Fall 2018

The LITIGATOR

VOLUME XIII OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 3

Inside

CCTLA: Much More Than A Meet-&-Greet Organization

Lawrance Bohm
CCTLA President

Greetings, everyone!! What a great summer this has been.

The season began with an incredible outpouring of support for our Sacramento Food Bank and Family Services at our annual Spring Fling event. I am pleased to report that we raised $113,989 in support of that wonderful organization. I want to take a moment to recognize each of the following Spring Fling committee members for their dedication and effort: Margaret Doyle, Art Scotland, Kelsey DePaoli, David Foos, Justin Gingery, Lori Gingery, Shelley Jenni, Debbie Keller, Marti Tayor, Jill Telfer, and especially, Parker White, who opened up his amazing home for our event.

Now that the kids are back in school (or about to be), we can get back to our routines. At CCTLA that means more educational opportunities for our members. We are continuing to offer luncheons, problem solving clinics, membership mixers and more. Please join me in supporting these programs by attending or sending a member of your office. It is the attendance at these programs that tells us if the program was worthwhile.

As an example, our September events include (see details for each in the CCTLA calendar on the back page):

- Tuesday, Sept. 11: Q&A Luncheon.
- Wednesday, Sept. 12: The CCTLA Problem Solving Clinic will feature John T. Martin speaking on "Finding Hidden Property Damage in Motor Vehicle Cases — What You Should Look For and What Your Experts Need to Know."
- Friday, Sept. 21: The CCTLA Luncheon topic will be "Trial Technology"; Speaker Lawrance Bohm.
- Thursday, Sept. 27: Monthly Membership Mixer. The program will be "Preparing Your Case for Trial."

In addition to these educational opportunities, we also are excited to announce our inaugural CCTLA Golf Tournament in October. This will be a "best ball," or scramble style, tournament to ensure a good time for all skill levels. Proceeds from the tournament will support the Wounded Warrior Project. Further details will be announced soon: Check our website at www.cctla.com. In the meantime, I hope to see you at one or more of our next education programs.

Mike's CITES

By: Michael Jansen
CCTLA Member

Please remember that some cases are summarized before the official reports are published and may be reconsidered or de-certified for publication. Be sure to check to find official citations before using them as authority.

YELLOW JACKETS AND GOLF COURSES

Carolyn Staats vs. Vintner's Golf Club, LLC
August 1, 2018 (2018 DJDAR 7667)

FACTS: Plaintiff was golfing on the defendant's golf course when she was attacked by yellowjackets that had made their home near the sand trap of the 5th hole. Plaintiff suffered serious personal injuries. Defendant filed a motion for summary judgment arguing theyt had no duty to Plaintiff because they did not know the yellowjackets were there. The trial court granted Defendant's motion for summary judgment.

HOLDING: The trial court's grant of summary judgment was reversed. "We hold only that golf course operators are not exempted from exercising reasonable care to protect their patrons against the foreseeable risk posed by yellowjacket nests on their premises." The court stated there are other triable issues regarding steps the golf course should have taken to minimize the risk, whether the course took any of those actions, and whether any failure to do so proximately caused Plaintiff's injuries.

REASONING: Defendant and the trial court relied upon cases standing for the proposition that a defendant must have specific knowledge of *the* specific harmful insect and the danger that insect posed to the plaintiff. This appellate court cited Coyle v. Historic Mission Inn Corp., (2018) 24 Cal App 5th 627 (black widow spider bit Plaintiff as she ate lunch).

Previous cases had held that an owner or occupier of property does not have a duty to protect against harmful insect bites where (1) it is not generally known that the specific insect is indigenous to the area; (2) the homeowner has no knowledge that a specific harmful insect is prevalent in the area where the residence is located; (3) the homeowner has never seen the specific type of harmful insect around the home; and (4) neither the homeowner nor the injured guest has seen the specific insect that bit the guest before or after the bite occurred.

Under such circumstances, the previous cases held that the injury was unforeseeable as a matter of law and the burden of preventing injury would be enormous and the task of defining the scope of the duty and the measures required of the homeowners would be extremely difficult.

The golf club's insurance company characterized the club's duty to prevent the yellowjacket swarm as one to prevent a danger that did not exist until the moment the swarm formed and became dangerous.

Plaintiff characterized the duty as a failure to inspect its premises to discover and eradicate yellowjacket nests.

This court decided there is a duty based on the foreseeability factors first enunciated in Roland v. Christian, (1968) 69 Cal 2d 108. In arguing for summary judgment, the golf course stated that it could not anticipate the level of danger posed by the yellowjackets without consulting with a trained expert to determine when, how and where a yellowjacket swarm might form and launch an attack. The appellate court showed common sense by stating, "but it is common knowledge that yellowjackets live in nests and are dangerous in large numbers, and people generally avoid these nests for fear of being stung."

The appellate court determined that it was reasonably foreseeable that a yellowjacket nest on a golf course could cause injury but had to determine whether it was

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Fighting a Phony Determination of Fault

By: Walter Schmelter, CCTLA Board Member

Years ago, auto insurers started offering "good driver discounts," keeping rates low for drivers who don't cause get traffic tickets or accidents, and penalizing with higher insurance premiums those drivers who do.

"Violation points" on one's driving record are used by the DMV to identify bad drivers for license review and are also used by insurers to charge more to risky drivers as identified by their driving record. But whodathunkit—some insurers take advantage of their own insureds in various subtle ways.

Insurance companies pay claims when they determine their insureds have some liability in an accident, or at least if their insured has legal exposure to such a claim. At times, insurers pay claims based on a demand from another insurance company or an attorney, sometimes without even taking a statement from their insured.

When they do pay a claim for any reason, insurers almost always send their insured a letter saying they have made a determination that their own insured is primarily at fault. An insured may receive such a letter long after a claim is settled and done, even if the insured received no traffic ticket.

