Summer 2009

The LITIGATOR

VOLUME VIII OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 2

Inside This Issue

Finding Solutions Takes Teamwork, and You Can Count on CCTLA

By: David Lee, CCTLA President

Once again, as this issue goes to press our city, our state, and the nation have significant problems. The financial challenges facing the county clinics and other public service agencies are growing each day. The solution to these problems is beyond the scope of what we as an organization can do. As individuals, this is the time to help in whatever way we can.

As an organization, what we can do is continue our efforts to bring you educational programs that help you do your job better. To that end, the listserve has continued to be a tremendous resource. And again, thank you to all who have taken the time to share your suggestions, advice, and work product.

What we also can do as an organization is offer moral support. This is an adversarial process that we are involved in. There are those days when you are driving to work and realize that on the road somewhere is someone else driving to work who wants you and your client to fail. Sometimes it helps to realize that we are all in this together. Some of our members work in fairly sizeable firms and have the opportunity to get constant support and reinforcement. Many of us are sole practitioners or have very small firms and do not have that level of support.

There was a time when more lawyers were downtown and would frequently meet at the bar to swap stories and get a sense of community. In these more health-conscious and socially responsible times, that is no longer the case.

Let me suggest to you that the Question-and-Answer luncheons that Jack Vetter hosts each month do offer a sense of community and often provide very useful information. The format is simple: The group gets together and somebody presents a question that they are dealing with, and the group makes suggestions. Very straightforward, very low key, and less formal than our regular luncheon meetings at the Firehouse. Jack is by nature a very helpful person, and the group will vary from month to month. The luncheons are the second Tuesday of each month.

Another useful service CCTLA offers is the mentoring program. The bulk of the work is done by Allan Owen, Jack Vetter and Chris Whelan. Each of them has a mountain of experience and really do wish to help. They will do everything from offering

Continued on page 13

Allan's CORNER

By: Allan J. Owen

Here are some recent cases that were culled from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* Cites.

Landlord Liability. In Tan v. Arnell Management Company, 2009 DJDAR 1499, plaintiff was shot in an attempted carjacking in the common area of his apartment. In a 402 hearing, the court took evidence of three prior violent crimes in the common areas of the complex, and the court ruled they were not sufficiently similar to the crime committed on plaintiff to impose a duty on defendants to protect the tenants. Judgment was granted for defendants. Plaintiff wanted the defendants to install gates on the entrance roadway and was not asking that defendant undertake ongoing surveillance or monitoring or do anything that would necessitate the expenditure of "significant funds." Plaintiff's expert opined that when gates were installed in crime areas, the rate of violent crime goes down. Appellate court reversed with an excellent discussion of the requirements of the Anna M. case (6 Cal 4th 666). The higher the burden to be imposed on the landowner, the higher degree of foreseeability required. But where the burdens are minimal, the amount of reasonable foreseeability required is lower. This is a must read for anyone who has a criminal act on property where they are suing the landlord.

Insurance Coverage. In Safeco v. Parks, 2009 DJDAR 1373, Parks was walking on Highway 101 when he was

Continued on page 20

Attorneys converge on Sacramento

By: Jack Vetter

Lobby Day in April was a roaring success. Several hundred attorneys from all over the state made contact with the offices of virtually every legislator in a marathon of education and persuasion on civil justice issues

Consumer Attorneys of California (CAOC) provided packets of information about three specific bills on our agenda. The first bill is designed to give consumers notice of the age of the tires they buy. Tires degrade, whether they are in used or not and reach a break point at six years.

The second bill provides court guidelines when asked to break down a structured settlement and allow the annuitant to sell it at a severe discount. Driven by ads and some unscrupulous, overbearing sales pitches on television and elsewhere, the courts could curb abuses.

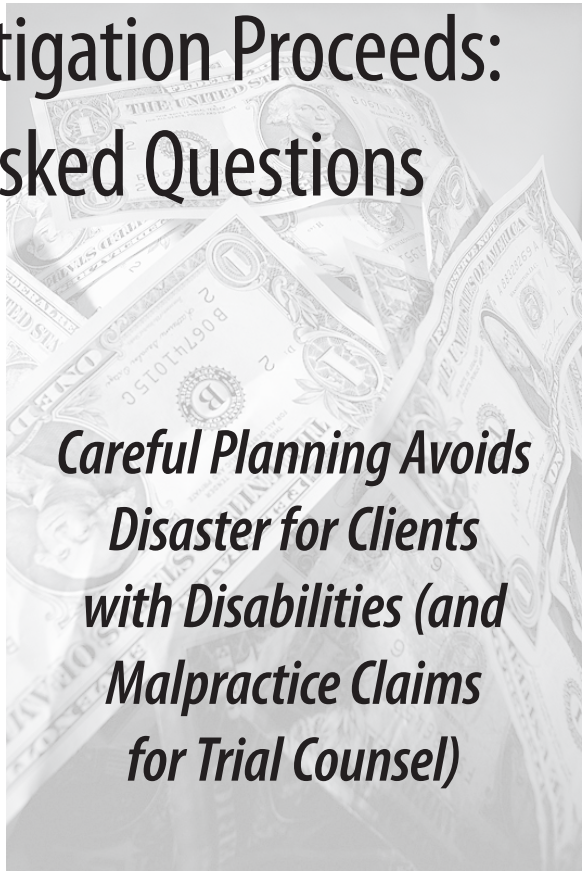
The third bill requires an insurer to prove intent-to-deceive to rescind a policy. In some cases, insurers comb the original application of the insured after a claim has been submitted to locate discrepancies in order to seize on an excuse to claim misrepresentation, whether relevant to the current claim or not. The result has been denial of coverage for inadvertent and insignificant differences innocently included in the original application for coverage.

The only blemish on the otherwise interesting and pleasant day came when the numbers were announced for participation from the various local TLAs. More than 30 lawyers each from three OTHER counties recognized the importance of this once-a-year direct contact with our representatives in the Capitol.

When the number of professionals from 500 miles away exceeds the folks from down the street, there is something missing in the dedication needed. Uniting with other trial lawyers to address the rights of our clients is essential, not only for those we represent, but for our own livelihood. We hope you'll join us next year.

Special Needs Trusts and Litigation Proceeds: Answers to Frequently Asked Questions

By: Brian D. Wyatt, Esq.



Plaintiff's counsel often has questions about how to plan for litigation proceeds when the client is disabled and receiving government assistance. There's no doubt that failing to plan correctly can disadvantage the client for life. It can also lead to a nasty lawsuit against the plaintiff's lawyer, despite the otherwise excellent work he or she may have done on the underlying case.

The main tool we employ for those litigation clients who depend on needs-based assistance is a first-party Special Needs Trust (SNT). That's because a properly drafted first-party SNT is a "safe harbor" under all applicable state and federal law. In other words, if a first-party SNT is constructed with the plaintiff's particular circumstances in mind, and if it fully comports with the applicable judicial and administrative rules, the SNT will allow the client *both* to benefit from the litigation proceeds *and* continue to receive needs-based assistance.

This article will identify those circumstances that require special needs planning, the options available to litigation clients who have disabilities and the particular issues plaintiff's counsel must understand in this tricky area.

Which clients need special planning?

It is important to know that not every client with a disability will actually require a first-party SNT. The threshold question is always

Continued on page 4

Special needs trusts: Plan carefully to avoid disaster

Continued from page 3

whether the client currently receives, or may in the future receive, *needs-based* government assistance.

Needs-based assistance includes Medi-Cal ("Medicaid" in states other than California) and Supplemental Security Income (SSI). Access to these two programs is what the client maintains with their SNT.

In contrast, neither Medicare nor Social Security Disability Insurance (SSDI) is a needs-based program. If that's all the client has, we will not look to establish a first-party SNT. That's because Medicare and SSDI are entitlements that do not depend on the client's financial circumstances.

However, to receive Medi-Cal and SSI, the client must have an extremely limited income and no more than $2,000 in certain non-exempt assets (Cash is not an exempt asset). This means, essentially, that the client must be committed to a sub-poverty level existence or they will be disqualified. A client in this situation must not receive their litigation proceeds directly.

Fortunately, if the litigation proceeds (and other non-exempt assets) are held in a qualified first-party SNT, they will be disregarded in determining whether the client is eligible for Medi-Cal and SSI.

Is a Special Needs Trust ever appropriate for a litigation client who does not receive needs-based government assistance?

A special needs trust may be appropriate for a litigation client even if they do not currently qualify for Medi-Cal or SSI. The client may require needs-based assistance in the future as their financial and personal circumstances evolve. In addition, an SNT has the added benefit of being a fully discretionary spendthrift trust. That means an SNT can shield a vulnerable client from their own inexperience or ineptitude when it comes financial management and from unscrupulous persons who might try to separate them from the funds.

Why does needs-based assistance matter so much to clients with disabilities?

Medi-Cal is typically the only source of medical coverage for clients with disabilities. Private health insurance is generally not an option because their disabilities are pre-existing conditions or because they simply are not employable.

If these plaintiffs receive their litigation proceeds directly, they will have to spend the money on their food, shelter and medical care until they have less than $2,000. Only then can they re-qualify for Medi-Cal and SSI. Unfortunately, re-qualifying in this way also means they will be forced to endure a meager existence.

The better option for them is a first-party SNT that allows them to benefit from their litigation proceeds and have their basic expenses covered by Medi-Cal and SSI.

What alternatives are there to using a Special Needs Trust?

Although SNTs are the primary means of protecting most clients with disabilities, they may not be appropriate in every case. For example, a plaintiff-client whose litigation proceeds are relatively small (e.g., $10,000) could simply spend the money on so-called "exempt assets," which will not disqualify them from needs-based assistance. These assets might include one automobile or even a primary residence.

The funds could also be used to pay off existing debts.

Another alternative could be for the plaintiff-client to give their proceeds to a third party. Because this would result in a period of disqualification from SSI and Medi-Cal, a gratuitous transfer is not likely to be the preferred option.

Frankly, the best course of action really depends on the client. If the goal is continued access to needs-based assistance and long-term use of the funds for the client's care, a first-party SNT is usually indicated. But the use of an SNT in conjunction with one or more of the alternatives noted above might be appropriate as well.

Isn't a structured settlement annuity good enough for those clients with special needs?

When a physical injury case yields significant monetary damages, a structured settlement is quite common. These are annuity-funded, income-tax-favored payments made periodically to the plaintiff for the rest of his or her life.

Combining this kind of structured settlement with a first-party SNT is usually the most effective strategy. At the outset there will typically be a lump-sum payment to the plaintiff to cover the attorney fees and costs (The payment may also include any pre-existing Medi-Cal lien). In addition, the settlement agreement will provide for a lump-sum payment for the plaintiff and a separate settlement annuity. The annuity will create continuing payments over an agreed-to period of time, subject to the plaintiff's continued survival. These lump-sum amount and ongoing payments will all be assigned irrevocably to the first-party SNT.

