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Barker Law Group's Legal Update
for the San Diego Insurance Adjusters Association (SDIAA)

Thursday, February 12, 2004

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With nearly 25 years of trial and other legal experience, Mr. Barker serves as managing partner of Barker Law Group, APLC leading an active insurance defense practice. In fact, insurance defense has always been a core practice at the firm. Every insurance defense attorney at the firm has significant trial experience. For years, the firm has been trusted by international, national and regional insurance companies to defend both their insureds in third-party liability cases and the carriers themselves in "bad faith" litigation. Because of the firm's vast experience in many areas of insurance defense, Barker Law Group is proud to enjoy highly productive and effective relationships with its carrier clients. Mr. Barker may be reached at (619) 682-4801 or via email, dhb@barkerlawgroup.com.

Barker Law Group's Legal Update – Review of Legal Developments affecting casualty insurance in California.

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Weinberg v. Safeco Insurance Company of America (2004) --- Cal.Rptr.3d ---, 2 Cal. Daily Op. Serv. 192, 2004 WL 33458

Type: Coverage

Nutshell: Insurer liable for arbitration award in excess of UIM policy limits where no measures are taken to limit arbitrator's powers.

Facts: Insured Weinberg was rear-ended by an under-insured motorist. He settled with that third party for $3,635 and then proceeded against his insurer, Safeco, for benefits under a $250,000/$500,000 UIM policy. After the arbitration, the arbitrator awarded $829,266.49. Safeco tendered a check for $246,365 ($250,000 - $3,635), plus interest and costs. Safeco did not seek to correct or vacate the award.

Weinberg filed a petition seeking to confirm the full arbitration award of $829,266.49. Safeco opposed, arguing "UIM arbitrations are not liability assessments against the insurer and therefore cannot be confirmed into money judgments." The trial court nevertheless confirmed the award.

Holding: The court of appeal reviewed and affirmed the judgment. Reviewing Insurance Code § 11580.2(f), the court concluded that the statute requires arbitration of only two issues: (1) whether the insured is entitled to recover against the uninsured motorist; and (2) if so, the amount of damages. Importantly, there is no language regarding a determination of the extent of coverage and the amount of money the insurance company is obligated to pay the insured.

"Unless and until the Legislature provides for a mechanism to address what is to be done when an arbitrator is not asked to determine the insurer's liability, but issues an award of damages, it is incumbent upon the parties to see that the arbitrator does not make an award of damages, but instead issues a declaration of liability or of rights."

Accordingly, Safeco was on the hook for the entire arbitration award because it took no steps to limit the arbitrator's power.

Comment: Arguably this case was wrongly decided. Although a literal reading of the Insurance Code may support the decision, the result is absurd because it ignores the meaning of UM or UIM policy limits.

In hindsight, Safeco should have done one or more of the following:
(1) Stipulate with opposing party that the arbitrator will issue a "declaration of rights" rather than an award of damages, and that the insurer will pay up to but not in excess of UIM policy limits;
(2) File a motion with the arbitrator to correct the award to reflect policy limits,
(3) Filed a petition in court to vacate the award.

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Adjusters and defense counsel should take note of this decision and be sure to require stipulations and/or post-award motions.

Given the questionable result, look for intervention by the legislature or the California Supreme Court. Alternatively, insurers may consider modifying policy language.

Homedics, Inc. v. Valley Forge Insurance Company et al. (2003) 315 F.3d 1135.

Type: Coverage / duty to defend

Nutshell: Under CGL policy, insurer has no duty to defend a patent infringement suit unrelated to "advertising injury."

Facts: Insured seller of a therapeutic magnetic device was sued by a competitor for patent infringement. Insured argued that the insurer had a duty to defend pursuant to the advertising and personally injury insuring clauses in the CGL policy.

Holding: No duty to defend. In recent years courts have addressed the issue of whether CGL policies insuring against "advertising injuries" covers patent infringement. Previous opinions reject that insurers have a duty to defend. However, Congress amended the Patent Act in 1994 to include "offers to sell" as conduct which could constitute a direct patent infringement and the amendment became effective in 1996. With the amendment, it is no longer clear that advertising can never give rise to a direct patent infringement action. Nevertheless, in the present action, the patent infringement at issue related to the design of the devise rather than "misappropriation of an advertising idea or style of doing business.

Comment: Although the court found that the insurer did not owe a duty to defend in this particular case, it is noteworthy that the court opened the door for patent infringement suits under the amended Patent Act to be covered by the standard CGL policy.

Juarez v. 21st Century Ins. Co. (2003) 105 Cal.App.4th 371

Type: Statute of limitations

Nutshell: An insurer had no duty to give its insured notice of the Insurance Code section 11580.2(i) time limit for bringing a cause of action related to a claim under an uninsured motorist provisions, when the company had received written notice that the claimant was represented by counsel.

Facts: Insured Juarez was injured in an accident with an uninsured motorist on March 19, 1996. 21st Century denied coverage because Juarez was driving his son's truck, which was neither an "insured vehicle" nor an "additional insured vehicle" as defined in the

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policy. Juarez retained an attorney and the attorney sent a letter of representation to the insurer. However, he did not file suit against the uninsured motorist or demand arbitration within one year after the accident, as required by Insurance Code § 11580.2.