Though the driver may be relieved his insurer paid the claim and that he avoided a lawsuit, few drivers recognize the impact of such a letter on one's insurance rates. Insurers send such letters to their insureds so they can raise that person's auto insurance rates, by removing the "good driver discount." While one property-damage-only accident may not result in increased insurance rates, an additional minor traffic ticket within three years can cause rates to skyrocket for any insurance policy issued within three years of the first accident, costing the insured thousands of dollars in additional premiums.

The concept of good driver discounts and "violation points" used by DMV and insurers to track bad drivers (and delete good driver discounts) is covered by Ins. Code §1861.025, with details covered by 10 Code Cal. Regs. §2632.13. Some basics: No points may be assessed if there was property damage only of $1,000 or less. No points may be assessed if the driver was less than 51% of the legal cause of the accident.

As with Evid. Code §603, "not at fault" presumptions apply if the driver was lawfully parked at the time of the accident; if the vehicle was struck in the rear by another vehicle and not ticketed for a moving violation; if the driver was not ticketed for a moving traffic violation, and the other driver was convicted of a moving traffic violation; if the accident was caused by animals, birds or falling objects; and if a solo vehicle accident was principally caused by a hazardous condition that a reasonably careful driver could not have noticed (e.g., black ice) or avoided (e.g., avoiding a child running into street).

Such causes are frequent in Sacramento—a bee in the car, a bicycle running a stop sign, untrimmed trees blocking a yield sign.

Determination of fault letters are insidious because they often come much later after the accident, after claims are paid, with the typical insured not knowing enough to read the law and timely object within 30 days after receipt of such a letter. Subd. (e) of the regulation mandates that *before* making an at fault determination, the insurer *first* diligently pursue a thorough, fair and objective investigation and maintain records detailing the investigation.

I have experienced cases where the insurer seems to have done **no** investigation, or relied solely on the statement of the claimant's attorney, or relied solely on a police report without even talking to its insured, or not asking appropriate questions about road hazards. Failing to do these things is much easier for an insurer than doing the thorough and good faith investigation required by law. If its insured fails to timely object, the insurer then imposes "points" upon its own insured, jacking up his or her insurance renewal rates for the next three years.

The law requires an accident be at least 51% insured driver's fault to levy "violation points." Often an accident has multiple legal causes—that is the very nature of comparative negligence and

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Insurance companies pay claims when they determine their insureds have some liability in an accident, or at least if their insured has legal exposure to such a claim. At times, insurers pay claims based on a demand from another insurance company or an attorney, *sometimes without even taking a statement from their insured*.

Determination of fault

Continued from page 3

allocation of damages. If client's fault was less than 51%, no points may be assessed.

One must challenge a determination of fault letter within 30 days of insured's receipt of the insurer's determination letter, objecting and requesting reconsideration. Sometimes clients never receive the determination letter and first learn of the adverse determination of fault when insurance premiums double at policy renewal. The regs require insured's *receip*t, not just insurer's sending. On your part, send the demand for reconsideration review via a trackable means. The insurer must respond within 30 days of its receipt.

List all the legal and factual grounds for reconsideration. *Before* making the determination their insured was at fault, the insurer should by law have *first* diligently pursued a thorough, fair and objective investigation. Did the insurer identify and talk to all witnesses? Did they give their insured the opportunity to rebut those witnesses? Did they investigate the scene? Did they consider concurrent causes of the accident—including comparative negligence of others? Often insurers shoot out their determination letter first and ask questions later. They may also fail to maintain records detailing the investigation – so ask for those records in your objection/demand for reconsideration.

Protect your clients by making sure they promptly bring to you all insurance correspondence regarding an accident—even after the case settles. Increase your client's awareness to watch for a bogus determination of fault letter and save your client thousands of dollars in increased auto insurance expense.

Oddly, the review process is less than impartial. The reconsideration may be reviewed by an agent or employee of the insurer other than the person who made the original determination. However, the reviewer often has authority to reduce the determination of fault to, say, 50%—enough to eliminate any violation points.

If the insurer fails to respond to your demand within 30 days of its receipt—argue they are again violating the law and demand the alternate determination you seek. Ideally, get the insurer's revised determination in writing, or send them a trackable letter confirming their acquiescence.

If your request for reconsideration is denied, and you suspect an insurer violated the law, report the matter to the insurance commissioner. Though other legal remedies are expressly reserved to the insured, I suspect none are financially viable. So, get it right the first time.

Protect your clients by making sure they promptly bring to you all insurance correspondence regarding an accident—even after the case settles. Increase your client's awareness to watch for a bogus determination of fault letter and save your client thousands of dollars in increased auto insurance expense.

DEAR JUDGES:
SAY IT AIN'T SO—
SAVE OUR COURTHOUSE!!

By: Steve Davids, CCTLA Past President

Okay, we've all seen the digital mock-ups and the dignitaries doing their thing, but y'all are making a huge mistake. I therefore place on my own head the crown of anti-courthouse-ification. Maybe it's my 36 years in Sac-town, but I LOVE our courthouse. It was built in 1965, when I was a mere lad of eight. When I got to Sacramento in the early '80s, I knew this city and its courthouse was where I wanted to be.

I had 25 wonderful years with Roger Dreyer and his amazing firm, and I have probably appeared in courthouses up and down California from Del Norte to San Diego, and everything in-between. Our own courthouse is far and above all of them.

For starters, there's the pre-Star Wars vibe of the white columns. It looked like something from outer space, or a space ship itself. But more importantly, it was the people. In 1982, I was chosen to be one of the "newby" DAs, along with Karen, Ralph, Bill, Lim, Noel and Lisa. I don't know about them, but it was the highlight of my career as a lawyer.

One of the wise old secretaries told me that I would not ever have a stronger bond with my attorney colleagues than the ones who worked with me in 1982. She was right.

It's still about the people, as well as the building. My colleagues and I marched into Department P, and the chambers of the Hon. Edward R. Garcia, a remarkably influential and intellectual jurist who later went on to the federal bench. I miss him very much and hope that he is still out there making young lawyers understand what it really means to be a lawyer. He never demeaned us, but he made it clear that he would not tolerate intellectual laziness. He complimented me … once … and it is day I will never forget.

