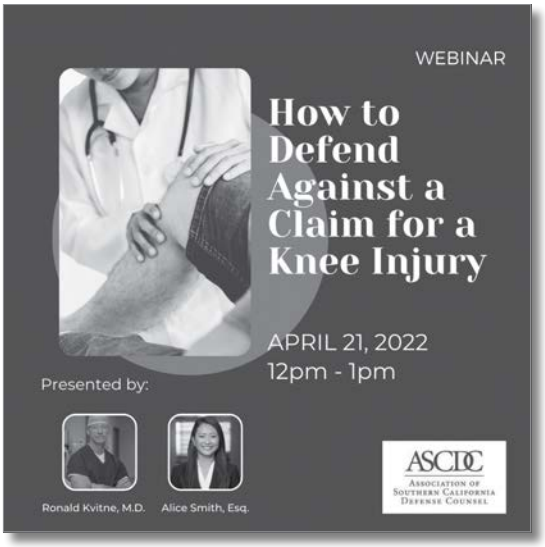
On March 3, 2022: Judge Ben Davidian, now a mediator with JAMS, recently retired from the Sacramento Superior Court bench after nearly thirteen years of service. Many of us remember Judge Davidian from his almost seven years as Supervising Judge of Dept. 59, the Sacramento Civil Settlement Center, where he conducted literally thousands of mandatory and voluntary settlement conferences, both in person and by Zoom.

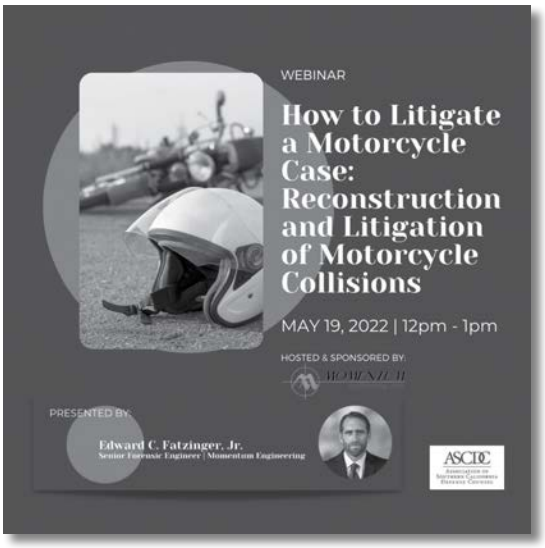
For more information contact:
Erica Ploetz | *EPloetz@jamsadr.com*

How to Defend Against a Claim For a Knee Injury

(Webinar recording not available.)

On April 21, 2022: Join board-certified orthopedic surgeon Ronald Kvitne, M.D. from the prestigious Kerlan-Jobe Orthopedic Clinic and Alice Smith, Esq. from Yoka | Smith, LLP for a discussion on how to defend a knee case. Dr. Kvitne has served as the Team Physician for Los Angeles Galaxy professional soccer team, is the Medical Director and Team Physician for the Los Angeles Kings NHL hockey team and a consultant for UFC Mixed Martial Arts. With more than thirty years' experience as an orthopedic surgeon and as an orthopedic medical expert witness, Dr. Kvitne will provide an overview of the knee and discuss the types of injuries seen in most personal injury cases, and the panel will offer tips on discovery through trial.





How to Litigate a Motorcycle Case: Reconstruction and Litigation of Motorcycle Collisions

(Webinar recording not available.)

On May 19, 2022: Please join us for an MCLE focused on Motorcycle Dynamics, Rider Safety, and Accident Reconstruction when it comes to motorcycle accidents. Our expert engineer will cover motorcycle related terminology and go over CA laws pertaining to safety as well as do's and don'ts when riding. We will also share some of our research and present real life examples from past cases.

For more information contact:
Vadim Perlovskiy | *vpp@momentum-eng.com*

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Handling the Soft-Tissue Injury Case in California: Is There Such a Case? (Webinar recording not available; please contact *kelly@camgmt.com* for purchase of recorded program.)