Juarez argued that the insurer was estopped from asserting the statutory time limit because it failed to give him notice of the time limit.

Holding: Plaintiff's claim is time barred. Although Insurance Code § 11580.2(k) imposes an obligation upon the insurer to notify the insured of the statutory time limit to commence arbitration, the subdivision expressly states that "the notice shall not be required if the insurer is represented by an attorney."

Comment: The court strictly held the insured (and his attorney) to the language of Insurance code §11580.2. Claim representative should ask that counsel purporting to represent insureds confirm the representation in writing. If received, it is safe to say that the representative is relieved of his or her duty to advise the insured of the statutory time limit. Competent plaintiff's counsel, however, will be aware of the time limit and take appropriate steps to protect their client.

Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company (2003) 114 Cal.App.4th 548.

Type: Coverage / technology

Nutshell: Loss of computer data is not a physical loss within the meaning of a CGL policy.

Facts: An agent of the insured company, while updating the company's computer database, committed human error by pressing the "delete" key on the keyboard, causing the database to crash, and resulting in a loss of crucial data. The insured made a claim for data restoration damages and business interruption damages, but made no claim for expenses incurred in replacing or repairing any item of hardware or storage medium. The company's insurer denied the claim, asserting that the losses were not covered by the policy because there was no "direct physical loss of or damage to" property.

Holding: Absent a loss or destruction of tangible property, the policy in question did not cover losses of stored computer data. The court limited this issue to one of contract interpretation, stating, "[t]he answer to coverage determinations is to be found solely in the language of the policies, not in public policy considerations."

The provisions of the policy specifically disallow coverage unless there is a "direct physical loss" to property.

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Under the rules of interpretation, a form providing coverage for "direct physical loss of or damage to Covered Property" requires "direct physical loss of or *direct physical* damage to Covered Property."

As per the contract, coverage is triggered only if the loss results from a "*risk* of direct physical loss." The risk of a negligent computer operator or a defective computer program is not a risk of a direct physical loss.

Information is stored in a physical medium, but the information itself remains intangible.

Comment: Although this is a case of first impression in California, third party insurance claims in other jurisdictions have led to the same result. These rationales are no different for first party claims.

Henkel Corp. V. Hartford Accident & Indem. Co. (2003) 29 Cal.4th 934

Type: Coverage

Nutshell: Insurer must consent to assignment of insurance policy to a successor corporation.

Facts: In 1980 Henkel Corp acquired a metallic chemical company which was a subsidiary of Union Carbide. Along with the acquisition of the stock of the subsidiary, Henkel assumed all liabilities. In 1992, plaintiffs sued Henkel for injuries arising out of exposure to the metallic chemicals between 1959 and 1976 (before the acquisition). After the insurer denied coverage, Henkel settled the case for over $7 million. Then Henkel filed a declaratory relief action against the insurer.

Holding: Henkel did not acquire the benefits of policies issued by the insurer to the acquired corporation. The policies prohibited assignment without the insurer's consent. Here, the insurer did not consent. The court recognized only two exceptions to the consent requirement: (1) When at the time of the assignment the benefit has been reduced to a claim for money due or to become due, or (2) when at the time of the assignment the insurer has breached a duty to the insured and the assignment is of a cause of action to recover damages for that breach. These exceptions did not apply.

Comment: This case is beneficial to insurers in the area of continuous loss cases because it is not unusual for the responsible party to have been purchased or merged into another corporation. Although the coverage question may involve technical issues best suited for coverage counsel, claim representative should be attentive to the issue and look for instances where the insured has merged into another corporation.

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<u>McMahon v. Superior Court</u> (2003) 106 Cal.App.4th 112

<u>Type</u>: Civil procedure

<u>Nutshell</u>: The court has no authority to shorten the minimum notice period for the hearing of a summary judgment motion.

<u>Facts</u>: Plaintiffs in a negligence/bad faith case against an insurance company moved for trial preference based on the age and health of the plaintiffs. The court granted the motion and also ordered that summary judgment could be heard on shortened time of 21 days. (Per CCP 437c, at the time the notice period was 28 days, but the current notice period is 75 days, and the motion must be heard at least 30 days before trial, meaning that notice of the motion must be given at least 105 days before trial.) Plaintiff's objected and made an ex parte request objecting to the shortened notice. The court denied the application.

<u>Holding</u>: The court may not shorten the statutory minimum notice period for summary judgment. "Because it is potentially case dispositive and usually requires considerable time and effort to prepare, a summary judgment motion is perhaps the most important pretrial motion in a civil case. Therefore, the Legislature was entitled to conclude that parties should be afforded a minimum notice period for the hearing of summary judgment motions so that they have sufficient time to assemble the relevant evidence and prepare an adequate opposition."

<u>Comment</u>: The fact that the extended notice period for summary judgment motions cannot be shortened will obviously affect only those claims that go to litigation. For those claims that do go to litigation, the claim representative should be aware that defense counsel will need to conduct discovery earlier than in years past. Given that most courts schedule a trial within one year of filing, counsel may have only six or seven months to prepare a case before the motion for summary judgment deadline.

<u>Madhani v. Cooper</u> (2003) 106 Cal.App.4th 412

<u>Type</u>: Premises liability

<u>Nutshell</u>: Tenant's attack of another tenant was foreseeable based on prior attacks by the same person.