I hope the new courthouse is amazing, but I probably will never see the insides of it. It is scheduled to be online in 2023, when I will be 65. I'm wondering if all the satellite branches will be conglomerated in the rail yards. I hope not. Many branches are downtown, but at least they aren't in the same building: main courthouse, family law (Granite Park, where I walk my dog), unlawful detainers and small claims court (near Folsom Boulevard and Howe), Juvenile Hall (Kiefer Boulevard), the Lorenzo Patino jail, where arraignments and such take place, and the Civil Courthouse that houses the former Sacramento Law Library and now is home to civil law and motion and settlement conferences.

I'd hate to have one behemoth in the railyards so that folks who need court services have to drive downtown and fight the parking and the parking fees. Dividing the courthouses is democratic with a small "d," and that's what it's supposed to be.

But let's get back to our own courthouse. What is wonderful about it is the exterior architecture, but also the two sets of doors: west from the parking lot, and east from the steps and the now-long-defunct fountain. Going into the doors of the courthouse was an experience in meeting people in the relatively slender elevator corridor. It is almost always a place to say hi and figure out where they are going. When I'm there, I meet people I know.

Contrast it to our white marble fed-

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I have probably appeared in courthouses up and down California from Del Norte to San Diego, and everything inbetween. Our own courthouse is far and above all of them . . . For starters, there's the pre-Star Wars vibe of the white columns. It look(s) like something from outer space, or a space ship itself. But more importantly, it was the people . . . It's still about the people, as well as the building . . . I'd hate to have one behemoth in the railyards so that folks who need court services have to drive downtown and fight the parking and the parking fees. Dividing the courthouses is democratic with a small "d," and that's what it's supposed to be.

Save Our Courthouse

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eral courthouse. I was there recently, and other than the phalanx of U.S. marshalls manning the entry doors, I literally saw maybe three to five people even though I was on two floors in addition to the main lobby (At least one of the aphorisms / poetry on the marble seats on the lobby floor packs a powerful emotional punch for any lawyer or client who has doubt about their cases, and their lives: "I'm not anyone more than anyone else. Did my job, then looked into their eyes. What had I become?").

I had the same experience in the Fresno Federal Courthouse: I could swear that other than the judge, attorneys, clerk, and marshalls on the case I was involved in, I saw no human beings in the building. That is not what a courthouse is supposed to be. Courthouses are about people, not about lofty and ethereal words like justice. Sacramento knew how to make it work, for people.

The elegance of our courthouse stems from the wonderful mirrored and jagged stairways that get you to the second floor. Go left and you can mingle with prospective jurors, and (alleged) criminals and their attorneys. Go right, and it's the same, but still different. You feel less pressure, because there are usually fewer people.

Once you get to the third floor, everything above is about the same, with the exception of the 6th floor, and we'll get to that later. Floors three through five are quieter, but more relaxed. You can even see a judge walking down the corridor and eschewing the security corridor for judges (Other than the ground floor and the sixth floor, the only people in the courthouse who can see whether it is a sunny day in Sacramento are judges and people in chains. There is some good in that.).

I now have to shamelessly steal a hilarious (to me) stand-up routine from a wonderful bailiff from the 1980s, and I am ashamed I don't remember his name. I think I can remember most if not all of his shtick regarding what floors involved what cases:

FIRST FLOOR: broken promises. These were departments A and B in my day: the arraignment courts. Now they're departments 1 and 2. These are folks who often have had somehow forgotten that they were asked to go to court. Some have the gumption (and fright) to make sure they show up in court to argue their drunk driving and/or misdemeanor offenses. Broken promises.

SECOND FLOOR: broken bones. Felony arraignments. That's all you need to know.

THIRD FLOOR: broken beer bottles. In my day, the DUI cases.

FOURTH FLOOR: broken hearts. Divorce court.

FIFTH FLOOR: now that's the big, one, and probably why it's at the top. Broken contracts!!

Any judge on the fifth floor has it made: sunshine and the cafeteria. Does it get any better? Look at the views! I still remember, as an insurance defense attorney, literally helping resolve a significant injury case in the cafeteria. I'm not the only one. I haven't been in the cafeteria recently, and don't know if the sight-impaired gentleman still guards the till. A more decent and kind person you will have never met. He knew me by my voice, and I loved his wonderful dog.

I have known a fair number of eccentrics (including myself) during my time at the Sacramento Courthouse. D.J. (not his real name) was a ball-busting prosecutor, and I think he was a former law enforcement officer before putting on the trial suit. I wasn't there what it happened, but he apparently was seen pacing back and forth and acting like a caged beast (He also had a humongous jaw that was enough to knock you down.). When someone asked why he was so hyped up, he retorted (while still pacing), "I just sent someone to state prison, and it's Goddamned better than sex!" This could be apocryphal, I hope…

On the other side, was M.P. (not his initials), a public defender. I had the pure pleasure of being an unpaid intern while in law school. One day, M.P. told me to go downstairs and talk to the guys in the holding cell before their arraignments and get some ideas of what can be done to get them freed. I was on the other side of the bars. One inmate started talking to me, but I had to get closer to hear him. I stepped into the cell. Quick as a wink, the deputy sheriff made things very clear: "Counselor, if your client tries to hold you hostage, I'm going to have to start shooting." Shooting?! I was a freakin' unpaid intern!! But the best part was the first time that someone actually called me "counselor."

Going back to M.P., he had a W.C. Fields' air about him, and a tremendous sense of humor about the law, and life. His wife was a probation officer, and he proudly declaimed that they had a symbiotic relationship: She put the bad guys in the clink, and he got them out. Will we have these kinds of wonderfully extravagant and larger-than-life people in the new courthouse? I sure hope so.

Dear Judges: I know you will follow your hearts and minds. There is what the Germans call gemutlichkeit (coziness). To me, that is the Sacramento courthouse. We don't need a 15-story monstrosity of empty hallways and lawyers / judges with no outrageous senses of humors. I'll take D.J., M.P., that clever bailiff who named the five floors, the other bailiff who told me I could be a hostage, and (gloriously) the first courthouse I ever wandered into, and the only one I fell in love with.