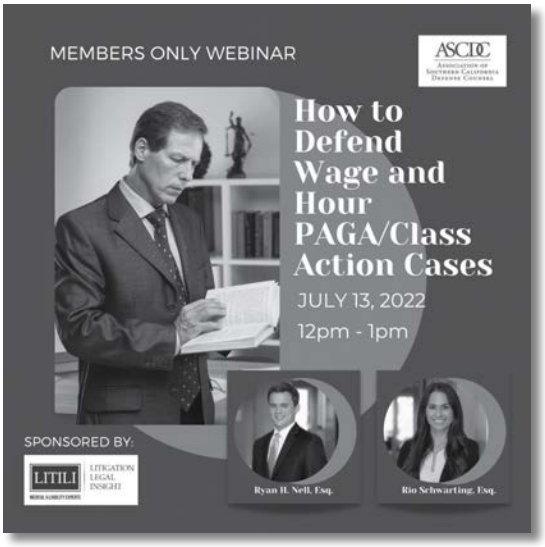
On June 16, 2022: Of all of the types of personal injury cases, soft-tissue injury cases are some of the toughest for the defense. This webinar will cover key areas, including but not limited to, conducting an investigation; establishing the defense in discovery; using pre-trial motions; offers of judgment; settlement strategies; and using experts during trial.

For more information contact:
Ninos Saroukhanioff, Esq. | *ninos@morgensternlawgroup.com*
Alexis Morgenstern, Esq. | *alexis@morgensternlawgroup.com*

How to Defend Wage and Hour PAGA Class Action Cases (Webinar recording not available; please contact *kelly@camgmt.com* for purchase of recorded program.)

On July 13, 2022: The past several years have seen a significant increase in representative wage and hour litigation in California, both through class actions and claims asserted pursuant to the Private Attorneys General Act of 2004 (PAGA). Attorneys Ryan Nell and Rio Schwarting will provide a high-level statutory and case law update before transitioning to best practices for litigating claims. Discussion will focus on the most common types of claims, as well as strategies than can be utilized to avoid common tactics by the opposition.

For more information contact:
Ryan H. Nell, Esq. | *rnell@pettitkohn.com*
Rio Schwarting, Esq. | *rschwarting@pettitkohn.com*



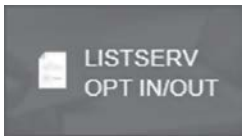
ASCDC Member Listserv

The Listserv is made available for the purpose of discussing matters related to or arising out of the participation as a member of ASCDC. ASCDC provides two members-only lists:

General (*general@ascdc.org*)
Employment (*employment@ascdc.org*)

New members are automatically opted-in to the general listserv. The employment list is opt-in only. All members should read and understand the Members Listserv Rules and Agreement before participating on the lists. It can be found here: *https://www.ascdc.org/PDF/ASCDC Listserv-Rules-Agreement.pdf.*

By default, the e-mail address associated with your ASCDC membership record is used for these lists and you must use that e-mail account to successfully access the list.



By clicking the button above on the *ascdc.org* website (you must be logged in as a member) you can access the rules and agreement document as well as opt-in or opt-out of a list.

Some useful guidelines, other than the rules and agreement document, for members using the list:

1. When sending to the list, use the e-mail addresses listed on the Opt In/Out page on the *ascdc.org* website (seen above). As of the time of writing this, they are: *general@ascdc.org* and *employment@ascdc.org*.
2. To prevent inadvertent "Reply All" issues on the list, send the request to yourself and BCC the list.
3. When replying to a message sent to the list, don't use "Reply All" as that will include everyone on the list. Simply use "Reply" to reply to the sender only.
4. Related to #3, send thank you messages or "me too" messages to the individual by selecting "Reply" so it only goes to the sender's inbox.
5. DO NOT post comments about a judge, even if it is complimentary.
6. To ensure the best chance of your message getting delivered to the list, refrain from using long signatures with images and avoid using attachments or links if possible.
7. Remember that your post is going to hundreds of other member inboxes and should be considered a professional communication.
8. For job openings, or if you are seeking a position or other 'classifieds' – like posts, please use the Member Marketplace available here: *https://www.ascdc.org/#memberMarket.asp*
9. Don't post commercial advertising, promotions, or junk mail of any kind.

If you have any questions about how to use the listserv, please contact *web@camgmt.com*.