<u>Facts</u>: Plaintiff Hamida Madhani was a tenant in an apartment building owned by defendants Glenn and Sheryl Cooper. As Madhani entered her apartment one night she was attacked by another tenant, Yvonne Moore, who came up from behind her, grabbed her by the hair, pulled her outside and threw her down several flights of stairs causing Madhani to lose consciousness and sustain serious physical injuries. This same tenant had assaulted Madhani and her mother on previous occasions (though not as severely) and

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Madhani had made numerous complaints to the building managers, who took no action. Madhani sued the Coopers for negligently failing to protect her from the tenant's assault. Observing that "[u]nfortunately, disputes between tenants are not uncommon," the trial court granted the Coopers' motion for summary judgment and entered a judgment in their favor.

Holding: Reversed. Landlord owed the tenant a duty of care to protect her from foreseeable future assaults from the other tenant. Triable issues of fact existed as to whether the landlord breached the duty.

As in most cases dealing with a landlord's liability for criminal acts by third persons, the key issue here is foreseeability of harm. (See, e.g., Sharon P. v. Arman, Ltd. (1999) 21 Cal.4th 1181, 1189; Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 676)

Here, the court concluded that the tenants attack was foreseeable: “We are not dealing here with an isolated incident or extraordinary behavior on the part of Moore. Through their agents, the building managers, the landlords knew or should have known Moore had engaged in repeated acts of assault and battery against Madhani as well as her mother. If injury to another ‘is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct’ it is ‘reasonably foreseeable.’ In contrast to the trial court's view, we do not believe a reasonably thoughtful landlord would accept as commonplace the repeated verbal and physical abuse of one tenant by another, but would act to put an end to such occurrences. In this case it was foreseeable Moore's violent outbursts and physical assaults would eventually result in serious injury to Madhani.

Comment: Although California appellate courts have been fairly strict on the foreseeability issue for premises liability cases, in this case the number of prior incidents and complaints was sufficient to make the ultimate attack foreseeable. This case is distinguished from Sharon P, Ann M, and the following case, where the court determined that assaults by unknown criminal assailants are not foreseeable (and thus no liability) absent prior similar incidents.

Benjamin Kadish v. Jewish Community Centers of Greater Los Angeles (2003) 112 Cal.App.4th 711; Review Granted 5 Cal.Rptr.3d 394

Type: Premises liability

Nutshell: Prior vague threats of violence are insufficient to make a criminal assault foreseeable such that a property owner has a duty to employ security measures.

Facts: In June 1999, Eleanor and Charles Kadish (the Kadishes) enrolled their sons, Benjamin (age 5) and Joshua (age 9), in a summer camp, Camp Valley Chai, run by the Jewish Community Centers of Greater Los Angeles (JCC). The JCC operated several

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centers in the Los Angeles area. The Kadishes' children were to be dropped off at the West Valley Center and bused to the North Valley Center in Granada Hills, where the camp is located. According to the brochure, campers would enjoy a "safe camping experience" set in a "secure environment" at the camp's "expansive camp site."
But, during the summer of 1999, all was not safe and secure for Jewish organizations. Attacks at synagogues and Jewish community centers in the United States were planned and carried out. Jewish organizations across the country referred to the summer of 1999 as the "summer of hate." The Anti- Defamation League sent notices to Jewish groups throughout the nation advising them to increase security. The West Coast office of the Anti-Defamation League notified Jewish organizations that there was a "strong potential" of violence against their members. From June to August 1999, the West Valley Center and the North Valley Center received anonymous telephone calls threatening their members with physical violence. The North Valley Center, located one block from an exit off the 118 Freeway, had a large sign identifying it as a Jewish facility. The center had no locks on the entry door, no security guards, and no emergency evacuation plan, notwithstanding that the JCC had implemented those precautions at other locations. Dating back to at least 1989, the Anti- Defamation League and groups within the JCC had recommended that the North Valley Center adopt security measures.

Beginning in early 1999, Buford Furrow, an individual with publicly avowed anti-Semitic views, began traveling and observing Jewish facilities in Southern California with the purpose of shooting and killing Jews. On the evening of August 9, 1999, Furrow sat outside the North Valley Center watching people come and go. No one asked him why he was there. He chose the North Valley Center as the site for his "war on Jews" because it, unlike other JCC facilities, had no security precautions. On August 10, 1999, Furrow entered the North Valley Center and shot Benjamin. His brother, Joshua, was not shot but "perceived" Benjamin's shooting.

The Kadishes filed suit against JCC, asserting among other things a cause of action for negligence, alleging that a lack of security measures allowed Furrow to shoot him. The JCC demurred to the complaint, contending that it did not have a duty to protect campers from violent criminal assaults. After several amendments, the trial court sustained the demurrer without leave to amend.

Holding:

The Court of Appeal affirmed the trial court. Citing Ann M. v. Pacific Plaza Shopping Center, the court held that a high degree of foreseeability is required in order to find that a property owner has a duty of care to hire security guards. In the absence of prior similar incidents of violent crime on the landowner's premises, there is almost never the required degree of forseeability.