To plan thoughtfully for a litigation recovery, counsel must make a realistic assessment of the future requirements of the client. Unfortunately, the trial attorney is often convinced to "over-structure" a settlement. Far too much cash funds the annuity, and not enough is left outside to care for the client's future needs. When this happens, it's because not enough attention was given to the future needs of the client. What if, for example, the client wants to purchase a home or an automobile with the proceeds years into the future? If there's too much cash in the structure, they won't be able to do it.

This is where a plaintiff's attorneys can really get into trouble.

What kinds of first-party Special Needs Trust are there?

There are two types of first-party SNTs. The first is commonly referred to as a "Litigation SNT," a "payback trust" or a "(d)(4)(A) SNT." A (d)(4)(A) SNT will contain the litigation proceeds and other assets of a person with a disability under age 65. It must be established for the individual's benefit by their parent, grandparent or legal guardian, or by the court. Medi-Cal will receive all amounts remaining in the trust on the beneficiary's death up to the total amount of Medi-Cal payments actually made.

Special needs trusts: Plan carefully to avoid disaster

The other type of first-party SNT is commonly known as a "pooled trust" or a "(d)(4)(C) SNT." A pooled trust is established and managed by a non-profit organization. The organization "pools" the assets of a number of beneficiaries with special needs for investment purposes, but essentially accounts for each beneficiary's share separately. The individual, or their parent, grandparent or guardian, or the court establishes the separate account with the pooled trust. Upon the beneficiary's death, Medi-Cal will receive all amounts in the account (not retained in the trust) up to the amount of the beneficiary's paid benefits..

Does establishing a first-party Special Needs Trust always require going to court?

A person with a disability is not permitted to establish their own (d)(4)(A) SNT. But that doesn't mean we always need court involvement. Determining the best procedural path can be a challenge and will certainly depend on the client's particular circumstances.

In essence, the choice of procedure will vary based on (a) whether there is a parent, grandparent or legal guardian who is willing to help, or, if not, whether a court order can be obtained; (b) whether the client has legal capacity; and (c) whether the client is a minor or has attained more than 65 years of age.

If someone is 65 or older, it is simply not possible to establish a (d)(4)(A) SNT. We will ordinarily advise some combination of joining a pooled trust, purchasing exempt assets, and spending-down if the client needs to qualify, or needs to remain qualified, for needs-based assistance.

The only circumstance where a first-party SNT *must* be established by a court is if we are planning for a minor or incapacitated adult who receives both a litigation recovery and needs-based assistance. In such cases, we will file a petition, either as an attachment to the minor or incompetent's compromise or as a separate filing in Probate Court. Probate Code Sections 3600-3613 govern this process and require that the court make certain findings of fact. This is the most expensive and complicated way to establish an SNT. California Rule of Court 7.903 will apply absent good cause, requiring trustee bond, court-supervised accountings and court authorization for trustee and attorneys fees.

If the client has capacity and is a legal adult under 65 years of age, but does not have a parent, grandparent or legal guardian willing or able to establish an SNT, we can use a simpler attorney-in-fact petition under Probate Code Section 4541. Although the procedures under Probate Code Sections 3600-3613 are available even if the client has capacity, the additional findings of fact required for Probate Code 3600-3613 petitions make the abbreviated process under Section 4541 a much better option. In many counties, Rule 7.903 will not even be applied to Section 4541 cases, meaning that there will be no ongoing/expensive court supervision of the SNT.

Of course, the easiest case occurs when there is an adult client with capacity, who is under 65, and who has a willing parent, grandparent or guardian to help. The type of (d)(4)(A) SNT used in such cases is called a "seed trust," meaning that once the parent, grandparent or guardian establishes the trust, the adult person with a disability who has capacity can transfer his or her own assets to the trustee of the trust. This is the most efficient way to establish an SNT for a plaintiff with a disability.

Who should serve as trustee of a client's Special Needs Trust?

Who will serve as the trustee of a first-party SNT is one of the most important decisions to make. Selecting the wrong person can defeat the entire purpose of the trust, as assets will be mismanaged and perhaps even distributed directly to the beneficiary. Family members often have difficulty saying "no" to the entreaties of SNT beneficiaries, which means the funds designed to last for life are spent prematurely. Investment in risky or underperforming assets is also a possibility.

That's why using an experienced bank or private professional fiduciary may be preferable. Although they may be less responsive, these institutions and professionals have greater skills managing funds, performing the required accounting tasks, and keeping records. They are more likely to avoid conflicts of interest, carry out fiduciary duties, and solve problems relating to the undue influence of family members. The additional cost is usually worth it because the trust is more likely to actually work.

How must a Special Needs Trust be administered after settlement?

The client must understand the consequences of establishing a first-party SNT. To be sure, if operated correctly, the trust will protect the client's continued access to essential needs-based assistance. But not every kind of distribution from the trust is acceptable. In particular, the trustee may only use the trust corpus for the "sole benefit" of the beneficiary during the beneficiary's life. This means that no money may be distributed to his or her minor child or spouse—not even the tiniest gratuitous transfer is allowed. Further, the trustee must refrain from transferring cash directly to the beneficiary. SNT beneficiaries must report all income on a monthly basis, and every dollar of income over $20 will reduce their SSI benefits by an equivalent amount.

Correctly establishing a first-party special needs trust, carefully funding it with the right combination of cash and structured settlement, and appropriately operating it will provide a lifetime of significant benefit to a client with a disability. For the trial attorney, this means tremendous satisfaction and peace of mind. For the client and the client's family, it means a higher quality of life.

***

Brian D. Wyatt is a special needs, estate planning, probate, and asset protection attorney with offices in Sacramento and Roseville, California. In addition to CCTLA, he belongs to the Academy of Special Needs Planners, Wealth-Counsel, and the National Academy of Elder Law Attorneys. Contact him at brian@wyattlegal.com or visit his website at www.wyattlegal.com.

RECENT VERDICTS, SETTLEMENTS & APPEALS

SETTLEMENTS:

David Rosenthal of Demas & Rosenthal settled John Doe vs. AM/PM Mini-Mart for $750,000.

Plaintiff pulled into the AM/PM at 29th and J streets at 2:30 a.m. on a Sunday morning to see why a large after-club party crowd had gathered in the parking lot. Plaintiff was driving a convertible Jaguar with spinner wheels. He soon became intimidated by the crowd and tried to leave. One of the individuals in the crowd pulled a gun, commanded plaintiff to exit the vehicle, then shot him twice in the neck from behind. The shooter, who claimed to be intoxicated and under the influence of Ecstasy, was later convicted of attempted murder and attempted carjacking. He testified he was attempting to steal the vehicle for the rims.

Plaintiff's primary injuries were cerebral artery stroke, partial vocal cord paralysis, a C1 fracture, and fractured teeth. He made a slow but remarkable recovery.

AM/PM was sued for inadequate security and preventive measures. Defendants made a motion for summary judgment based on the line of cases that require heightened foreseeability in order to impose a duty to prevent third-party criminal conduct, contending that past crowds were harmless groups of people looking for a good time. The motion was defeated with evidence that the crowds repeatedly gathered gathered at the AM/PM on weekends to drink and do drugs and that there had been a prior shooting on the premises under similar circumstances. Defendants maintained that its policy of calling police to disburse loiterers was adequate and relied on videotapes showing several police vehicles at the AM/PM within the half hour prior to the shooting as evidence that additional security would not have prevented the incident. Defense counsel Jerry Chong, Law Offices of Jerry Chong & Alice Wong

Vanderlaan v. Kalashian, prosecuted by Jonathan Hayes and Roger Dreyer, was settled at a mediation with Nicholas Lowe, Esq. for $965,000. Plaintiff was in rear-end accidents in January and April of 2006. The incidents resulted in neck and lower back pain. Ms Vanderlaan underwent a discectomy at L5-S1, with no fusion. The case settled at mediation with Nicholas Lowe, Esq., for $965,000.

Lee v. Pier1 Imports, handled by Joe Yates. settled pre-litigation for $225,000. Medical expenses were $18,000, income loss was $5,000. Medical liens were reduced to less than $2,000. Plaintiff was looking at plates in Pier1 when a display rack fell on her foot, severing her great toe tendon, requiring surgical repair, and resulting in residual scarring and pain. The case settled pre-litigation for $225,000. Medical expenses were $18,000, and income loss was $5,000. Medical liens were reduced to less than $2,000.

Chris Wood settled Orduno v. M-3 Construction at mediation for $850,000. This lawsuit arose from a construction-site incident that occurred in El Dorado Hills. Plaintiff was employed by the general contractor, T & S Construction as a laborer. While working, M-3 Construction asked that Plaintiff and an excavator come over and unload rebar from a delivery truck as M-3 did not have a way to get the rebar unloaded and placed into the forms. As a favor, Plaintiff and his operator went over and began unloading the rebar. While the excavating operator was lifting a bundle of rebar, he dropped it approximately one foot back onto the trailer. The impact startled Plaintiff, who was standing at the end of the trailer, and caused him to fall off the side of the flat bed trailer. His ankle caught in a bundle of rebar, and he sustained a significant knee injury. Plaintiff sued M-3 Construction, which was the contractor that contracted and was responsible for the placement of the rebar. M-3 argued that Plaintiff was injured by his own co-worker, he was a special employee, and his fall from the trailer was his own fault. The case settled a mediation for $850,000.

Bill Owen settled a wrongful death case for a 66-year-old widow for $1,200,000. An additional $300,000 was split among adult children. A speeding car hit Plaintiff's husband, who was on a motorcycle on Highway 50, heading home from Tahoe. Settled with Allied adjuster. Defendant was a young adult.

APPEALS

Timmons v. UPS: the Ninth Circuit reversed an order granting summary judgment and judgment in favor of the defense as to Plaintiff's claims of disability discrimination. Timmons, represented by Jill P. Telfer, worked 23 years as a truck driver for UPS when he required accommodation to continue working. Because of UPS' refusal to reasonably accommodate, Timmons was forced into medical retirement. The case has been remanded to be tried. Several attorneys of Paul Hastings represent UPS.

Carr v. Washington Mutual: The 5th District Court of Appeals reversed Merced Superior Court Judge Kirihara's JNOV order and $60,000 defense cost judgment and reinstated Plaintiff's judgment where Plaintiff prevailed with a $800,000 jury verdict against Washington Mutual for disability discrimination. The verdict is comprised of $118,000 in economic damages and $682,000 for pain and suffering. Plaintiff was a 14-year bank teller who required reasonable accommodation to continue working after being robbed at the bank at gunpoint. The bank argued the Plaintiff was still an employee and that it would accommodate once her doctor released her to return to work. Counsel for the defense were Charles Taylor and Kristen Zumwalt of Lang, Richert & Patch. Jill P. Telfer represented the Plaintiff.