AMICUS COMMITTEE REPORT

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Don't miss the recent amicus *VICTORY*

The Amicus Committee recently participated as *amicus curiae* in the following case:

1) ***Berroteran v. Superior Court*** (2022) 12 Cal.5th 867: Request in a Lemon Law case from Lisa Perrochet and Fred Cohen at Horvitz & Levy to support the defendant's petition for review. The trial court ruled in limine that plaintiff could not introduce former deposition testimony of witnesses deposed years earlier, in cases with different parties and lawyers, in another state. The court found plaintiff had not met his burden to establish defendant had a motive to "cross examine" the witnesses during the earlier depositions, so the hearsay exception under Evidence Code section § 1291 did not apply. The trial court followed *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, which held – consistent with legislative history and the overwhhelming prevailing practice among defense counsel – that parties generally don't have a motive to examine friendly witnesses at deposition and, thus, deposition testimony was generally (but not categorically) inadmissible in another case. The Court of Appeal disagreed with *Wahlgren* and overturned the trial court order by issuance of a pretrial writ, finding defendant had not shown a lack of motive to cross-examine. Alan Warfield and David Schultz from Polsinelli LLP submitted a letter supporting the defendant's petition for review, which was granted. The Supreme Court issued its opinion on March 7 reversing the Court of Appeal and reaffirming the *Wahlgren* position that there is a "general rule against the use of a discovery deposition in a subsequent proceeding" under Evidence Code section 1291, although the hearsay exception might apply on a proper showing in unusual circumstances outlined by the Supreme Court. The court noted that the party opposing the introduction of deposition testimony from aligned witness did not bear any burden to prove that its counsel lacked a similar interest and motive to examine its witnesses at that deposition. ▼

Keep an eye on these *PENDING CASES*

ASCDC's Amicus Committee has also submitted *amicus curiae* letters or briefs on the merits in the following pending cases:

1) ***Betancourt v. OS Restaurant Services, LLC*** (2020) 49 Cal.App.5th 240, review granted and held (S262866): Eric Schwettmann from Ballard, Rosenberg, Golper & Savitt successfully sought publication of the favorable Court of Appeal opinion in this case regarding the recovery of attorney fees in a FEHA-related case. The California Labor Commissioner filed a petition for review. The California Supreme Court issued a "grant and hold" order pending the outcome of *Naranjo v. Spectrum Security Services, Inc.* (S258966), which raises the following issues: (1) Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks?; and (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?

   Note that, because of ASCDC's successful publication request, the favorable opinion in *Betancourt* is citable as persuasive authority pending review. The Court of Appeal explained that statutory fees under Labor Code section 218.5 are *not* recoverable for rest break and meal period violations, and held the trial court abused its discretion in awarding plaintiff over $280,000 in attorney fees where the only wage and hour claims alleged and litigated were just such violations. The opinion also contains a discussion of proper disclosure of settlement negotiations where offered for a purpose other than attempting to disprove the invalidity of claims under discussion.

2) ***Hoffmann v. Young*** (2020) 56 Cal. App.5th 1021, review granted (S266003): Request from Chris Hu at Horvitz & Levy to support defendant's petition for review on an issue regarding recreational immunity. In a divided opinion, the Court of Appeal in Ventura held that an invitation to use a motorcycle track abrogated the track owner's recreational immunity defense. Don Willenburg from Gordon Rees submitted a joint letter on behalf of ASCDC and the North. The Supreme Court granted review on February 20, 2021 to decide the following issue: "Can an invitation to enter by a non-landowner – here, the landowner's child – that was made without the landowner's knowledge or express approval satisfy the requirements of Civil Code section 846, subdivision (d)(3), and abrogate the landowner's immunity from liability for damages suffered during permissive

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recreational use of the property?" Oral argument occurred on June 8, 2022.

3) ***Bailey v. San Francisco District Attorney's Office*** (2020) unpublished opinion, review granted (S265223): The Amicus Committee recommended, and the Executive Committee approved, submitting a brief on the merits in this employment case involving the "stray remark" doctrine. The Supreme Court granted review to address this issue: "Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation?" Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits supporting the Court of Appeal analysis, which found no triable issue on which a jury could find that an employee's single epithet altered co-worker plaintiff's working conditions.