Your Honors, please open your hearts. Keep our courthouses as they are. You won't regret it.

Any hate mail would be welcomed, at stephen@ameriolaw.com.

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Bullying the Bully with Mediation: Extortion or Blessing?

By: Gary Davis, JAMS

With increasing frequency, lawyers throughout the country are handling bullying cases. I have mediated matters and followed highly publicized cases where students were the targets of videos posted on social media that spewed hatred and conveyed racially or ethnically threatening material, sometimes even using the student's name. Attorneys consulted by these victims of cyberbullying often seek monetary compensation from the bully, the bully's parents, and, at times, the school where both the bully and the victim are students.

Beyond school years, bullying can happen in a number of contexts. There are reports of attacks in the workplace that are often personally directed and may include bullying that is racial or sexual in nature, creating toxic work environments. Bullying can occur during business negotiations or within social groups or clubs. The misconduct of coaches or doctors of athletes, even at the university level, has become commonplace. The same is true of media or entertainment executives whose bullying activities sometimes constituted criminal assault. The victims are male or female, teenage school students, or sophisticated adults.

These bullying situations can happen through cyber or social media activities or in person and are often perceived by the targets as threatening to their safety. In addition, such activity often damages the victims' reputation. At times, acts of bullying can involve criminal conduct, as well as civil wrongdoing. How can the victim's attorney stop the bullying and also maximize a monetary recovery for his or her victim client? How can the alleged bully preserve privacy? And do so quickly.

Experience indicates that these circumstances cry out for the opportunity for both sides to take part in the confidential remedy afforded by mediation.

At times, actual damages are difficult to quantify. There are usually limits to what the accused will pay to preserve privacy. Once the victim has filed the civil lawsuit, privacy is gone and so is the ability for the victim to obtain what might have been a favorable recovery. Often damages are based solely on emotional distress with no economic loss. Emotional harm can be significant, and in some cases, damages can be substantial. However, damage assessment requires obtaining knowledge of the alleged bully's financial status, family or employer. It is probably no revelation that most teenage students do not have the ability to favorably respond to settlement demands of substance. But parents in some states can be held responsible for the intentional torts of their children (in California – up to $25,000).

In my capacity as mediator, I have observed cases where innocent parents of a not-so-innocent child bully were politicians, actors or highly placed business executives who had reputations to protect at almost any cost. I have seen settlements that involve sums far beyond statutory liability.

Before the filing of a formal lawsuit and resulting publicity, each side should seriously consider other alternatives for resolving the issue. Some accused of

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Bullying the Bully

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being bullies are adamant that they have done no wrong and are not afraid of the publicity. Such accused will want their day in court. This is the way it should be, particularly when the accused bully has not done anything that would cause embarrassment or damage one's reputation. However, when cyberbullying is involved it is often impossible for the bully to deny the basic event.

In other instances, the bully (and those who will be adversely connected) often will relish the opportunity to mediate in an effort to avoid that publicity that would follow a lawsuit being filed. The confidentiality and privacy of mediation lends itself as an alternative to litigation.

Rules regarding confidentiality of a mediation vary from state to state. The careful practitioner may consult the Uniform Mediation Act (UMA). It is commonly agreed that California has the strictest mediation confidentiality rules in the country. California Evidence Code 1119 (a) in essence provides that no evidence of anything said or admission made, or writings submitted, or communications, negotiations, or settlement discussions shall be compelled in any arbitration, administrative adjudication, or civil action. This can be attractive in situations where parties would like to keep the details of the alleged bullying out of the public eye.

In many cases a victim's attorney will send a letter accompanied with a well-drafted, unfiled, proposed civil complaint that sets forth the bullying conduct, the statutes (both federal and state) violated by the conduct and the names of those responsible for damages resulting from the bully's conduct. Often such a letter also names a specific date, in the near future, when the civil complaint will be filed with the court. Having a finite date for the filing acts as a hammer for all sides to be reasonable at mediation.

The victim's attorney must avoid any semblance of the crime of extortion. California Rules of Professional Conduct 5-100 (a) provides: "A member shall not threaten to present criminal, administrative or disciplinary charges to obtain and advantage in a civil dispute." Penal Code 519 is clear, "Fear, such as will constitute extortion, may be induced by threat…if any of the following: to accuse the individual threatened, or a relative of his or her family of a crime."

Those accused of bullying activity often complain at mediation that although there are little or no actual monetary damages, they are being blackmailed or extorted.

While it is true that the desire to avoid adverse publicity is coercive in nature, the willingness to participate in mediation is neither blackmail nor extortion. The opportunity to reach a confidential resolution should be considered a blessing.

In addition to reaching a pecuniary recovery, I have seen many other positive outcomes of utilizing mediation in disputes involving bullying. Mediation may lead to heartfelt apologies or an agreement of the accused and those legally responsible for the acts of the bully to change company policies or to have the bully or those connected to take part in training programs that might avoid there being other victims in the future. Mediation allows for creative remedies, all protected by the veil of mediation confidentiality.