Trial Lawyers For Public Justice

Wyeth v. Levine: U.S. Supreme Court Refuses to Swallow Big Pharma's Preemption Pill

By: Leslie Brueckner, Public Justice Staff Attorney

Consumer advocates across America heaved a collective sigh of relief when, on March 4, 2009, the U.S. Supreme Court rejected Wyeth Pharmaceutical's bid to wipe state law failure-to-warn claims against drug manufacturers off the litigation map. In Wyeth v. Levine, 2009 WL 529172 (U.S.Vt.), one of the most high-profile cases decided this term, the Court held 6-to-3 that federal law does not preempt lawsuits against prescription drug manufacturers for failing to warn of their drug's dangers. The decision is being hailed as a resounding victory both for victims' rights and for public health and safety.

A Tragedy That Could Have Been Avoided

Wyeth was filed on behalf of a professional guitarist, Diana Levine, who lost an arm after an injection of the nausea drug Phenergan, which is manufactured by Wyeth (She was given the drug to combat nausea associated with migraine headaches). The injectable form of Phenergan can be administered intravenously through either the "IV-push" method, whereby the drug is injected directly into a patient's vein, or the "IV-drip" method, whereby the drug is introduced into a hanging intravenous bag and slowly descends through a catheter inserted in a patient's vein. The drug is corrosive and causes irreversible gangrene if it enters a patient's artery.

Ms. Levine's injury resulted from an IV-push injection of Phenergan that inadvertently hit an artery. As a result, her arm developed gangrene, and doctors amputated first her right hand and then her entire forearm. In addition to her terrible pain and suffering, Ms. Levine lost her livelihood as a professional musician.

A Vermont state court jury ultimately returned a verdict for the plaintiff of $6.7 million. During the trial, Ms. Levine presented evidence of at least 20 incidents

Continued on page 8

High Court Refuses to Swallow Big Pharma's Preemption Pill

Continued from page 7

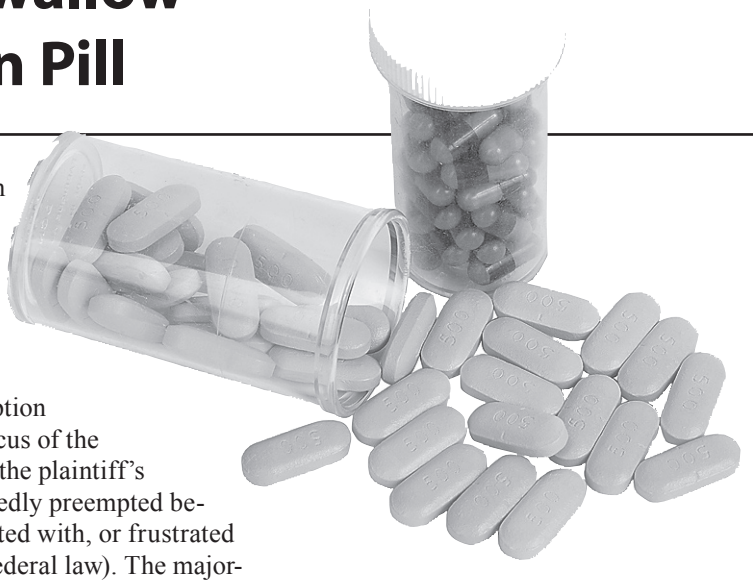
prior to her injury in which a Phenergan injection resulted in gangrene and amputation. The jury found that Wyeth should have analyzed the accumulating evidence regarding the risks of Phenergan and added a stronger warning about IV-push administration of the drug.

On appeal to the Vermont Supreme Court, Wyeth attempted to avoid liability by arguing that Ms. Levine's failure-to-warn claim was preempted on the ground that Wyeth could not legally have changed the drug's label without prior approval from the United States Food and Drug Administration ("FDA"). The Vermont Supreme Court rejected this argument, holding that the jury's verdict did not conflict with the FDA's labeling requirements because, under the agency's "changes being effected" ("CBE") regulation, Wyeth could have added stronger warnings against IV-push administration without prior agency approval. See Levine v. Wyeth, 944 A.2d 179, 185-86, 188 (2006). The Vermont Supreme Court wrote: "The litigation at issue here does not pose a direct and positive conflict with federal law, and, thus, there is no basis for federal preemption." *Id*. at 192.

Wyeth sought U.S. Supreme Court review in March 2007. Most Court watchers expected that the petition would be denied, given that the Vermont Supreme Court's ruling did not conflict with the decisions of any federal Courts of Appeals or state high courts. Even the United States Solicitor General's Office, which filed an *amicus* brief in favor of FDA preemption, urged the court to deny review given this lack of a split. But the Court reached out and took the case anyway, in an ominous move that sent shudders through the consumer rights community.

The U.S. Supreme Court Just Says No

As it turns out, however, these concerns were unwarranted. In the U.S. Supreme Court, both Wyeth and the United States (as amicus) took the position that Ms. Levine's claims were impliedly preempted because they conflicted with the FDA's decision to approve the drug's warning label (Because the Food Drug and Cosmetic Act [FDCA] lacks an express preemption clause, the sole focus of the case was whether the plaintiff's claims were impliedly preempted because they conflicted with, or frustrated the purposes of, federal law). The majority opinion, authored by Justice Stevens, rejected this contention, holding that the mere fact of agency approval of a drug's label does not absolve the manufacturer of its responsibility to add to or strengthen the label to warn the public of its risks. *See* 2009 WL 29172 at *7-9.



In so ruling, the Court first reaffirmed the strong presumption against federal preemption in cases involving the historic police powers of the States. It wrote: "In all pre-emption cases, and particularly in those in which Congress has legislated...in a field which the States have traditionally occupied,...we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. at *5 (citations, internal quotations, and footnote omitted).

In light of this presumption, the majority went on to hold that the FDCA does not preempt Ms. Levine's claims. The Court first addressed Wyeth's argument that Ms. Levine's claims are preempted because, said Wyeth, "it is impossible for [the drug manufacturer] to comply with both the state law duties underlying those claims and its federal labeling duties." *Id*. at *7. The Court rejected this argument in light of the FDA's CBE regulation, which "permits a manufacturer to make certain changes to its label before receiving the agency's approval." *Id*. *7-9.

The Court went on to chastise Wyeth for its "cramped reading" of the FDA's regulatory framework. *Id*. at *8. "Wyeth suggests," Justice Stevens wrote, "that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. Yet through many amendments to the FDCA and to FDA regulations, *it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times.* It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug on the market." *Id*. (citations omitted; emphasis added). On this basis, the Court rejected Wyeth's attempt to shirk its responsibility for the content of its warning labels.

Justice Stevens was equally adamant in his rejection of Wyeth's argument that Ms. Levine's claims would "obstruct the purposes and objectives of federal drug labeling regulation." *Id*. at *10. The Court rebuffed this argument in plain terms, stating "Wyeth contends that the FDCA establishes both a floor and a ceiling for drug regulation ...The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary." *Id*.

The Court went on to emphasize the important role damage suits play in protecting the public, stating that "[t]he FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct

High Court Refuses to Swallow Preemption Pill

Continued from page 6

compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times." *Id*. at *12 (footnote omitted).

In finding no preemption, the Court also went out of its way to reject the FDA's view, as expressed in the preamble to a 2006 labeling regulation, that its approval of a prescription drug's label "preempts conflicting or contrary State law." *Id*. at *10 (quoting 71 Fed. Reg. 3922, 3934-35 (2006)). Justice Stevens found that the FDA's preamble did not "merit deference" because it was not "an agency regulation with the force of law"; instead, the preamble constituted a "mere assertion that state law is an obstacle to achieving [the agency's] statutory objectives." *Id*. at *11. The Court also rejected the FDA's preamble on the grounds that it was promulgated without any notice to the public or opportunity to comment; it stated a position "at odds with what evidence we have of Congress' purposes"; and, last but not least, "it reverses the FDA's own long-standing position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA's regulation of drug labeling during decades of coexistence." *Id*. at *11-12. The majority ultimately concluded that "Congress has repeatedly declined to preempt state law, and the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight." *Id*. at *13.

The majority's opinion in Wyeth did leave drug manufacturers a thin reed on which to rest their preemption hopes. In addressing Wyeth's impossibility argument, Justice Stevens noted that, "[o]f course, the FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its review of the manufacturer's supplemental application." *Id*. at *9. "But," he wrote, *"absent clear evidence that the FDA would not have approved a change to Phenergan's label,* we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Id*. (emphasis added). Justice Stevens cautioned that the burden of proving such a "clear evidence" defense lies squarely on the drug manufacturer, id., and that "[i]mpossibility pre-emption is a demanding defense." *Id*. In so ruling, Wyeth cut the vast majority of prescription-drug preemption arguments off at the knees.

Why Wyeth Matters

1. Holding Drug Companies Accountable. The first—and most important—reason Wyeth matters is because it halted Big Pharma's attempt to wipe out consumers' rights to sue for failing to warn of the true risks of their drugs. If Wyeth had gotten its way, no consumer would ever be able to sue for failure-to-warn, regardless of the extent to which the drug's label understates its potential risks.

This would have been a disaster. As

Continued to page 10

High Court Refuses to Swallow Preemption Pill

Continued from page 9

Justice Stevens noted, the FDA itself has admitted that it is unable to ensure the adequacy of prescription drug labels. See *id*. at *12 n.11 (quoting, *inter alia*, an FDA Science Board Report concluding that "the Agency suffers from serious scientific deficiencies and is not positioned to meet current or emerging regulatory responsibilities."). Among other things, the agency, when deciding whether to approve a drug label, is limited to the information that is submitted by the drug manufacturers themselves. Then, when new risks become known after a drug's label has been approved, the agency has only limited authority to force a manufacturer to change its label to reflect the newly discovered risks.

As Public Justice explained in an *amici* brief filed on behalf of editors and contributing authors of the *New England Journal of Medicine* (NEJM), the upshot is that, in many, many cases, drugs are left on the market with inadequate labels, even as the casualty statistics climb ever higher. *See* NEJM Brief in Support of Respondent, 2008 WL 3851616; *see also* David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-To-Warn Claims,* 96 Geo. L.J. 461 (2008).

Litigation is often the only way to dig up information regarding the true risks of prescription drugs. This information can, in turn, spur the agency to put pressure on the manufacturers to improve the labels. But without this critical "feedback loop" generated by prescription drug litigation, the agency would not have the information that it needs to pressure drug manufacturers to improve their labels. And, without litigation, the manufacturers would neither compensate victims nor have any financial incentive to correct their labels and provide consumers with adequate warnings. *See id*. at 491-96 (discussing how litigation uncovers information within the control of drug companies that is otherwise unavailable to the FDA).

In short, an adverse ruling in Wyeth would have been a catastrophe for public health. Victims of inadequately labeled drugs would have had no recourse to seek compensation for their injuries. The FDA would have been stripped of the invaluable information that is often unearthed during the course of litigation. The only winners in this scenario would have been drug manufacturers themselves, who could have continued to increase their profit margins unrestrained by the risk of litigation, at the direct expense of the hapless victims of inadequately labeled drugs.