Here there were no prior incidents at JCC. Although there were anti-Semitic threats, they were too vague to impose a duty on JCC to take additional security precautions. “We conclude that these vague threats were not sufficiently specific so as to require that

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security measures be adopted to prevent a maniac from shooting children at a summer camp. Plaintiffs did not allege any specifics about the threats--who, what, when, where, or how. Anonymous threats of such a vague nature do not provide an organization with guidance about what, when, and where precautions, if any, should be taken, nor against whom. And '[a]bsolute safety is not an achievable goal.'"

The court further supported its holding with the following rationales:

- It was speculative as to whether any security precautions would have prevented this shooting. The campus was expansive, and it was unknown what type of security measures would have prevented the shooting by a maniac.
- JCC was not morally to blame for the shooting. "Society deplores the act of a deranged gunman and does not blame the property owner. It is unfortunate that bigotry such as Furrows is no stranger to our society."
- Requiring JCC to prevent the shooting would place an onerous burden on the organization. "The operation of a camp is rarely a lucrative endeavor and is often done on a non-profit basis. As stated in a slightly different context, '... It serves no one to impose a duty which, rather than protecting [others], forces the businesses which they frequent to close.' "

Comment: This case is consistent with a long line of California cases which refuse to hold landlords liable for criminal attacks absent prior similar incidents. This case added a twist in that plaintiffs argued that general anti-Semitic threats and warnings from the community made the violent assault foreseeable. The appellate court rejected foreseeability based on vague threats, but the door is still open for foreseeability based on more specific threats (as opposed to prior violent incidents.)

Note: the California Supreme Court has accepted review of this case and so there may be further refinements in the law pertaining to premises liability.

Wiener v. Southcoast Childcare Ctrs., Inc. (2003) 107 Cal.App.4th 1429, Review Granted, 132 Cal.Rptr.2d 883

Type: Premises liability

Nutshell: In a case where a car drove through a chain link fence and into a preschool playground, plaintiffs offered sufficient evidence of the foreseeability of that harm to preclude summary judgment in favor of defendants.

Facts: Steven Abrams drove his car through a four-foot high chain link fence and onto the playground of the Southcoast Early Childhood Learning Center (Southcoast), with the intent of killing children playing there. He succeeded in killing two. The parents sued defendants Southcoast and the owner of the property, First Baptist Church of Costa Mesa (the Church), alleging negligence and premises liability. The playground was adjacent to a busy street. Another car had previously *accidentally* crashed through the fence, and

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another had driven onto the curb. The trial court granted summary judgment in favor of defendants, concluding that without notice of prior similar crimes in the area, defendants could not have foreseen Abrams' criminal act and thus had no duty to protect against it.

Holding: Judgment reversed. "For purposes of evaluating whether a duty is owed, the issue of "foreseeability" refers to whether the defendants' alleged negligent conduct created a foreseeable risk of a particular kind of harm, not whether the specific conduct of a particular third party wrongdoer could be anticipated. In this case, the defendants' alleged negligence was their failure either to erect a sufficiently sturdy barrier between the playground and the immediately adjacent busy street, or to move the children to a more protected area, thus guarding against the danger of their being hit by errant automobile traffic. That is the very harm which came to pass. We conclude plaintiffs offered sufficient evidence of the foreseeability of that harm to preclude summary judgment in favor of defendants in this case."

"The fact that the intentional nature of Abrams' conduct may not have been foreseeable does not automatically exonerate these defendants from the consequences of placing small children in a virtually unprotected play area adjacent to a busy street. Abrams' murderous intent may not have been foreseeable, but a jury might decide that a car careening onto the street-side playground was foreseeable. Certainly, if defendants had actually allowed the children to play in the busy street, no one would be arguing that such negligence should be excused by the state of mind of a driver who hit them."

Comment: The court makes an interesting distinction and refused to follow the established line of cases regarding the duty of land owners to prevent criminal acts. Although the driver here criminally intended to hurt children by driving onto the playground with his car, the court looked beyond the criminal nature of the act and instead focused on the general risk of automobiles crashing through the fence.

Note: The California Supreme Court has granted a petition for review (along with Kadish).

Parnell v. Adventist Health System/West (2003) 106 Cal.App.4th 580, Review Granted, 131 Cal.Rptr.2d 148

Type: Medical liens

Nutshell: A hospital that has received full payment for services under the terms of its contract with a medical insurance provider is not entitled to file a lien to recover the difference between that payment and the hospital's "usual and customary" charges for similar services.

Facts: Plaintiff was injured in an automobile accident while he was a passenger in a taxicab. He received hospital care from an Adventist Health System hospital. The

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hospital presented a claim for payment to the plaintiff's health care plan and received payment in full at the rates specified in the various provider contracts. However, the payment was less than the hospital's "usual and customary" charges for such services.

Plaintiff sued the driver of the vehicle that struck the taxi. When he did so, the hospital filed a notice of lien pursuant to Civil Code section 3045.1 in the amount of $14,450.40.

Plaintiff sued the hospital in a class action asserting unfair business practices (Bus. & Prof.Code, § 17200), violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), trespass to chattels, breach of contract, and negligence.

The hospital filed a motion for judgment on the pleadings which the trial court granted. The court concluded the statutory hospital lien "is not constrained by the Hospital's negotiated discount with a health insurance carrier.... The langua[ ]ge of the statute is plain and unambiguous. While plaintiff does not have a personal liability to the Hospital ... public policy does not mandate that plaintiff should have ... a windfall from the third party tort feasor in the form of recovery of the full charge billing of the Hospital...."