Lessons of a Dangerous-Condition-of-Public Property Case

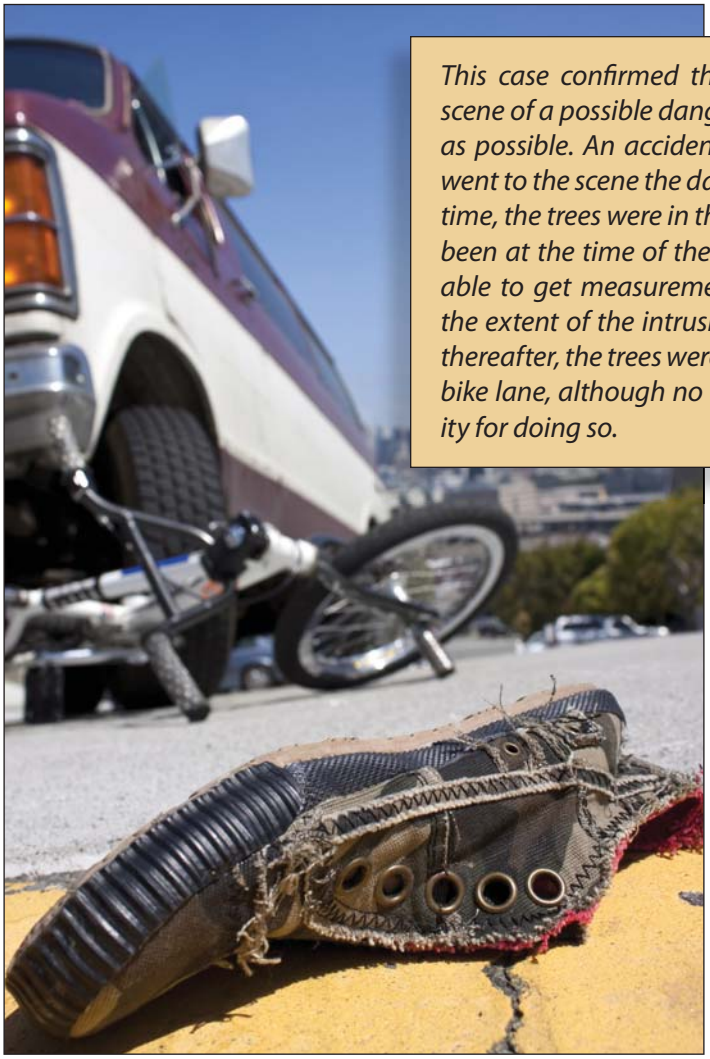
By: David Rosenthal, CCTLA Board Member

In a recent case against the County of Sacramento, we represented a bicyclist who, while on his way to work, sustained a serious brain injury after being struck on Folsom Boulevard by a passing van. There was evidence that our client had been riding eastbound on Folsom when he encountered some branches that extended from two "old growth" trees on the south shoulder into the bike land, and he moved left to avoid the branches prior to being hit. Unfortunately, the traffic collision report concluded that our client moved out of the bike lane into the number two lane of Folsom, directly in front of the van in violation of Vehicle Code §22107.

We pursued a claim against the driver of the van, but we also made claims against the County of Sacramento and Regional Transit, the public entities potentially responsible for maintaining the trees and keeping the bike lane free of obstructions. Having litigated this somewhat unique roadway condition case to a successful conclusion, I can share several experiences that may be helpful to others in future cases.

A. Initial Investigation

This case confirmed the importance of visiting the scene of a possible dangerous-condition case as soon as possible. An accident reconstruction expert and I went to the scene the day after being retained. At that time, the trees were in the same condition as they had been at the time of the incident, and the expert was able to get measurements of the branches to show the extent of the intrusion into the bike lane. Shortly thereafter, the trees were trimmed well back out of the bike lane, although no entity would take responsibility for doing so.



This case confirmed the importance of visiting the scene of a possible dangerous-condition case as soon as possible. An accident reconstruction expert and I went to the scene the day after being retained. At that time, the trees were in the same condition as they had been at the time of the incident, and the expert was able to get measurements of the branches to show the extent of the intrusion into the bike lane. Shortly thereafter, the trees were trimmed well back out of the bike lane, although no entity would take responsibility for doing so.

Additionally, while at the scene, we noticed that bicyclists using the bike lane moved to the left at the trees while riding by. We were able to capture a number of bicyclists passing the trees in this fashion on video. This evidence was a double-edged sword since although the bicyclists we captured clearly moved to the left to avoid the branches, they were also able to stay in the bike while passing.

Lastly, visiting the scene on this occasion and others gave me a clear picture not only of the roadway where the incident occurred, but the stretches of road west and east of the trees. This familiarity was helpful in formulating written discovery and deposition questions throughout the case.

B. Sorting out the Entities

As we all know, it is important at the beginning of the case to identify all of the potential liable parties, but this can be difficult where there is more than one public entity potentially responsible for the same area. In our case, it was not readily apparent who owned the tree or who was responsible for maintaining the tree branches that caused the bike lane obstruction. The county clearly owned the paved roadway along Folsom Boulevard, including the bike lane. However, the trees were rooted in a dirt area off the pavement. On the other side and above the dirt shoulder were Regional Transit light rail tracks and overhead lines. In addition, there was an RT bus stop within the trees. We made claims and filed suit against both entities.

In discovery, the county produced an inter-agency memorandum from the 1980s showing an agreement for the county to maintain the trees on the road side of the Folsom shoulder and for RT to maintain the trees on the light rail tracks side. Of course, the persons reaching the agreement were long gone, and no county employee would admit to knowing anything about the agreement.

One advantage of pursuing both entities was that RT was eager to prove that it was not responsible for the trees. It conducted a survey purporting to show that the RT's right of way started south of the trees. The person most qualified from RT testified that although he was not personally aware of the inter-agency memo, both the county and RT had a longterm custom and practice of maintaining the trees in accordance with the terms of the

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Dangerous condition

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agreement.

Ultimately, the county produced documents that showed it used the same right-of-way lines as the ones established by the RT survey, and its employees reluctantly conceded that it had responsibility for maintaining the trees to the extent they impeded the county roadway.

C. Rules of the Road

One valuable source for general rules in our case was the county website for the Department of Transportation, where it states that "[t]he Maintenance & Operations Division (M&O) maintains, operates and improves unincorporated area roadways" and that "M&O crews are in the field on a daily basis to inspect roadways for needed repairs and modifications." Moreover, the Trees and Landscape Section "has primary county-wide responsibility for maintaining trees and vegetation within the road right-of-way" and it is the county's goal is "to create and maintain an integrated system of bikeways that is direct, safe and convenient to use for work, school, errands and recreation."