Luckily, this parade of horribles was stopped in its tracks. Wyeth makes crystal clear that failure-to-warn litigation against pharmaceutical companies is here to stay. As Justice Stevens put it, "the [drug] manufacturer bears responsibility for the content of its label *at all times*." *Id*. at *8 (emphasis added). Consumer advocates could not have hoped for a clearer ruling.

But that's just the first reason Wyeth matters. As explained below, the decision could prove valuable in a number of other important respects.

2. Limiting the Scope of Implied Conflict Preemption: Wyeth is also important because it suggests that the U.S. Supreme Court may be backing away from finding implied preemption based on an alleged conflict with the purposes underlying federal regulations. Back in 2000, in what may come to be viewed as the high water mark of implied conflict preemption rulings, the Court decided Geier v. American Honda Motor Co., 529 U.S. 861, which held 5-to-4 that claims that a car was defective because it lacked an airbag were preempted by a federal regulation that permitted—but did not require—airbags to be installed in passenger vehicles. Geier's holding has been decried by many (including the four Justices who dissented in the case) as a radical—and unwarranted—extension of implied conflict preemption. *See* 529 U.S. at 911 (Stevens, J., dissenting) (criticizing the vague and "potentially boundless scope" doctrine of [implied conflict] preemption").

Since then, however, the Court has seemed to pull back from the type of "free-form judicial policymaking" engaged in by the Geier majority. *Id*. at 911 (Stevens, J., dissenting). In 2002, for example, the Court issued a unanimous decision in Sprietsma v. Mercury Marine, 531 U.S. 57 (2002), rejecting implied conflict preemption of state law claims that a boat engine was defective because it lacked a propeller guard. And just last year, in Altria v. Good, 129 S. Ct. 538 (2008), the Court refused to find implied conflict preemption of consumer-fraud claims against manufacturers of so-called "light" cigarettes.

And now comes Wyeth, in which six members of the Court (including Justices Breyer and Kennedy, who joined the *majority* decision in Geier), rejected implied conflict preemption. In so ruling, the majority narrowly limited Geier to its facts, holding that the decision in that case was based on the "complex and extensive" history of the substantive regulation at issue. *See* 2009 WL 529172 at *13 n.13. (In a remarkable opinion concurring in the judgment, Justice Thomas went so far as to assert that implied conflict preemption should be abandoned entirely on the ground that it "leads to the illegitimate – and thus unconstitutional—invalidation of state laws..." *Id*. at *25 (Thomas, J., concurring in the judgment)).

If this string of rulings is a portent of things to come, then defendants may be hard-pressed in the future to persuade courts to find implied conflict preemption, particularly in regulatory cases, like Geier, that invite courts to "[run] amok with our potentially boundless . . . doctrine of implied conflict preemption based on frustration of purposes ..." *Geier*, 529 U.S. at 907 (Stevens, J., dissenting). That would be very good news for everyone who cares about victims' rights and preservation of the civil justice system.

3. Reaffirming the Presumption Against Preemption. Wyeth also should put the final nail in the coffin of the argument that there is no presumption against preemption in cases involving "the historic police power of the States." In recent years, conservative forces have repeatedly argued that the presumption against preemption should not be applied in any preemption cases involving state law damage claims. *See*, e.g., Altria v. Good, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, 2008 WL 976401 at *4 (arguing that the presumption against preemption "ought to be laid to rest"); Warner-Lambert v.

High Court Refuses to Swallow Preemption Pill

Kent, Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners, 2007 WL 4205141 at *14 (arguing that "there is no basis in the text of the Constitution for a presumption against preemption in any circumstance."). The Supreme Court recently rejected these arguments in Altria v. Good, which applied a presumption against preemption in a consumer-fraud case involving so-called "light" cigarettes. *See* 129 S. Ct. 538, 543 (2008). By reaffirming the presumption against preemption yet again—this time in a case involving personal injury claims—Wyeth hopefully puts the issue to rest once and for all.

4. Curbing Federal Preemption by Regulatory Fiat. Wyeth also may help stem the tide of Executive Branch attempts to achieve preemption by regulatory fiat. Over the past few years, several federal agencies attempted to wipe out tort litigation against the industry they purport to regulate by including pro-preemption language in their regulations stating that, in the agency's view, state law claims against the regulated industry would frustrate federal purposes, and thus are preempted. *See*, e.g., Thomas O. McGarity, *The Perils of Preemption*, *Trial Magazine* (September 2008) (discussing pro-preemption preambles published by the FDA, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission); Catherine M. Sharkey, *Preemption by Preamble; Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227 (Winter 2007) (same).

The most notorious example of this practice was committed by the FDA itself, when it declared, in the preamble to a 2006 labeling regulation, that it possesses the exclusive authority to determine the content of prescription drug labels, and that state law failure-to-warn claims are impliedly preempted because they would conflict with the agency's labeling decisions. *See* 71 Fed. Reg. 3922, 3934-35 (2006). Even though this position represented a 180-degree reversal of the FDA's prior views on the matter (before the Bush Administration took power, the FDA enthusiastically endorsed tort litigation as complementing the agency's ability to ensure the safety of prescription drugs), a host of courts threw out failure-to-warn claims against prescription drug manufacturers on the ground that the FDA's newly minted preemption view was entitled to "deference." *See*, e.g., Colacicco v. Apotex, 521 F.3d 253 (3d Cir. 2008). (Colacicco, happily, was vacated and remanded in the wake of Wyeth.) A number of other courts—including the Vermont Supreme Court in Wyeth (*see* 922 A.2d at 193)—rejected the FDA's preamble as inconsistent with the FDCA and with the agency's own regulations and thus not entitled to any weight. *See*, e.g., Perry v. Novartis Pharmaceutical Corp., 456 F. Supp. 2d 678 (E.D. Pa. 2006).

Justice Stevens put an end to the debate, holding that "the [FDA's] preamble is at odds with what evidence we have of Congress' purposes and it reverses the FDA's own long-standing position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA's regulation of drug labeling during decades of coexistence." 2009 WL 529172 at *12. Based on this observation, the majority concluded that the FDA's "recently adopted position" is entitled to "no weight." *Id*. at *13.

This holding could prove invaluable in undercutting other agency's attempts to achieve federal preemption by including pro-preemption language in regulatory preambles. Of course, with a new administration in power, these sorts of regulatory power grabs may fall by the wayside. But so long as pro-preemption preambles remain on the books, manufacturers may attempt to exploit them by arguing that the FDA's preamble was uniquely flawed, thereby rendering Wyeth inapplicable to cases involving different products (and different preambles).

Although any such attempt would face substantial obstacles, given the Wyeth majority's stated distrust of "an agency's mere assertion that state law is an obstacle to achieving its statutory purposes," *id*. at *11, there will likely be further litigation in this area. And Wyeth's refusal to defer to the FDA's preamble will provide substantial ammunition in the fight to ensure that preemption remains where it belongs: in the hands of Congress, not the Executive Branch.

5. Recognizing the Value of the Civil Justice System. Finally, at a time when "tort reform" remains a constant threat notwithstanding the transfer of power in the White House, Wyeth provides a powerful reminder of the importance of the civil justice system in compensating victims and keeping America safe. With regard to the FDA, Justice Stevens observed that the agency itself has "traditionally regarded state law as a complementary form of drug regulation." *Id.* at * 12. The majority went on to note that "State tort suits uncover unknown hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information." *Id*.

Although Justice Stevens couched this observation in terms of the FDA, his language is broad enough to encompass all litigation involving defective products. And, although consumer lawyers already understand that tort suits help to "uncover unknown hazards" of dangerous products, thereby creating an incentive for manufacturers to make their products safer (and to warn of their risks), Wyeth's ringing endorsement of tort litigation cannot help but reach a larger audience. It is precisely this sort of public education that is needed to ensure that the civil justice system continues to play its role in making the world a safer place.

* * *

Leslie A. Brueckner has been a staff attorney at Public Justice for over 15 years. Among other victories, Ms. Brueckner served as lead counsel in Sprietsma v. Mercury Marine Corp., 537 U.S. 51 (2002), a federal preemption case unanimously upholding an injury victim's right to sue a manufacturer for failing to install propeller guards on its recreational motor boat engines.

To read the Supreme Court's decision in Wyeth, or to learn more about Public Justice, go to www.publicjustice.net. To contact Ms. Brueckner, email lbrueckner@publicjustice.net.

"Pillah" Talk©

Introducing Dorothee Mull

By: Joe Marman

Dorothee Mull, who has worked at the Sacramento Food Bank and Family Services for the last 17 years, is now both the Bridge Builders director and the Special Events coordinator. Bridge Builders is the program whereby senior volunteers are organized to assist in the various projects of the Food Bank. Last December, CTLA recognized Dorothee Mull with the Presidential Award for Humanity.

Dorothee grew up on a cattle ranch outside of Folsom and moved with the family cattle herd every summer to their family ranch in Sattley in the Sierra foothills. She got involved in drama at Folsom High School, and spent a summer at Priscilla Beach Theater in Plymouth, Mass. She studied drama with Jack Klugman in Pittsburgh. She moved to Los Angeles and graduated from USC in speech, hearing and drama. She moved back to Sacramento in the early 50s and became the first speech therapist hired by Sacramento County.

Ms. Mull got involved in the Sacramento Young Republicans and rode her bike to San Francisco for the "Bike for Ike" campaign where she personally met Dwight Eisenhower. When she gave a speech for then-Lt.Governor Butch Powers in Sacramento, she met her future husband, Archibald Mull Jr., with whom she eloped two months later. She was appointed to the Sacramento State Fair Board and served as the only woman director for eight years, and she rode horses in the hunting and jumping competition in California.

Mrs. Mull was very active in the Sacramento Lawyer's Wives Club and raised funds for scholarships for UC Davis law students.

Her husband was Archie Mull Jr., who practiced criminal law until his

Dorothee Mull with Blake Young at last year's Spring Fling

Continued on page 13

CCTLA Briefs . . .

Medical Liens Update seminar books available

Daniel Wilcoxen, Don M. de Camera, Elisa R. Zitano, Lawrence Knapp and Sylvius von Saucken provided valuable information during CCTLA's Medical Lien Update seminar held May 2 and attended by 78 CCTLA members.

They provided information about Medi-Cal liens, Ahlborn, ERISA and waivers and reductions of ERISA liens after Sereboff, Hanif. They also discussed equitable apportionment issues, Medicare set-asides and the new Medicare reporting rules, and provided 10 steps for faster Medicare lien resolution.

CCTLA members who were unable to attend can order a seminar book for $100. It contains information from all five speakers regarding the topics covered. Contact Debbie at Debbie@cctla.com or send your check, payable to CCTLA, to P.O. Box 541, Sacramento, CA 95812.