Holding: The Court of Appeal reversed the trial court, holding that hospital was not entitled to a file lien against patient to recover difference between provider's payment and hospital's "usual and customary" charges for similar services.

The court references an interesting hypothetical: "A striking absence from the available legislative history undermines respondent's interpretation of the hospital lien act. We may view the matter through the lens of an example: An uninsured hospital patient incurs a bill of $5,000. Upon discharge, the patient goes to the hospital finance office and says, "I can pay you $3,000 now or $100 per month for 50 months. Take one or the other, or sue me." The hospital representative elects to accept $3,000 as full payment of the patient's bill. The next day, however, the hospital files a lien for $2,000 against the patient's potential recovery from the tortfeasor who put the patient in the hospital. Does the hospital lien law, on its face, allow or disallow such a lien? Would such a lien comport with the 'purpose and history' of the hospital lien act?"

"We think, based on the purposes of the act as disclosed in the available legislative history, the hospital lien act did not, and was not intended to, rewrite California law of accord and satisfaction in such a manner as to permit the hospital to assert a lien in the foregoing circumstances. (See §§ 1521- 1523 [statutory principles of accord and satisfaction].) Nor do we see any indication in the language, purpose, or history of the law that would effect such a change if the compromise were reached with, and the discounted charges were paid by, the patient's relatives, church, or medical insurer. Whether it makes the choice at the time of entering into a provider contract with a medical insurer or in negotiations with the patient after services have been provided to a particular patient, it is the hospital's choice to accept or refuse the level of payment offered by the payor. In either case, we see nothing in the statute designed to relieve a

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hospital of its choice to provide services at a price below the 'usual and customary' charges for such services."

Comment: This case is on review with the California Supreme Court, who recently handed down Olszewski v. Scripps Health, discussed below, addressing MediCal liens.

Claim representatives should scrutinize claimants' medical billings to ascertain what the provider actually accepted from the claimant's medical insurer. Arguably the claimant's compensable damages should be based on what the hospital accepted in payment for services instead of what it could have billed in the absence of medical insurance. This area of the law, including its relation to the "collateral source rule" remains somewhat unsettled law in California. Look for further developments from the California Supreme Court.

Olszewski v. Scripps Health (2003) 30 Cal.4th 798

Type: Medical liens

Nutshell: A medical provider may not enforce a lien in excess of the amount paid by MediCal.

Facts: Plaintiff Cimarron Olszewski was a Medi-Cal beneficiary who received emergency medical care from Scripps Health , a medical care provider that participates in the Medi-Cal program. Scripps received and accepted Medi-Cal payments for the medical care it provided to plaintiff. Plaintiff filed a lawsuit against the tortfeasor who caused her injuries. Scripps then asserted a lien against "the personal injury claims, judgments or settlements of" plaintiff pursuant to Welfare and Institutions Code section 14124.791 and Civil Code section 3045.1.

Plaintiff a class action against Scripps, alleging that Scripps had no legal right to assert and collect on such liens in light of federal Medicaid law governing provider reimbursement and third party liability. In addition to restitution and damages, plaintiff sought an order declaring that the liens asserted by Scripps against her and the other class members were "unlawful, unenforceable, and uncollectible" because federal law preempted the California statutes authorizing these liens.

Scripps demurred, and the trial court sustained the demurrers without leave to amend. The trial court concluded that defendants had a statutory right to assert the liens under section 14124.791 and that federal law did not preempt this statutory right. The court also held that plaintiff's tort claims were barred because the filing of the liens was "a privileged communication protected by Civil Code [section] 47[, subdivision] (b)(2)." The Court of Appeal disagreed with the trial court on the preemption issue and concluded that federal Medicaid law preempted section 14124.791; i.e. the court concluded that Scripps' lien was invalid and unenforceable.

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Holding: The Supreme Court affirmed the Court of Appeal and trial court decision. When California became a participant in the federal Medicaid program, it agreed to confirm with federal law in return for federal funds to furnishing care to the poor and indigent. Although the resulting California MediCal statutes authorized health care providers to assert a lien for the full cost of their services against any judgment, award or settlement for the unpaid balance, this provision of the law was never implemented because it conflicted with federal law. In 1992, the California legislature allowed providers to assert a lien for the full amount of their services only after refunding to MediCal the payment made.

The California Supreme Court held that the federal statutes preempted the California statutes authorizing the MediCal liens. Federal law requires MediCal to pay the amount due according to its payment schedule. The hospital must accept this payment as payment in full. Federal law does not permit a hospital to recover from a third party any amount greater than the amount payable under the state plan.

The Supreme Court recognized that "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor. (See Hanif v. Housing Authority (1988) 200 Cal.App.3d 635, 639-644 [where the provider has relinquished any claim to additional reimbursement, a Medicaid beneficiary may only recover the amount payable under the state Medicaid plan as medical expenses in a tort action].) As a result, the tortfeasor escapes liability for the full amount of the medical expenses he or she wrongfully caused. Such a result not only benefits the party who should be responsible for the medical costs of the beneficiary at the expense of the blameless provider, it also harms society as a whole. Because health care providers cannot recover the full costs of their services from responsible tortfeasors, they must either charge more to those innocent patients who can pay in order to recoup their losses or stop providing medical care to the needy. In the end, everybody suffers but the third party tortfeasor. We therefore urge the Legislature to remedy this anomaly in a manner consistent with federal law."