The more specific rules came from the county code. Chapter 12, §12.12.035 of the code applies to obstructions of public road rights of way and requires that "trees shall be maintained in such a manner that foliage remains trimmed to a minimum height of . . . . fourteen and one-half (14.5) feet above any paved roadway or shoulder area." The branches from the subject trees extended over the bike lane at a heights as low as 5 feet. Based on the "shall" language, we alleged the breach of a mandatory duty under Government Code §815.6.

D. Establishing Notice

One difficulty for our case against the county was establishing notice that the trees constituted a dangerous condition. Surprisingly, although it was responsible for maintenance of trees within county rights of way, the Tree and Landscape Maintenance Division of the County Department of Transportation had no record of maintaining the trees in question.

Our initial investigation included several SWITRS requests. We started by focusing on bicycle incidents or any incidents involving foliage or vegetation on Folsom Boulevard. When this didn't return anything useful, we expanded the same parameters to broader areas. Again, this did not produce similar incidents. However, the information was useful to us in shifting our focus to proving notice by other means.

One notable aspect was that at the time of the incident, there were staked juvenile trees that appeared to have been recently planted along Folsom, both east and west of the subject old growth trees. Although the county tree maintenance and landscape groups were separate, we directed discovery to get documents describing that landscape project and identifying the county employees involved.

As it turns out, the planting project had occurred approximately one year prior to the incident, and landscape supervisors had visited the trees on numerous occasions since. At deposition, one supervisor testified he had to drive around the subject trees while inspecting the juvenile trees from his vehicle. This went well with testimony that all county employees within the division were responsible for noticing hazards within county rights of way.

In addition, we had an arborist inspect the subject trees, which he determined were a maple and an elderberry He noted they were fairly fast growing trees was saw evidence of pruning cuts on both trees at different times over a likely period of 15 years. Since the county was responsible for keeping the trees out of the road, this was at least circumstantial evidence it's tree maintenance employees were aware that the trees grew over the roadway and had trimmed them in the past.

E. Discovery Plan

Written discovery was important in identifying persons with knowledge and producing some nuggets of information like the old inter-agency memo regarding tree maintenance. However, by far the best information was obtained through depositions. As with any bureaucracy, the responsibilities for road and tree maintenance at the county are spread between several individuals in different departments. One deposition typically lead to information that required another deposition. It took at least 10 depositions of county employees to get to the point where we felt we had the necessary testimony to make a liability case at trial.

F. Conclusion

Public entity liability cases come in many varieties. The prosecution of any case will obviously vary with the facts and circumstances. Hopefully, sharing the above will help some of you in similar cases (*See case specifics in Verdicts & Settlements on page 43*).

Epic Systems Corp. v. Lewis: U.S. Supreme Court Suppresses Employee Rights and Continues to Uphold Binding Individual Arbitration Agreements

By: Christopher Orlando, J.D. Candidate 2019/Law Clerk at Kershaw, Cook & Talley PC

Arbitration agreements certainly have their place in the realm of business-to-business transactional contracts. In a perfect world with reasonable limitations, arbitration agreements would allow sophisticated parties dealing at arm's length to expeditiously and amicably resolve disputes without engaging in prolonged litigation. Instead of undergoing years of discovery, exorbitant expert witness costs, court hearings that may get delayed for months and mounting attorney's fees, arbitration agreements have the benefit of resolving a business dispute cheaply and efficiently so that both parties can enjoy the benefit of their bargain. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974).

The Supreme Court has long justified enforcing arbitration agreements, finding that arbitration does not undermine parties' substantive rights. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985). In its latest decision, the Court decided that even claims of substantive violations of the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act ("NLRA"), which provide guarantees of employee rights to collective action, are capable of being fully vindicated in arbitration pursuant to the Federal Arbitration Act ("FAA"). Epic Sys. Corp. v. Lewis, 200 L. Ed. 2d 889, 897 (2018).

Although this ruling ignores the distinction between transactional arbitration situations, and the application of arbitration agreements to substantive employee rights violations, to Justice Neil Gorsuch and four of the Court's other justices, "balance," "contemporary developments" and "good policy" are entirely irrelevant to avoid the statute's application. *Id*. at 905-06.

To lawyers watching on the sidelines, this decision is not surprising given the Supreme Court's penchant to enforce arbitration agreements regardless of the substantive federal and state rights at issue. Id. at 906; DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U. S. 477 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

In fact, when there has been an arbitration agreement at issue, the Court has consistently enforced arbitration clauses and rejected efforts by plaintiffs to vindicate substantive rights as a class "with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act." Epic Sys. Corp., 200 L.Ed.2d at 906.

The majority decided that plaintiffs must prove that the NLRA intended to create private class-action rights for aggrieved employees. Section 7 of the NLRA states that employees have a right to "concerted action" (among other rights), but it does not explicitly say "class action" when Congress presumably could have. Thus, in the majority's view, the FAA and the NLRA should be read in harmony with each other because there is neither a "contrary congressional command," nor an "inherent conflict" that would otherwise make the substantive rights of the NLRA unable to be arbitrated. While these factors may support the Court's decision, they fail to take into account its real-world effects.

To summarize Justice Ginsburg's dissent in one sentence, "the effect of this decision is to limit and undermine employee and unionized collective action all together." Epic Sys. Corp., 200 L. Ed. 2d at 920. Specifically, Justice Ginsburg gave due weight to the rationale behind the NLRA, that employees can better protect themselves against abusive employment policies and working conditions working together, rather than individually.[1]

Indeed, nowhere in the majority decision does the Court consider Judge Posner's oft-cited quote that "the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." Carnegie v. Household Int'l, Inc.,

Continued to page 15

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376 F.3d 656, 661 (7th Cir. 2004).

Judge Posner's economic analysis of class actions was confirmed by a 2015 *New York Times* study[2] that assembled records from arbitration firms across the country and found that "between 2010 and 2014, only 505 consumers [in the U.S.] went to arbitration over a dispute of $2,500 or less." Using Verizon (with its more than 125 million subscribers) as an example, the *Times* found that the telecommunications giant faced only "65 consumer arbitrations in those five years."