Q&A Luncheons offer opportunity to explore, share legal information

After you get past the knee-jerk reluctance to accept a slip-and-fall claim, what criteria do you use to decide to commit to it or not? After that discussion, last month's Q&A participants explored limitations on Form Rog questions on medical history of similar body parts, complications of using and obtaining interpreters for in-office consultations, conflicts between simultaneously represented drivers and passengers, and current thinking on Colossus. New contacts for referrals to and from participants were also established.

Come join us at Vallejo's at 4th and S streets at noon on the second Tuesday of each month for a delicious no-host Mexican lunch, with separate checks and unlimited soda. You'll get some of the best 10-on-1 legal practice discussions you could ever hope for. CCTLA members only. Mark your calendar now or it will slip by again.

President's Message

Continued from page one

advice to linking you to resources, or in some cases, preparing your trial for you.

I also want to give you an update on the Problem Solving Clinic, another of our more collegial programs. As you may know, the courthouse is now owned by the state. So interestingly, we have been told that if we want to hold a function on state property, we must provide liability insurance. Such insurance would cover slips and falls and whatever. We have made an executive decision not to incur the cost of this insurance. So the Problem Solving Clinics will be moved from the courthouse to some other location. We have a couple of locations in mind, but if you have suggestions please let me know.

We will not host a clinic this month because the Spring Fling will be on Thursday May 21. That is an event you should all attend: free food and drink, a sense of community, and the proceeds of the auction go to help out the Food Bank. It doesn't get much better than that. Hope to see you there.

Pillah Talk

Continued from page 7

death in 1978. She helped to run the law practice for 12 years with her son, Archie Mull, III. Her husband was a president of the California State Bar and was a delegate to the American Bar Assn. He became involved in the World Peace through Law organization, and he and Dorothee traveled to Yugoslavia with then-Chief Justice Earl Warren.

Ms. Mull soon got involved with the Sacramento Food Bank, where she began a program to educate new mothers and later graduated to setting up a program for senior volunteers. She still sets up luncheon speakers and holds monthly "thank you" luncheons for the senior volunteers. The Sacramento Food Bank serves approximately 700 lunches each day in Oak Park, and there are approximately 700 brown-bag lunches given away each Sunday. The food is donated primarily by Safeway, Save Mart and Raleys. She greatly appreciates the help CCTLA gives to the Sacramento Food Bank. CCTLA began making donations to the food bank seven years, beginning with $4,000. Last year, CCTLA's gift was $15,000.

The Sacramento Food Bank now has at least 10 different community aid programs which include food, clothing, mother-baby assistance in baby supplies, education programs for young mothers, daytime and after school toddler programs, computer training, transitional living, and a Mom for Moms program where 10 Save Mart stores will offer low cost supplies on Sundays in May to young and poor mothers. Volunteers make up 96% of the food bank's work force, and 15,000 people receive groceries from the food bank each month. It is estimated that 500,000 articles of clothing are given away each year.

Q. Do you have any life's heroes who you admire, and why?

A. I would have to say that would be Blake Young. He has done a tremendous job of expanding the services and programs offered to the public from the Sacramento Food Bank.

Q. Will you be attending the Spring Fling this year on May 21?

A. Yes, as I have done for the last seven years. I help organize the event.

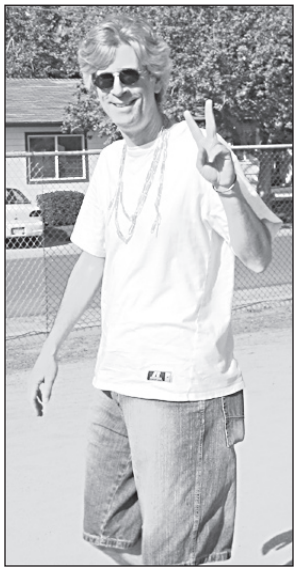
Running to find a cure: CCTLA members raise $3,500-plus

The Law in Motion team relaxed at a local watering hole after completing the Relay for Life and raising $3,500 for the American Cancer Society. From left: Laressia Carr, Jill Telfer, Stephen Davids Elisa Ungerman, Margaret Doyle, Kim Jones, Mike Jones, Erin Jones and Linda Whitney

CCTLA members raised more than $3,500 for the American Cancer Society in the April 25-26 East Sacramento Relay for Life.

The Law in Motion team raised more than any other team and was the only team to have a presence all 24 hours of the relay. Team members include Shanie Bradley, Robin Brewer, Don Green, Jackie and Rocco Bonsignore, Laressia Carr, Steve Davids, Margaret Doyle, Jay Leone, Debbie Keller, Mike, Kim and Erin Jones, Dan O'Donnell, Julio Muoa and Daniel O'Donnell-Muao, Jill Telfer, Elisa Ungerman, Randee Sandlin, Craig Rolfe and Linda Whitney. Special thanks to each team member and to those other CCTLA members who helped make the event a success.

"The community event celebrated the lives of those who have battled cancer, remembers loved ones lost, and empowered us to fight back against a disease that takes too much," Team Captain Jill Telfer said. "The money raised will help fight cancer on four fronts: research, education, advocacy and service. We had a fabulous time participating in the Relay for Life and hope next year more will join us in coming together with our community, working to make a difference."

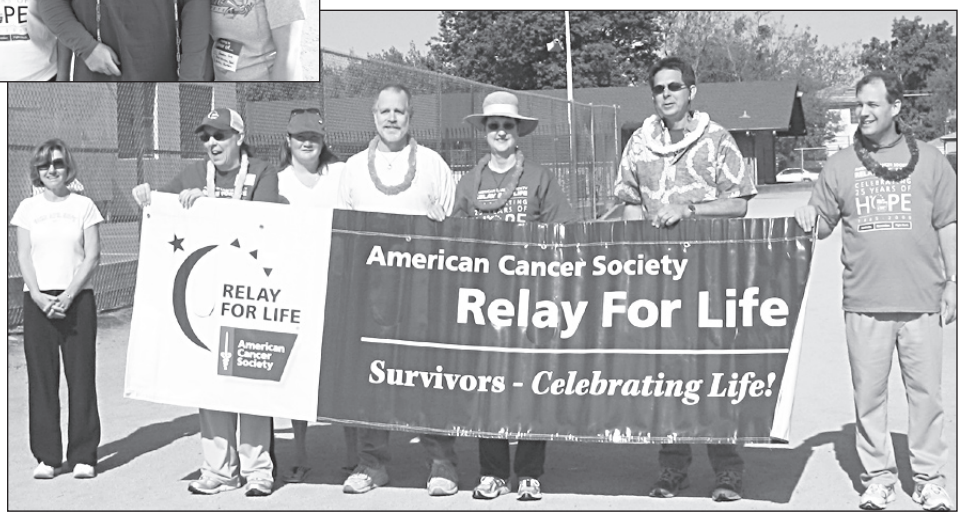


Stephen Davids

Dan O'Donnell and Daniel and Julio Muoa

Right: Kim, Mike and Erin Jones

Below: Laressia Carr, Shanie Bradley and Jill Telfer



Above: the Cancer Survivors' Honorary Lap

Left: Randee Sandlin and Craig Rolfe

GOVERNMENT TORT WARS
Episode 2: Attack of the Claims

By: Stephen Davids and Eliot Reiner

Welcome to part two of grappling with government tort liability issues. In the first installment in this series, we attempted to ferret out the appropriate government entity, so now the time has come to prepare the claim.

The starting point is Government Code section 910, which instructs exactly what must be in the claim. Subsections (a) and (b) deal with contact information. Subsection (c) requests the "date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted." Subsection (d) asks for a "general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." Subsection (e) asks for the name of the government employee(s) who caused the injury or damage, if known. Subsection (f) asks for the amount of the claim, *but only* if the claim is less than $10,000. If your claim is worth more than $10,000, and it always will be, then "no dollar amount shall be included in the claim." Instead, a statement is required as to whether it will be a limited jurisdiction or unlimited civil case. And that's it: six requirements.

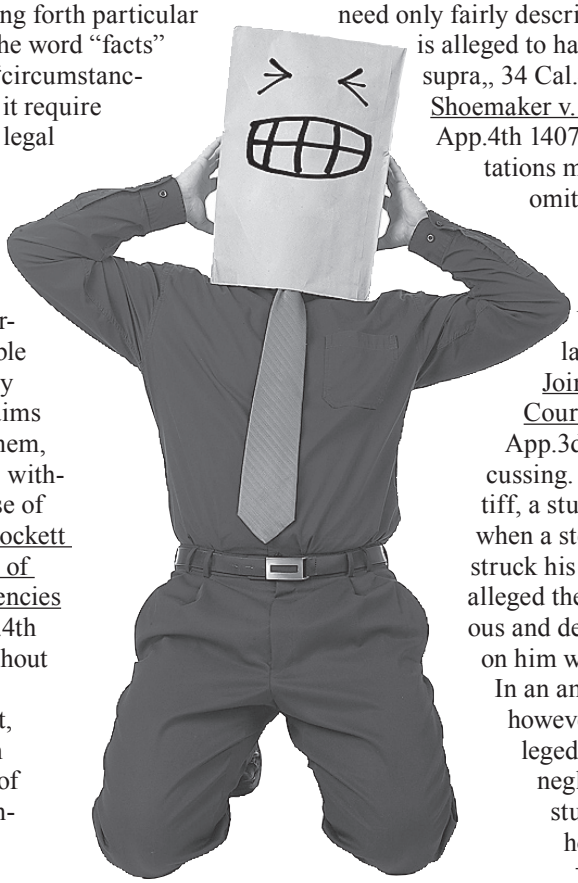
CLAIM FORMS

Some government entities require that specific claim forms be filled out. My experience is that these forms often ask for information not required by Government Code section 910: names of witnesses, doctors, identities of insurance companies, *etc*. The appropriate response to these claim form questions is "This information is not required by Government Code section 910." We have not been challenged on this yet. Further, when claim forms ask for allowable information, such as the topics set forth in section 910, subsections (a) through (f), then I always say "see attachment." On a separate pleading (although it doesn't have to be in pleading format,) we then present, in narrative format, a statement that addresses the statutorily-required subjects. We have included, below, a sample claim attachment that has been used, so far without objection, in dangerous condition of public property cases.

CONTENT REQUIREMENTS

The key statutory provisions are section 910(c), which asks for the "date, place, and other circumstances" giving rise to the claim, and also section 910(d), which asks only for a "general description of the indebtedness, obligation, injury, damage or loss…" We are convinced, but don't have the guts to try it, that a valid government claim (after setting forth the required contact information) could be done in one sentence: "On April 1, 2009, I was driving east on Big Horn Road between Bruceville and Laguna Blvd. when I lost control of my vehicle and crashed on a curve that was unsafely and improperly banked; I received some injuries and my claim is more than $10,000 and will be an unlimited case." Try this at your own risk, and for the following reasons.