4) ***Valenzuela v. City of Anaheim*** (9th Cir. 2021) 6 F.4th 1098, rehearing denied, 29 F.4th 1093: Defense counsel Tim Coates at Greines, Martin, Stein & Richland sought amicus support from ASCDC regarding recoverable damages in a section 1983 wrongful death action. The issue presented to the 9th Circuit was whether an heir can recover for the decedent's "loss of life." There is a circuit split on this issue. Steven Fleischman, Scott Dixler, and Chris Hu from Horvitz & Levy submitted an amicus brief on the merits. On August 3, 2021, the Ninth Circuit issued a published 2-1 opinion affirming the award of loss of life damages; Judge Lee dissented. In a related case raising the same issue – *Craig v. County of Orange* (2021) 856 F.Appx. 649 – the 9th Circuit issued a memorandum disposition on August 18, 2021. On March 30, 2022, 11 Ninth Circuit judges issued a dissent from the denial of the petition for rehearing en banc in *Valenzuela*. 29 F.4th 1093. Expect petitions for certiorari to be filed in both cases.

4) ***TriCoast Builders, Inc. v. Fonnegra*** (S273368): The California Supreme Court has granted review to address these two issues: (1) When a trial court denies a request for relief from a jury waiver under Code of Civil Procedure section 631, and the losing party does not seek writ review but instead appeals from an adverse judgment after a bench trial, must the appellant show "actual prejudice" when challenging the order on appeal?; and (2) Does a trial court abuse its discretion when it denies a request for relief from a jury trial waiver without a showing that granting the request will prejudice the opposing party or the trial court? Steven Fleischman and Andrea Russi from Horvitz & Levy will be submitting an amicus brief on the merits supporting the defendant's position. V

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Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

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If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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President – *continued from page 3*

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On a personal note: There is a long list of people who share in the success of this program; too many to mention within my allotted word count. THANK YOU to Presiding Judge Eric Taylor, Supervising Judge of Civil Courts Hon. David J. Cowan, Hon. Daniel Crowley, Hon. Zaven Sinanian, Belinda Macauley, Marcel Bourdase (PESC), Jose Torres (PESC), Chris Stockton (PESC), Mark Rodgers (PESC), Martin Bambanian, ASCDC's board members, and all the Settlement Officers that have served. And, to my dear friend, Genie Harrison – my gratitude overflows.

Capitol Comment

– continued from page 5

by its own terms, on July 1, 2023. The California Defense Counsel is a co-sponsor of SB 848 (Umberg), which would extend the sunset until January 1, 2026. CDC has been collaborating on this issue with the California Judges Association, the Consumer Attorneys of California, and the Judicial Council chaired by the Chief Justice, to extend the sunset, in the belief that while not perfect, the ability to conduct some proceedings remotely benefits litigants, lawyers, and the courts.

Taken together, 2023 is shaping up to be one of the most consequential on record in terms of legislation relating to civil practice. Expect much more information as the legislative session comes to a close.

ASCDC
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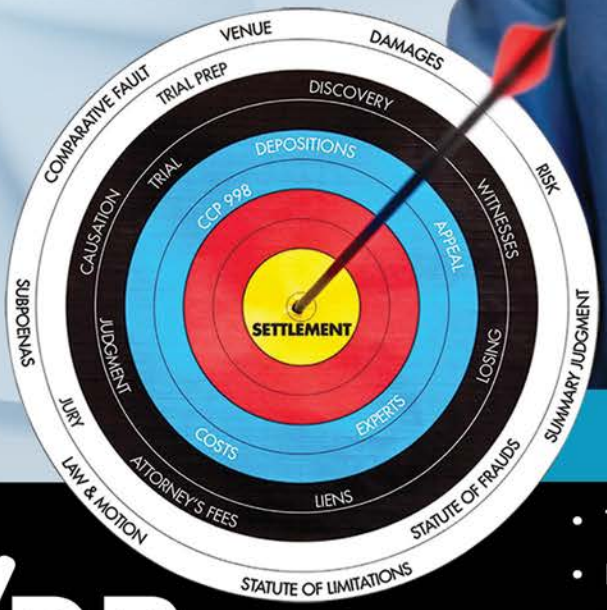

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