As another example, *Time Warner Cable,* which has 15 million customers, faced seven" consumer arbitrations. While employee wage and hour violations are often worth far more than $30 to an individual employee, even thousands of dollars of unpaid overtime are usually not worth arbitration costs and fees by the time the claim is resolved.

According to a more recent 2017 study,[3] the Economic Policy Institute found that 53.9% of employers across the United States force their employees to sign mandatory arbitration agreements. In California, 67.4% of employers require non-union employees to sign mandatory arbitration agreements, substantially higher than the national average. One explanation is that California has strong employment laws that protect employee rights, and as a consequence, employers are using the FAA to opt out of litigating in California Courts.

However, even gig-economy independent contractors are now increasingly subject to arbitration clauses and class action waivers. According to a 2017 study[4] that analyzed Terms of Service contracts from 38 gig companies between 2009 and 2016, researchers from the University of Oregon School of Law found that prior to 2012, only about one third of companies used arbitration agreements. By 2016, nearly two thirds of gig companies made their workers sign an arbitration agreement, almost all of which included a class action waiver.

Contrary to the Court's findings in Epic Systems, arbitration is rarely a mutually selected forum that allows the vindication of substantive rights, as in a courtroom. In terms of legal resources and bargaining power, most arbitration provisions are drafted by and for those in the superior bargaining position—the employer or company—and to the detriment of the employee or consumer.

Instead of fighting an employee wage and hour class action, and dealing with all the potential negative publicity, the employer can simply compel binding individual arbitration (along with limited discovery and appeal rights) to keep a widespread pattern of illegal behavior out of the public eye.

Moreover, many companies are well aware that it is far cheaper to settle individual arbitration cases against a handful of employees or consumers who are more likely representing themselves *pro se,* than it is to face claims by a class of employees or consumers who are represented by experienced plaintiffs' attorneys.

Under California law, plaintiffs have found occasional success fighting binding arbitration agreements. For example, the Ninth Circuit has recognized that plaintiffs may successfully challenge an arbitration agreement if it is both procedurally and substantively unconscionable.[5]

Additionally, the California Second District Court of Appeal recently vacated an arbitration award in favor of JP Morgan Chase Bank on the grounds that the arbitrator failed to disclose four cases the arbitrator accepted involving counsel for Chase while the plaintiff's arbitration case was pending.[6]

However, these basic assurances of contractual conscionability and mandatory disclosures of arbitrator conflicts do little to address the inherent power imbalance between a corporation and a single employee or consumer in a typical arbitration proceeding.

In short, because of the Supreme Court's decision in Epic Systems, it will be much more difficult for employees to hold companies accountable particularly when it comes to vindicating employee rights.

FOOTNOTES

1. Epic Sys. Corp., 200 L.Ed.2d 889 at 920. (J. Ginsburg Dissent) "Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection."

2. *Jessica Silver-Greenberg & Robert Gebeloff, N.Y. Times, "Arbitration Everywhere, Stacking the Deck of Justice."* (Oct. 31, 2015). https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html

3. *Alexander J.S. Colvin, Economic Policy Institute,* "The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers," (Apr. 6, 2018). https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the- Courts-is-now-barred-for-more-than-60-million-american-workers/

4. *Tippett, Elizabeth Chika and Schaaff, Bridget, How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy, Rutgers Law Review, Forthcoming* (July 14, 2017). Available at SSRN: https://ssrn.com/abstract=3009913 or http://dx.doi.org/10.2139/ssrn.3009913

5. Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 926 (9th Cir. 2013) (Excessive procedural or substantive unconscionability may compensate for lesser unconscionability in the other prong. But here we have both. Ralphs has tilted the scale so far in its favor, both in the circumstances of entering the agreement and its substantive terms, that it "shocks the conscience.")

6. Honeycutt v. JPMorgan Chase Bank, N.A., No. B281982, 2018 Cal. App. LEXIS 679, at *33-34 (Ct. App. Aug. 2, 2018) ("The arbitrator disclosure rules are strict and unforgiving. And for good reason. Although dispute resolution provider organizations may be in the business of justice, they are still in business. The public deserves and needs to know that the system of private justice that has taken over large portions of California law produces fair and just results from neutral decisionmakers.")

Mentoring: Giving Back

By: Travis Black, CCTLA Vice President

Creating a culture of collaboration and shared learning is part of the goal of CCTLA. Promoting the benefits of mentoring, for both the giver and receiver, is an important cornerstone of our organization.

I was a retired police officer, working for Progressive Insurance, managing a Special Investigation Unit (SIU) that covered six states. With my prior law enforcement background, it was a great job. I was in charge of the West Division, which consisted of six states, managing 35 employees and had the opportunity to travel a lot.

I had passed the California Bar and had oversight responsibilities for several defense firms. However, I wasn't able to actually practice law.

At the time I worked for Progressive, it had 12 divisions. Then one day, Peter B. Lewis, chairman of Progressive, changed the structure of the company's divisions, and I found myself in charge of Northern California and Oregon. Overnight, my job wasn't fun or challenging anymore!

Shortly after this, I met with Lewis and was offered a golden handshake, a year's salary. I jumped on it. I immediately called my wife and told her that I was opening my own law practice and was going to practice personal injury law. She was a defense attorney working for Correll and Associates, house counsel for Farmers Insurance. I remember hearing her crying on the other end of the phone. She apparently didn't share my naïve enthusiasm! I remember her telling me I didn't even know how to create legal pleading paper, how was I going to practice law!

It didn't take long before I realized I really didn't know much about the "practice" of law. I had a background in handling claims, knew how to settle cases, but didn't know what to do when the insurance company made me an unacceptable offer, and I was forced to litigate it. I didn't have a mentor. My wife provided me with three binders full of examples of pleadings, discovery, motions, and said good luck!