The case law has placed its own extensive gloss on what suffices as a "general description" of the "circumstances" giving rise to the claim. You will notice that nothing in the statute specifically mentions setting forth particular facts (unless the word "facts" is implicit in "circumstances"), nor does it require a recitation of legal theories. The purpose of the claim is to "provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." (Stockett v. Association of CA Water Agencies (2004) 34 Cal.4th 441, 446.) Without going off on a digressive rant, there has been much tearing of hair and gnashing of teeth about the fact that government entities never accept and settle claims at the claims-presentation stage, and therefore the claims statute is somehow onerous and unfair. Without debating the merits of this argument, the fact is that the Legislature has the right to set requirements for suing the government, given that it could theoretically reinstate sovereign immunity.



The fundamental conundrum in suing the government is that, as we pointed out in the first article in this series, the government makes the rules about when and how you can sue the government, and we have to deal with that. It is hardly surprising that personal injury claims aren't settled at the claims stage, because injuries are developing and treatment is continuing. Further, most of our claims arise in cases where liability can be reasonably disputed, meaning that the government will always have to involve a lawyer before analyzing the claim.

A claim "need not contain the detail and specificity required of a pleading, but need only fairly describe what the entity is alleged to have done." (Stockett, supra,, 34 Cal.4th at 446, citing Shoemaker v. Myers (1992) 2 Cal. App.4th 1407, 1426; internal quotations marks and bracketing omitted.) Because it is a Third Appellate District case, and often cited by government lawyers, Fall River Joint USD v. Superior Court (1988) 206 Cal. App.3d 431, is worth discussing. The minor Plaintiff, a student, was injured when a steel door on campus struck his head. The claim alleged the door was dangerous and defective, and closed on him with excessive force. In an amended complaint, however, the Plaintiff alleged that the school had negligently supervised students engaged in horseplay, causing

Continued on page 16

Government Tort Wars: Attack of the Claims

Continued from page 15

the minor to fall and get his head stuck between the door and the door jamb. The Third Appellate District held that the negligent supervision theory was premised on an entirely different set of facts than what had been set forth in the claim. The operative language of Fall River is "entirely different factual basis." (*Id*., at 436.) A "substantial compliance" argument was rejected, because "here, Defendant was given no warning that it might be sued for its employees' failure to supervise Plaintiff and his fellow students, and had no ability to consider the validity of such a claim until the filing of the amended complaint." (*Id*., at 437.) This was not even minimal compliance, much less substantial compliance.

A similar holding occurred in Stevenson v. S.F. Housing Authority (1994) 24 Cal.App. 4th 269, 278: a fuller exposition of the factual bases beyond those provided in the claim was not fatal, as long as the complaint was not based on an "entirely different set of facts."

The Stockett case cited above is helpful. The Plaintiff had generally stated the circumstances of his allegedly wrongful termination in the claim: retaliation for supporting another employee's sexual harassment complaints. The claim, however, did not contain allegations in the complaint that the Plaintiff's termination violated public policies favoring free speech, and opposing public employee conflicts of interest. The Supreme Court held that the Plaintiff was not precluded from asserting his illegal-motivation theories, even though they weren't specifically set forth in the claim. He had adequately given notice of his wrongful termination theories.

In Blair v. Superior Court (1990) 218 Cal.App.3d 221, another Third Appellate District case, the plaintiff sued for dangerous condition of public property due to accumulation of ice on a highway. His claim alleged that Caltrans negligently maintained and constructed the road surface, and failed to sand the roadway. In his complaint, however, he alleged lack of guardrail and other defects not specified in his claim. The Third Appellate District found that the claim and complaint were "premised on essentially the same foundation, that because of its negligent construction or maintenance, the highway" was in a dangerous condition. (*Id*., at 226-227.) To justify striking allegations in the complaint for not matching the claim, there must be a "complete shift in allegations, usually an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim." (*Id*., at 227.)

BASES FOR GOVERNMENT TORT LIABILITY

With the foregoing principles in mind, it helps to review the statutory bases for government liability, so that appropriate claims can be formulated to fairly apprise the government of the nature of the case.

Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211 abolished sovereign immunity, and broke open the proverbial floodgates of litigation against the government. The government responded: two years later, the Tort Claims Act was passed. Government Code section 815, still on the books, establishes that there is no longer any government liability based on common law or judicially created doctrines: all government liability must be based on a specific statutory duty. (*See* Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 932.) Government lawyers have a field day arguing that common law theories such as negligence, negligent entrustment, *et al*. are inapplicable in government tort cases. As we shall see, this is a canard, because statutory governmental liability is suffused with common-law negligence concepts. Preparation of the claim must take into account, and in my opinion cite and/or describe, one of the following statutory bases for government liability.

1. Vicarious liability. Under Government Code section 815.2(a), a public entity is liable for the acts / omissions of its employees in the course and scope of their employment. Therefore, common law negligence is very much an aspect of government tort liability. One caveat is that the employing entity is not liable if the employee enjoys a statutory immunity. Immunities are a rather permutated subject, and will be discussed in subsequent articles.

2. Common law torts. Government Code section 820(a) holds government employees liable "to the same extent as a private person" for common law torts. This is the exception that swallows what government lawyers try to argue is the "rule" that negligence doesn't exist in government tort cases.

3. Breach of mandatory duty. This is a statutory basis for liability under Government Code 815.6 that is very limited, and often not applicable. The mandatory duty must be based on violation of a statute, regulation, or other "enactment" that is designed to protect against the risk of a particular type of injury, unless of course the government establishes it was reasonably diligent. Good luck getting a case that falls into this extremely narrow category.

4. Dangerous condition of public property. This form of liability is established by Government Code sections 830 and 835, and has a strong negligence component. Essentially, the government is liable for a condition of its property that poses an unreasonable risk of harm to the public generally (as opposed to specific parties to an accident) when the property is used with "due care." The government must have either (1) negligently created the dangerous condition, or (2) negligently allowed it to continue, after receiving either actual or constructive notice of its existence a sufficient period of time before the subject occurrence to have taken ameliorative measures. There are several immunities that potentially apply, and will be discussed in subsequent articles.

5. Negligent vehicle operation. Vehicle Code section 17001 makes public entities liable for negligent operation of government vehicles.

6. Common carrier liability. This is based on Civil Code section 2100.

7. School liability. Schools have a duty to hold students to account for their actions, based on Education Code section 44807.

AVOIDING TRAPS BY OVER-"PLEADING" THE CLAIM

California pleading rules, of course, require only a recitation of "ultimate facts." Since claim pleading requirements are less than formal pleading requirements, it is a little unclear just what is required. The best approach, in our view,

Government Tort Wars: Attack of the Claims

is to treat the claim like a complaint and allege as many ultimate facts as possible.

One common area for trouble is in vehicle accident cases. Having learned it the hard way, we think it is good practice (if not required) to specifically allege negligent entrustment. The claim should also allege that other employees of the public entity negligently hired, trained, managed, and supervised the employee-driver, including assigning him / her to shifts or work duties that were unsuitable, for whatever reason. The claim should also allege that the government negligently maintained the vehicle. The trick is to look down the dusty road and try to anticipate what testimony may come up in depositions of pubic employees. Over-pleading is better than under-pleading, since it potentially saves you from law and motion. As a client of ours is fond of saying, "slow, but sure."

Dangerous condition of public property cases should also involve allegations that the government negligently failed to hire careful and competent contractors, since most road work these days is outsourced.

Dangerous conditions should also be liberally claimed in school cases. In Jennifer C. v. Los Angeles USD (2008) 168 Cal.App.4th 1320, the district was found to have a duty to protect a special needs student from sexual assault, in part because the assault occurred in a hidden alcove under a stairway that had not been properly cordoned off or protected, meaning it was potentially a dangerous condition of public property.

In school cases, negligent supervision should always be in the claim.

BE CAREFUL OF PLEADING YOURSELF RIGHT OUT OF DUTY, AND RIGHT INTO AN IMMUNITY

Especially in dangerous condition of public property cases, it is easy to structure the claim in a way that results in no liability.

1. You may have a case in which the government failed to remove snow or ice from the road. Under Allyson v. Dept. of Transportation (1997) 53 Cal.App.4th 1304, a government entity has no duty to an individual motorist to (1) post speed limit signs, (2) establish chain controls, (3) plow show off state highways, (4) implement de-icing measures, or (5) warn of icy roads. These cases can still be prosecuted, depending on the facts of the individual accident, but some creativity will have to be employed. Of course, once the government does agree to undertake a duty, it must do so non-negligently. (Johnson v. State (1968) 69 Cal.2d 782.)

2. Be wary of Government Code section 831 (the "weather immunity") which immunizes the government from liability for accidents caused by conditions of weather "as such," and which were obvious to the motorists in the area. Your claim must be based on something other than a failure to do something to account for heavy fog, for instance.

3. Government Code section 830.4 immunizes governments from lawsuits based solely on failure to place traffic reg-

Continued on page 18

Tort Wars

Continued from page 17

ulatory signs, such as stop signs. If you have a stop sign or traffic signal case, you must have some other reason why the location was dangerous, such as poor visibility sight lines. (*See* Washington v. City and County of S.F. (1990) 219 Cal. App.3d 1531.)

4. The sample government tort claim, below, even pleads around the design immunity of Government Code section 830.6, which is likely unnecessary.

5. Government Code section 830.8 immunizes the government from claims that it should have posted warning or advisory signs. There is an exception for circumstances where such warnings were necessary to ameliorate a hidden "trap." This "trap exception" is itself an exception to the immunity of section 830.8, and not an actual theory of liability. It can nevertheless be argued that the "trap" exception should be mentioned in the claim. Slow, but sure.

PRESENTATION OF THE CLAIM

Finally, the claim must then be presented to the government entity *via* its governing body. For the State of California, that means serving the Victim Compensation and Government Claims Board. For a county, serve the clerk of the board of supervisors. For a city, serve the city council. For special purpose districts, they will have a board of directors or governors, or other governing body, and will have an administrative office. Our practice is to have a process server present these, as who knows what can happen with a mailed claim, and if it will be property routed and filed, or misplaced? The last problem any of us wants is to be arguing whether we actually filed the claim, and if so, when.

COMING NEXT:

DEALING WITH LATE CLAIMS

SAMPLE DANGEROUS CONDITION CLAIM

The following claim involves a cross-median accident in which the government is alleged to have not properly placed median barrier to prevent head-on accidents.

SEQ CHAPTER \h \r 1TO THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD OF THE STATE OF CALIFORNIA:

Claimants _____, as the heirs of _____ ("decedent") bring this claim for wrongful death of the decedent. [Describe family relationships.] The decedent was killed as the result of an accident that occurred on _____ (date) on Interstate _____ in _____ County approximately 316 feet north of mile post marker _____ ("the accident location.") Claimants hereby make a claim and allege as follows:

1. Claimants' names are _____, and their address is _____.

2. The address to which Claimants desire all correspondence and notices in this matter to be sent in the address of his attorney, as follows: _____.