Comment: Claims representative should determine whether a claimant's medical costs were paid by MediCal. In those instances, recoverable medical expenses are limited to the amount of the MediCal payment accepted by the medical provider.

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State Farm Mutual Auto Insurance Company v. Campbell (2003)
123 S.Ct. 1513, 538 U.S. 408

Type: Punitive damages

Nutshell: Insureds brought action against automobile liability insurer to recover for bad-faith failure to settle within the policy limits, fraud, and intentional infliction of emotional distress. The United States Supreme Court held that the award of $145 million in punitive damages on $1 million compensatory judgment violated due process.

Facts: Curtis Campbell caused an accident in which one person was killed and another permanently disabled. State Farm contested liability, declined to settle the ensuing claims for the $50,000 policy limit, ignored its own investigators' advice, and took the case to trial, assuring Campbell and his wife that they had no liability for the accident, that State Farm would represent their interests, and that they did not need separate counsel. In fact, a Utah jury returned a judgment for over three times the policy limit, and State Farm refused to appeal. The Utah Supreme Court denied Campbell's own appeal, and State Farm paid the entire judgment.

The Campbells then sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. The Utah Supreme Court reinstated the $145 million punitive damages award.

Holding:

The U.S. Supreme Court reversed the $145 million punitive damages award.

A punitive damages award of $145 million, where full compensatory damages are $1 million, is excessive and violates the Due Process Clause of the Fourteenth Amendment.

- Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different purposes of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. Thus, the Court has instructed courts reviewing punitive damages to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

- Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.

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Comment: Insurance policies do not cover punitive damages, but the issue of punitive damages becomes relevant to the claim representative where (1) the insured is exposed to punitive damages; (2) the insurance company is accused of bad faith conduct. Claims representatives should note the Court's 10-to-1 guideline when evaluating such cases. The Supreme Court's 10-to-1 ratio is *a guideline, not a rule*.

Juan Ramon Romo v. Ford Motor Company (2003) 113 Cal.App.4th 738

Type: Punitive damages

Nutshell: This is the first California case to review a punitive damages case since the U.S. Supreme Court handed down Campbell. Applying Campbell, the court significantly reduced the punitive damages award from a 58-to-1 ratio to an approximately 5-to-1 ratio.

Facts: The Romo family was riding in their 1978 Ford Bronco when it rolled over as Juan Romo tried to avoid a car that had swerved in front of him. Two family members were killed, and two were injured. In the products liability action brought by the Romos individually and on behalf of the estates of their deceased family members, the jury awarded compensatory damages from Ford Motor Company of $5 million and punitive damages of $290 million. The trial court granted Ford a new trial on punitive damages. Plaintiffs appealed. The Court of Appeal reinstated the punitive damage award. The California Supreme Court denied review, and on certiorari to the United States Supreme Court, it ordered the case reconsidered in light of the State Farm v. Campbell decision.

Holding: On reexamination in light of Campbell, the Court of Appeal ordered a reduction in the punitive damages from $290 million to $23.7 million.

The Court concluded that Ford's conduct was highly reprehensible. Ford "willfully and consciously ignored the dangers to human life inherent in the 1978 Bronco as designed, it also ignored its own internal safety standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength of the roof before placing it in production. In the case of *deceased* claimants, because the damages were limited, there had to be some relationship of the punitive damages to the harm caused the deceased victim, not merely the compensatory damages awarded. A higher ratio between compensatory and punitive damages was justified in such cases. As to the personal injury for the surviving victims' claims, a somewhat lesser multiplier was appropriate.

Considering the "extreme reprehensibility" of Ford's conduct, the Court concluded that a punitive damage award of triple the compensatory damages would be constitutionally reasonable as to the individual *injured* plaintiffs. As for the *wrongful death* claims, an award of $5 million each to each estate was constitutionally reasonable. Adding the two punitive awards together, the punitive damages were approximately five times the compensatory damages awarded.

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Comment: This case is particularly interesting because the life of the case spanned pre-Campbell and post-Campbell. In the first California appellate decision, before Campbell, the appellate court upheld the $290 million punitive damages award, and upon revisiting the award *after* Campbell, it reduced the award to $23.7 million. In this first California case applying Campbell, the court rigorously applied the Supreme Court's standards and kept the award under the 10-to-1 guideline.

Bussard v. Minimed, Inc. (2003) 105 Cal. App. 4th 798

Type: Employer's liability under respondeat superior theory.

Nutshell: Employer may be liable for negligent acts of employee, committed while driving home, if negligent act resulted from risks created at work.

Facts: Employer hired a pest control company to spray pesticides in its facility overnight. The next day, employee fell ill at work from pesticide remnants and drove home early. She caused a wreck with plaintiff on the way home. Plaintiff sued negligent driver's employer, claiming respondeat superior.

Holding: Employee's negligent driving was a foreseeable result of employer's pesticide spraying, because it is not startling or unusual that employee would not be fit to drive after breathing pesticide fumes. Therefore summary judgment in favor of employer was inappropriate.