3. On _____, the decedent was killed as a result of the failure of the employees and/or other agents and representatives of the STATE OF CALIFORNIA, Department of Transportation (hereafter "The STATE") charged with the responsibility of designing, constructing, placing, maintaining, and supervising a safe roadway at the accident location. On _____ at approximately _____ (time), decedent was riding as a passenger in a 1996 Toyota Camry owned by _____ and proceeding north on Interstate _____ at the accident location. At that time, _____ was driving his 2001 Toyota Tacoma north on Interstate _____ when a tire and/or wheel separated from his vehicle and entered the southbound lanes of Interstate _____, causing a 2007 Chevrolet driven by _____ to lose control, enter the center median area, and then proceed into the northbound lanes of Interstate _____, causing a collision with the vehicle in which the decedent was riding as a passenger. The accident was the result of improper, inappropriate, and unsafe design, maintenance, supervision, monitoring, inspection, control and management of the accident location by employees and/or representatives of the STATE.

4. As a direct result of the negligent design, maintenance, supervision, monitoring, inspection, control, and management of the accident location by employees and/or representatives of the STATE, a dangerous condition of public property was created pursuant to Government Code Section 835 for the following non-inclusive list of reasons: failure to post appropriate and necessary regulatory and/or warning signs, despite the existence of roadway traps; SEQ CHAPTER \h \r 1lack of a center median barrier, despite the average daily traffic, median width, and cross-median accident warrants being met, and/or other factors warranting installation of a center median barrier; inadequate visibility and sight distances at the accident location, inadequate and inappropriate roadway maintenance at or near the accident location, inappropriate speed zoning at and around the accident location, inappropriate roadway design and/or construction at or near the accident location, inadequate and inappropriate cross-sectioning and geometric elements of the roadways at or near the accident location, and inappropriate presence of fixed objects in the "clear zone" at or near the accident location. As a result of the foregoing, the accident location was unsafe for the movement of vehicles on the public highways through the accident location. As a result, the cross-median accident described herein occurred. Employees and/or representatives of the STATE had actual and/or constructive knowledge of the unsafe conditions, and/or created the unsafe conditions, within a sufficient time prior to the subject accident in order to report said unsafe condition, and/or to take corrective measures, and failed to either make such report or reports, and further failed to take such corrective measures. The STATE is not entitled to the "design immunity" of Government Code Section 830.6, due to changed circumstances, lack of appropriate approval, and unreasonableness of the design, along with other factors. Claimants have not yet completed their investigation, and therefore cannot at this time state with specificity each and every reason why the accident location was a dangerous condition of public property pursuant to Government Code Section 835.

5. In addition, the STATE failed to select a competent and safe contractor or contractors to do roadway construction work at or near the accident location, and failed to supervise, monitor, inspect, control, and manage the activity of said contractor or contractors so as to avoid the creation and maintenance of the dangerous condition of public property discussed herein.

6. In addition, the accident location constituted a highway trap for purposes of Government Code Section 830.8 in that it was necessary for the STATE to warn of the above-described dangerous situation, which endangered the safe movement of vehicles on the roadway, and would not have been reasonably apparent to, not would have been reasonably anticipated by, a person exercising due care. The STATE completely failed to provide such warnings.

7. As a direct result of the improper design, maintenance, supervision, monitoring, inspection, control, and management of the accident location by the STATE, and the failure of the STATE to comply with its mandatory duty to properly design, maintain, supervise, monitor, inspect, control, and manage the accident location, a dangerous condition or public property and/or a roadway trap were thereby created, resulting in the death of the decedent.

8. As a direct result of the dangerous condition of public property and/or roadway trap as described herein, which was owned, designed, maintained, supervised, monitored, inspection, controlled, and managed by the STATE and each of its respective employees and/or representatives responsible for such operations, whose names are unknown at this time, Claimants have sustained damages for economic and non-economic loss of support, care, comfort, and society of the decedent. Further, Claimants are the successors in interest of decedent and are entitled to recover all economic damages sustained by the decedent after the subject accident and before her death. The value of the wrongful death and survivorship claim each are in excess of $10,000, and this will be an unlimited civil case.

WHEREFORE, all Claimants respectfully request that the STATE approve this Claim.

Capitol City Trial Lawyers Association

Post Office Box 541, Sacramento, CA 95812
Telephone: (916) 451-2366 ~ Facsimile: (916) 451-2206
Web site: www.cctla.com

The 2009 CCTLA Officers and Board cordially invite you to the

7th Annual Spring Reception & Silent Auction

Date: *Thursday, May 21, 2009*
Time: *5:30 p.m. to 7:30 p.m.*
Place: *At the Home of Allan J. Owen & Linda K. Whitney*
2515 Capitol Avenue, Sacramento

This reception is free to honored guests, CCTLA members, and one guest per invitee. Hosted beverages and hors d'oeuvres will be provided.

Reservations should be made no later than Friday, May 15, 2009, by contacting Debbie Keller @ 916/451-2366 or debbie@cctla.com

We hope to see you there!
DAVID G. LEE, President, & the Officers and Board of CCTLA

☞All silent auction items have been donated and all proceeds will go to ***Sacramento Food Bank and Family Services.***

Allan's Corner . . .

Continued from page 2

struck by a passing motorist. He was on the roadway because his girlfriend had left him there. Girlfriend lived with her father and grandmother in a condominium rented by grandmother. Her parents were divorced and her father had sole legal and physical custody. The girlfriend did sometimes stay with her mother at the mother's boyfriend's house. Boyfriend had a homeowner's insurance policy issued by Safeco. Girlfriend tenders her defense to Safeco under the mother's boyfriend's policy. Safeco declined the defense, and the case was submitted to binding arbitration with the arbitrator awarding over $2 million. Girlfriend assigned her rights against Safeco to plaintiff.

Plaintiff sued Safeco to recover the judgment, and Safeco filed a separate dec relief action, alleging it had no duty to defend or indemnity. Bad faith action stayed, dec relief action tried to court. After girlfriend's father testified, he went home and asked his mother whether she had any insurance on the condo and found out that Safeco also insured the grandmother. Trial court entered judgment in favor of plaintiff against Safeco, finding that Safeco had breached its duty to defend under the mother's boyfriend's policy. Appellate court reversed that decision.

After the decision was reversed, plaintiff's counsel demanded that Safeco tender the policy limits under the grandmother's policy. The adjuster on that claim concluded that girlfriend was insured and that the automobile exclusion in that policy did not preclude coverage. He tendered the $100,000 policy limits and later another $1,000 for med pay. Plaintiff amended his bad faith complaint to allege a breach of Safeco's duty to defend and indemnify under the grandmother's policy. In the meantime, the trial court entered judgment under the mother's boyfriend's policy, then vacated that judgment finding that although there was no duty to defend, there might be a duty to indemnify. Appellate court reversed that, holding that if there is no duty to defend, there cannot be a duty to indemnify. Appellate court specifically noted they were making no comment on the grandmother's policy, only on the mother's boyfriend's policy. Bad faith action proceeded to trial on grandmother's policy and the jury found in favor of plaintiff.

On appeal, Safeco contended that plaintiff's bad faith action was barred by the statute of limitations, that summary adjudication should have been granted on that cause of action because plaintiff did not comply with the policy's notice provision, that the girlfriend had received an adequate defense from another insurer, that there was no evidence that Safeco rejected a policy limits settlement demand on that policy, that the automobile exclusion provision precluded coverage, that they were denied their right to a jury trial on the plaintiff's damages, and several other grounds. Appellate court noted that the statute of limitations for a bad faith claim is two years (CCP 339). The Court of Appeal found this was filed timely due to the stay in the action while the dec relief case was pending. As to the summary adjudication motion, if a trial court denies summary judgment or adjudication because it erroneously concludes that disputed issues of material fact exist, once those issues are resolved against the moving party at a trial on the merits, the error in denying the motion cannot result in reversal unless the error resulted in prejudice to the defendant. Safeco contended they didn't act in bad faith on the grandmother's policy because defense was tendered only under the boyfriend's policy. Trial court rejected this argument because the adequacy of Safeco's investigation and the prejudice were disputed issues of material fact. Safeco did not establish prejudice from the delayed notice. In this case, Safeco relied on the automobile exclusion under the first policy and was relying on that exclusion in the bad faith case so the court and the jury could reasonably infer that Safeco would have relied on this exclusion to decline the defense under the grandmother's policy (Interesting since the adjuster on the grandmother's policy paid the policy and did not rely on that defense).

As to the other defense issue, Safeco was contending that the arbitration award was collusive and that issue could not have arisen had they defended the girlfriend so they cut their own throats. The court held that a jury was entitled to determine that Safeco breached its duty of good faith and defense was tendered under one policy by failing to investigate whether the insured was entitled to coverage under another policy, and the settlement demand was made under the boyfriend's policy. Safeco took the position that the girlfriend resided not with mom's boyfriend but with the grandmother. Safeco could have searched to see if grandmother had a policy, and if they had, they would have found the grandmother's policy. Safeco was not entitled to rely upon its own breach of the duty to conduct a reasonable investigation to shield itself from liability for breach of a related duty to accept the reasonable settlement demand. The court discusses the automobile exclusion and that the auto use was not the predominating cause of the injury. There are discussions of jury instructions, testimonial errors, etc. All in all, a great plaintiff's case.

Emotional Distress. In Binns v. Westminster Memorial Park, 2009 DJDAR 2831, the court holds that a defendant memorial parks' internment of a stranger in a family plot adjacent to a family member can give rise to a claim for negligent infliction of emotional distress where the plot is reserved for the claimant.

Defense Medical Exam. In Mazari v. Ayrapetyan, 2009 DJDAR 2838, plaintiff appealed verdict (in his favor) relying on Evidence Code 755.5 which renders inadmissible a record of her testimony concerning defendant's medical examination conducted of a plaintiff who is not proficient in English without the aid of a certified interpreter. Court holds that 755.5 does not prohibit testimony regard-

Allan's Corner . . .

ing medical examinations that do not involve communication with the plaintiff. The trial court had limited testimony of the defense physicians to observations, results of non-language defendant's tests and a review of plaintiff's physicians' records. Who knew this Evidence Code section existed?