Comment: California law applies respondeat superior liability broadly, but it does not generally apply to an employee's daily commute. There is an exception, however, when the employee endangers others with a risk arising from or related to work. For example, employers who allow employees to drink at a work-related holiday parties have been held liable for employee's car accidents.

Elizarraras v. L.A. Private Security Services, Inc. (2003) 109 Cal. App. 4th 237

Type: Security company's liability for not preventing underage alcohol consumption

Nutshell: A security company does not have a statutory legal duty of care to underage patrons to prevent them from drinking, or driving while intoxicated.

Facts: Restaurant/bar owner hired a private security company as excess security for a party. Two minors arrived intoxicated, were served alcohol on the premises, were involved in an altercation, drove away drunk, crashed and died. Heirs argued that private security company breached duty of reasonable care by not preventing minors or

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intoxicated patrons from entering the bar, by not preventing minors from consuming alcohol there, by not summoning post-altercation medical assistance, and by not preventing drunken minors from driving.

Holding: Security company is statutorily immune from liability because it did not actually serve alcohol, and the statute does not punish acquiescence or mere inaction.

Comment: California Business and Professions Code section 25602 precludes liability for those who serve alcohol to already intoxicated persons, when those persons are later injured. One may be liable however, under section 25602.1, if the injured person is a minor. This exception applies only when a party furnishes the minor with alcohol. There is no punishment for acquiescence, and the statute creates no duty to prevent a minor's consumption.

Rosen v. State Farm General Insurance Co. (2003) 30 Cal.4th 1070

Type: Insurance contract interpretation

Nutshell: The terms of a clear, unambiguous contract will be upheld.

Facts: Homeowner submitted a claim to his homeowner's insurance carrier for the cost of repairing two decks. Homeowner repaired the deck after a contractor discovered severe deterioration in the supporting frame. Homeowner believed the decks were in a state of *imminent* collapse, entitling him to benefits under a policy which stated insurer "insures only for direct physical loss to covered property involving the sudden, entire collapse of a building...Collapse means actually fallen down or fallen into pieces. It does not include settling, cracking, shrinking, bulging, expansion, sagging, or bowing."

Holding: This policy unambiguously requires actual collapse, therefore costs for preventing imminent collapses are not covered.

Comment: The mutual intent of the parties at the time of creation of the insurance policy governs, and if at all possible, that intent will be construed solely from the written provisions of the document. If the policy language is clear and explicit, it governs. If it is ambiguous, however, the ambiguity will be resolved in favor of and in accordance with the reasonable expectations of the insured.

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<u>Intel Corp. v. Hamidi</u> (2003) 30 Cal.4th 1342

<u>Type</u>: Unauthorized email as a trespass to chattels

<u>Nutshell</u>: Under California law, the tort of trespass to chattels does not extend to an electronic communication that neither damages the recipient computer system nor impairs it's functioning.

<u>Facts</u>: Former Intel employee sent six mass emails over 21 months to thousands of employee addresses on Intel's electronic mail system, criticizing Intel's employee practices. There was no evidence that the employee breached Intel's computer security to obtain the addresses, nor that Intel's computer system was damaged or its functionality impaired, nor that Intel was prevented from using its computers for any measurable length of time. Some staff time was consumed in trying to block further messages, and some employees were distracted by the emails. Intel sued, seeking injunctive relief based on a trespass to chattels theory.

<u>Holding</u>: Since there was no injury to Intel's computer system and no interference with its ordinary and intended operation, the theory of trespass to chattels cannot succeed.

<u>Comment</u>: Notwithstanding the inapplicability of trespass to chattels theory, emails are not exempt from the ordinary rules of tort liability. Various theories may apply, such as interference with prospective economic relations, interference with contract, intentional infliction of emotional distress, and speech-based torts such as defamation. Furthermore, the facts of this case do not present issues regarding commercial email ("spam"), which the legislature has specifically addressed statutorily. Additionally, the issue of emails containing viruses or other destructive computer coding has not been explored.

<u>Hameid v. Nat'l Fire Ins. Of Hartford</u>

<u>Type</u>: Duty to defend

<u>Nutshell</u>: Oe-on-one solicitation of a few customers does not give rise to the insurer's duty to defend the underlying lawsuit pursuant to a CGL policy providing coverage for advertising injury.

<u>Facts</u>: Mr. Hameid opened a hair salon near a competing salon. Shortly thereafter, two hairdressers from the competitor left and rented work stations from Hameid, taking most of their customers with them.

The competitor sued Hameid and the hairdressers for (1) misappropriation of trade secrets, (2) unfair competition, (3) breach of contract, (4) breach of the implied covenant of good faith and fair dealing, (5) intentional interference with prospective economic advantage, (6) negligent interference with prospective economic advantage, (7) civil conspiracy, and (8) injunctive relief. The competitor claimed that all three defendants

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possessed "trade secrets," including its "customer list, price list and pricing policies," and that the defendants had "misappropriated the above-described trade secrets by committing certain acts," including: utilizing the customer list in order to identify and solicit its customers, and using its confidential price list and pricing policies to undercut it. As to Hameid specifically, the competitor alleged direct misappropriation and unfair competition, conspiratorial activity with the codefendants, and an agency relationship with them.

Hameid's carrier denied coverage. After Hameid defensed the case, he sued the carrier for bad faith and breach of contract. The trial court granted summary judgment, finding that the underlying lawsuit claimed misappropriation of trade secrets, and not "advertising injury" as defined in the policy. The appellate court reversed, and the California Supreme Court granted review.

Holding: The term "advertising injury" as used in the CGL policy requires widespread promotion to the public such that one-on-one solicitation of a few customers does not give rise to the insurer's duty to defend the underlying lawsuit.

The Court rejected the argument that its definition of advertising would effectively preclude small businesses from ever invoking their rights to coverage for advertising injury liability. "Under the proposed definition of 'advertising,' small businesses like Hameid's may still rely on CGL coverage for 'advertising injury' if they place spots on the radio or television, buy space on billboards or bus benches, or take out advertisements in newspapers directed to the public at large, and their content caused advertising injury. Therefore, we conclude that excluding personal solicitations from the definition of 'advertising' in the CGL insurance policy will not foreclose small businesses from invoking their rights under CGL insurance policies or from otherwise purchasing insurance protection that does cover potential liability for such solicitations."

Here, the competing salon alleged that the hairdressers made telephone calls and sent mailers to the competitor's customers advising them of their new location and of Hameid's lower prices. These activities were mere "solicitation," not "advertising."

Comment: The allegations asserted against Hameid are very popular in litigation. Insureds have continually attempted to secure coverage, or a duty to defend, under the advertising injury clauses of CGL policies. This decision restricts coverage and the duty to defend to cases where the insured has engaged in "advertising" as it is commonly understood.

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George Kapsimallis v. Allstate Insurance Company

Type: Coverage - Property - Date of Loss

Nutshell: Inception of the loss commencing one-year statutory and policy period to bring action against insurer was point in time when appreciable damage occurred and was or should be known to the insureds.

Facts: Section 2071 sets forth the standard form required for all fire insurance policies, which includes insurance against loss caused by earthquake. (§ § 102, subd. (a); 2070.) This standard form provides that any action on the policy against the insurer must be commenced within 12 months after the "inception of the loss." (§ 2071 ["No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss"].)

George and Priscilla Kapsimallis and others filed a lawsuit against Allstate Insurance Company, alleging Allstate had intentionally denied valid claims for benefits after the Northridge earthquake by improperly using January 17, 1994 as the date of loss for all claimants to establish whether a suit had been commenced within one year after a loss, as required by Allstate's policies, rather than determining the date of loss individually based on when the claimant reasonably should have discovered appreciable damage caused by the earthquake.

Mr. and Mrs. Kapsimallis alleged that their property was damaged in the earthquake, but that they did not discover the damage until some time later.

The trial court, assuming Allstate had in fact used January 17, 1994 as the date of loss for all claimants, found the practice proper as a matter of law and granted a motion for judgment on the pleadings, holding plaintiffs could not allege a breach of contract, bad faith or a Business and Professions Code section 17200 violation.

Holding: Reversed. The California Supreme Court referenced an earlier decision, Prudential-LMI v. Superior Court. In that case, the Court held that "'inception of the loss' should be determined by reference to reasonable discovery of loss and not necessarily turn on the occurrence of the physical event causing the loss." The Court's opinion makes plain its definition of "inception of the loss" is based on the standard form language in section 2071, which is incorporated into all fire insurance policies: "California law supports the application of the following delayed discovery rule for purposes of the accrual of a cause of action under section 2071." The delayed discovery rule of Prudential-LMI, therefore, applies regardless of the nature or severity of the physical event causing the loss.

“To be sure, based on the magnitude of the Northridge earthquake, many insureds could not help but notice appreciable damage immediately; therefore, the inception of the loss

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for them occurred on January 17, 1994, the date of the earthquake." "Whether plaintiffs will be able to prove their delayed discovery allegations and demonstrate their discovery of appreciable damage was reasonable, as required by Prudential-LMI, remains to be seen."

Comment: The California Supreme Court has clarified that analysis of inception of the loss, even for catastrophic losses, requires more than merely looking at the date of the event, even though that may seem like the most likely date for inception of the loss.

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February Luncheon: Barker Law Group's Legal Update for the San Diego Insurance Adjusters Association (SDIAA)

Here's a New Year's resolution for you: keep current with legal developments affecting casualty insurance in California.

Please attend the SDIAA lunch presentation on February 12, 2004 for a review of some interesting legal developments and how they affect your work.

Thursday, February 12

11:00 Check-in / 12:00 Luncheon Presentation

Marina Village - Catalina Room
1936 Quivira Way, San Diego
Directions from Interstate 5

Take the Sea World Drive exit. From Sea World Drive, take West Mission Bay Drive, on your right. When you see a large green sign that says Quivira Road, get in the farthest left of the two left turn lanes. Turn left, go one very short block and turn left again. Drive about one half mile, and Marina Village will be on your right.

Presented by
Douglas H. Barker

and
Christopher W. Olmsted

Members: With RSVP $20 Without RSVP $25
Non-Members: With RSVP $25 Without RSVP $30

Please RSVP to SDIAA:
Contact Erin Orr (619) 278-5458 / erin.orr@ucop.edu
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