Bad Faith. In McCoy v. Progressive West Insurance Company, 2009 DJDAR 2849, plaintiff's vehicle was stolen and when recovered was of no real value. McCoy reported the loss to Progressive, who acted like Progressive and denied the claim. They filed an answer to the bad faith claim asserting that its investigation was reasonable and within the standard of good claims handling. The facts are a fairly typical Progressive claims handling practice—they looked for fraud and reported it to law enforcement even without denying the claim, then denied the claim even though the police refused to investigate or prosecute. Jury found in favor of plaintiff and awarded $100,000 in punitive damages. Progressive, on appeal, complained that the judge refused to give certain instructions. One instruction basically said an insurer is not in bad faith where they refuse to pay or delay payment due to the existence of a genuine dispute as to the existence of coverage liability. A second one states that in determining whether or not there is a genuine dispute, you should consider whether the carrier misrepresented the nature of the investigation, lied during depositions or to the insured, dishonestly selected experts, hired unreasonable experts, and whether the carrier failed to conduct a thorough investigation. The trial court refused these instructions, finding the genuine dispute doctrine was subsumed within the concept of what is reasonable and unreasonable set forth in KC 2331. Appellate court agreed.

tion as a designated medical/legal expert, asked if he had formulated opinions on the subject of causation. Doctor said he had not been asked to do that, said he can't say that any particular event caused the surgery and does not know what caused the need for surgery. Plaintiff later sent a letter to defense attorney saying the doctor had read his deposition, had also received a letter from another doctor saying there was no other motor vehicle accident, that was a mistake and that the deposed doctor will testify that the probable cause of the surgery was the events giving rise to the lawsuit. Defendants did not attempt to re-depose the doctor but did move in limine to limit the trial testimony of the expert to opinions given at the time of the deposition. The trial court did not allow testimony regarding causation. Appellate court reversed finding that a party's expert may not offer testimony at trial that exceeds the scope of the deposition testimony if the opposing party has no notice or expectation of new testimony and here, defendants were given the information and could have sought to re-depose.

Bad Faith Conduct at Settlement Conference. In Vidrio v. Hernandez (Mercury Insurance Company), 2009 DJDAR 5298, Mercury attended the settlement conference, had its counsel file settlement conference statements but only offered $1,000 each to plaintiffs in a rear-ender with medical bills for each claimant in excess of $1,000. Mercury contended it was denying fault and contesting nature and extent of injuries. Trial court awarded sanctions against Mercury for their bad faith conduct at the settlement conference, and the appellate court reverses, finding that Rule of Court, Rule 2.30 does not allow sanctions for "failure to participate in good faith in any conference" as that was specifically deleted from the statute in 2001. Sanctions can't be used to force parties to settle a case.

Prop 51. In Koepnick v. Kashiwa Fudosan America, INC., 2009 DJDAR 5504, plaintiff was injured in an elevator accident. Jury found defendant (building owner) and elevator maintenance company both negligent and apportioned liability. Trial court ruled owner had non-delegable duty to maintain elevator and so owner was responsible for 100% of non-economic damages. First District agrees, relying on Srithong v. Total Investment Co. (1994) 23 Cal. App. 4th 721 and Brown v. George Pepperdine Foundation (1943) 23 Cal. 2d 256.

Helping Your Client Get His/Her Rightful Due

By: Jack Vetter

It is an ongoing frustration to attorneys representing injured people that when it comes to causation, the medical professions seem to balk at making the needed causation decision. Worse yet, based on non-legal interpretation of the terms involved, the doctor concludes that if it isn't the main reason, it isn't any part of the reason.

Whether your issue is causation between two events, a particular trauma and a pre-existing condition, or some other complicating factor, if the doc doesn't get this question right, your client loses his rightful due.

Here is a letter I use to educate medical care providers on the special terms involved in the legal causation question. It could be shorter or longer, but the inclusion of the exact language of the CACI Jury Instructions, along with a little explanation, has gone a long way for me in overcoming the skepticism that often faces us when we prepare the deponent for this all-important question. I hope it works for you.

Sample letter:

RE: Our Client: Sharon Plaintiff

Date of Loss: 2/14/07

Date of Birth: 8/4/46

Dear Dr. :

I represent Sharon Plaintiff for personal injuries that were sustained in a motor vehicle collision in February of 2007. I am interested in your opinion as to whether by legal standards it is more probable than not that the trauma from the collision was a substantial factor in her need for later care including the two surgeries. That question is very important in the legal case. By requesting a short report from you now, I hope to minimize the inconvenience to you and your practice. If we can address the relevant legal questions in proper legal terminology, it is much more likely that depositions, further consultations and trial testimony can be avoided in the future.

You are familiar, I know, with the basics of the story. She was in a significant auto accident on February 14, 2007, after a cholecystectomy by Dr. Nowgone on December 7 just a few months before. The collision included an abdominal wall contusion. The trauma created a hernia which was addressed by Dr. HatesAttorneys in May of 2007. Unfortunately that healed unevenly resulting in your revision with mesh in August of 2008.

Because the legal standard is quite different than common medical usage, I offer the following additional materials to assist your analysis. The standard to be used is whether 1) it is "more probable than not" that 2) the accident was "a substantial factor" in causing the pain, disability, and need for treatment and surgery. It is essential to keep in mind that the question does not address the cause of the *original pathology* here, only the cause of the *change in symptoms*, disability, and need for certain treatment.

For the first test, "probability," the legal inquiry is simply whether it is "more likely than not." You need not be medically certain. The 95% confidence factor for a defensible medical diagnosis is not applicable here. In fact, you could expect an opinion to be proved wrong 49% of the time and that element of probability would still be satisfied.

As to the second test, "substantial factor," the standard is somewhat less intuitive. In order to be a substantial factor, the accident need not be the only cause or even the major cause. It is defined best by describing how small the effect must be to no longer be a "substantial factor." In order to help the jury understand, they will be told by the judge, it need only be more than a "slight, trivial, negligible, or theoretical factor."

One related legal principle of "legal causation" is that a trauma which might not create a lasting injury in most people, is still considered to be a "legal cause" of an injury where the injured person was already particularly fragile for some other reason. The unexpected "eggshell skull" of the plaintiff does not lessen the defendant's responsibility for whatever injury is caused by the wrongful conduct. In this case, the defendant is not liable, of course, for the preexisting problem,

Sample letter, continued:

only the aggravation of symptoms, and disability.

The additional quotes from legal sources below [1] reflect the actual language the judge uses to explain these concepts to the jury. They may help you with the special legal definitions given to these terms. You may, of course, qualify your opinions by incorporating these unique legal definitions.

It is expected that you will have to use information from the medical record to give an opinion. In legal matters experts like you may rely on other information such as the medical records authored by others. Again, it is fine to mention that you are relying on the notes of others where appropriate.

Obviously, you need information about her pre-accident condition and the treatment before you saw her. I have taken the liberty of providing highlighted notes from the Sutter records to minimize the inconvenience to you of reviewing the whole record.

A month before the injury (1/2/07) Dr. Rideout felt she was healing "better than expected" from the prior surgery (12/07/06.) On the day (2/14) of the head on crash, at the ER the notes reflect a "tender lower abdomen" and "abdominal wall strain." The positive findings on the CT scan were "probably from trauma."

On 3/2 Dr. NowGone noticed a bruise, pain and tenderness consistent with a post traumatic incisional hernia and apparently related to the collision. The diagnosis was "post traumatic incisional hernia." On 3/9 in the ER there was pain where she had surgery. On 3/26 she reported ongoing reflux and problems since the Auto accident. On May 8, Dr HatesAttorneys checked the fundoplication, repaired the hernia and followed up an infection. The residual "healing ridge" was expected to go away.

After intervening wrist surgery, she eventually came to you in July of 2008 and had surgery for both the hernia repair with mesh and for hemorrhoids on 8/12/08. An ER visit resolved post op problems on 8/14. She currently has increasing pain after achieving some relief from 4-5 visits to physical therapy.

The primary question you are asked to address is, "Is it more likely than not, keeping in mind whatever preexisting weaknesses she had from her prior surgery, that the trauma of the February 14 collision was more than a trivial or slight contributing factor to the need for additional care after the crash?"

If the motor vehicle trauma was more than "a slight or trivial factor" for her surgeries and condition, then legal causation is shown. Your opinion addressing that exact question would be most helpful in deciding the case. Since Sharon was on an excellent path for healing a month before and then had abdominal trauma with an increase in symptoms at the time of the car wreck, it seems the legal level of certainty is easily met. Unless there was some indication that the surgeries and ER visits after that would probably have happened without the aggravation of the auto collision, they would follow in a continuing chain of causation.

If there is a charge for looking at this, please send a reasonable bill for prompt payment. Thank you for addressing these issues on behalf of your patient and my client, Sharon Plaintiff. Certainly if I can be of assistance in clarifying any of this, just give me a call or short email and we'll get the issues resolved. I hope that this opinion and report will resolve any issues the other driver might raise suggesting that the trauma of the crash that totaled her car did not contribute to her subsequent course.

Very truly yours,
JACK VETTER

---

1. *A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Causation: Substantial Factor: CACI Civil Jury Instructions #430.*

A person's negligence may combine with another factor to cause harm. If you find that defendant's negligence was a substantial factor in causing plaintiff's harm, then defendant is responsible for the harm. Defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing plaintiff's harm. Causation: Multiple Causes, CACI Civil Jury Instructions #431.

Plaintiff is not entitled to damages for any physical or emotional condition that he had before defendant's conduct occurred. However, if plaintiff had a physical or emotional condition that was made worse by defendant's wrongful conduct, you must award damages that will reasonably and fairly compensate him for the effect on that condition. Aggravation of Preexisting Condition or Disability CACI Civil Jury Instructions #3927.

You must.... reasonably and fairly compensate plaintiff for all damages.... even if he was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury. Unusually Susceptible Plaintiff CACI Civil Jury Instructions #3928.

Government Tort Wars:

Attack of the Claims

Page 15

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

MAY

Thursday, May 21
CCTLA's 7th Annual Spring Reception
& Silent Auction
Location: Home of Allan Owen
and Linda Whitney
Time: 5:30 to 7:30 pm

Thursday, May 28
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: TBA - Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, May 29
CCTLA Luncheon
Topic: TBA
Speaker: Judge James M. Mize
Location: Firehouse Restaurant
Time: Noon
CCTLA Members $30 - Nonmembers $35

JUNE

Tuesday, June 9
Q&A Luncheon—noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Friday-Sunday, June 12-14
Regional TLA Conference
Resort at Squaw Creek in Tahoe
Details to come!

Thursday, June 25
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: TBA - Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, June 26
CCTLA Luncheon
Topic: "Making Your Case: The Art
of Persuading Judges"
Speakers: Daniel U. Smith, Esq. & Justice Rick Sims
Location: Firehouse Restaurant
Time: Noon - CCTLA Members $30

JULY

Tuesday, July 14
Q&A Luncheon - Noon
Location: Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, July 23
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: TBA - Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, July 31
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Location: Firehouse Restaurant
Time: Noon - CCTLA Members $30

AUGUST

Tuesday, August 11
Q&A Luncheon - Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, August 27
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: TBA - Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, August 28
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Location: Firehouse Restaurant
Time: Noon - CCTLA Members $30.

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA Board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact:

Jack Vetter: jvetter@vetterlawoffice.com

Chris Whelan: chwdefamation@aol.com

Cliff Carter: cliff@ccalawcorp.com

Contact Debbie Keller @ CCTLA at (916) 451-2366
for reservations or additional information with regard to any of these events

CCTLA Calendar of Events