About this time, I had become friends with Andy Woll, who had been a partner in a large Sacramento defense firm. He had very nicely destroyed a case that I thought was perfect. He was considering retirement, and when the firm dissolved, I struck gold. I had a mentor! I am quite certain that I called him at least four to five times a week. I called him during the day, in the evening and on weekends. He second chaired the first few trials I had and was there to get me out of trouble most of the time. I can remember apologizing for calling him so much. But he always said that he was giving back to the legal profession. At the time, I didn't really appreciate what he was saying.

As I gained experience, I became very involved with Gerry Spence's Trial Lawyers College, graduating in 2004. I learned a totally different way to try a case. John Demas pushed and prodded and finally talked me into being on the Board of Directors for the Capitol Trial Lawyers Association (CCTLA).

A few years ago, Andy Woll passed away. I had the opportunity to spend a lot of time with him in the hospital. He wasn't able to talk very much, but I promised him that I would pay forward the generous sharing of time and knowledge in the spirit of what he had provided to me in those early years. I have a picture of him and me in my office and it serves as a

Continued on page 18

Mentoring

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reminder of the difference that one person can make in the life of another.

I have always been interested in education and have been involved with the CCTLA Education Committee for several years. One of the things I have come to realize is how fortunate we are to have many talented attorneys in our association. Dan Wilcoxen, who I'm guessing has served on the Board of Directors for over 20 years, is constantly donating his time and talents pertaining to medical liens. Matt Donahue is always reaching out and volunteering his vast knowledge of insurance to our association on our listserv.

Glenn Guenard is always sharing his knowledge and experience. Bob Bales, our past CCTLA president, works tirelessly with the CAOC. These are just a few examples from the large pool of attorneys who can be a brain trust to support your efforts.

I have found one of the most rewarding experiences we can have as attorneys is to give back to the legal profession by being a mentor. I painfully remember how it felt to be facing an insurance company with its unlimited funds and questionable ethics and feeling helpless. I also remember how good it felt to reach out to Andy, knowing that he was there for assistance, encouragement or even just a reality check!

CCTLA implemented a mentoring program several years ago. Sadly, I don't think the word has gotten out as well as it should: that there is help just a phone call away!

I would highly encourage any attorney who needs some help to reach out to the association. Sometimes it's really hard to ask for help. But remember, every experienced attorney has been right where you are!

I also would like to invite any attorney who feels he or she has knowledge and experience to volunteer to be a mentor. We all have busy work schedules and family commitments. But you can volunteer as much or as little as you want. Imagine being able to spend 15 minutes with a young attorney, giving them some solid advice and watching that attorney take off.

Be part of this positive program in CCTLA. Inspire the next generation of attorneys to carry forward with a culture of shared learning and support for each other.

CCTLA' S COMPREHENSIVE MENTORING PROGRAM

If you would like to get more information regarding this program or have a question with regard to one of your cases, contact Jack Vetter at jvetter@vetterlawoffice.com, Lori Gingery at lori@gingerylaw.com, Glenn Guenard at gguenard@gblegal.com or Chris Whelan at Chris@WhelanLawOffices.com.

SPRING FLING 2018

The Capitol City Trial Lawyers Association (CCTLA) held its 16th annual Spring Fling and Silent Auction on June 14 at the Ferris White Home, with more than 200 guests. This event benefits Sacramento Food Bank & Family Services and this year raised more than $113,000 for SFBFS. At the event, Justin Ward, CCTLA treasurer, received the Morton L. Friedman Humanitarian Award.

Photography by Joseph Potch

CCTLA President Lawrance Bohm presents Justin Ward, CCTLA treasurer, with his plaque after Ward was named the winner of the Morton L. Friedman Humanitarian Award

From left: CCTLA past presidents John Demas and Kyle Tambornini with Doug Jaffe and Kate Ebert

Above, from left: Justice Darrel Lewis, Parker White, Insurance Commissioner Dave Jones and Dan Wilcoxen, CCTLA director and past president

Above, from left: Judge Robert Hight, Tanya Davis and Hank Greenblatt

Lori and Richard Gingery

Special thanks to Joel Clapick of Galatea Effect for donating the wine and his time for this year's event. jclapick@galateaeffect.wine

HOPPY BREWING COMPANY

Special thanks also to Troy Paski of Hoppy Brewing Company for donating the beer for this year's Spring Reception. Hoppy Brewing's new location will be opening soon at 1022 2nd Street, Old Sacramento.

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Justin Ward, CCTLA treasurer, with Uduak Oduok, after he received the Morton L. Friedman Humanitarian Award

Justice Art Scotland (Ret.) and Margaret Doyle

From left: Marti Taylor, CCTLA director; Shelley Jenni, past CCTLA president; and Drew Widders, also a CCTLA director

From left: Judge Michael Brown, Judge Ben Davidian, Judge Morrison England, Judge Judy Holzer Hersher, Judge David Brown and Laura Moreno

Justice Art Scotland (Ret.) and Bill Kershaw

Elisa Zitano, Susan Schoenig, Ashley Amerio and David Smith, CCTLA past president

Left, from left: CCTLA Executive Director Debbie Frayne Keller, Colleen Frayne McDonagh and Taylor Frayne Keller

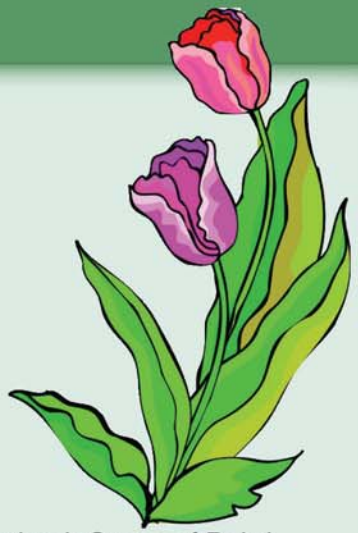
CCTLA's 2018 Spring Fling was a tremendous success thanks to all who attended and donated to the Sacramento Food Bank and Family Services.
In addition to the 80 $1,000 sponsors, special thanks go to four CCTLA members who added very generous donations to help meet the goal of raising over $100,000 for SFBFS:
Bill Kershaw
Parker White
Kyle Tambornini
Lawrance Bohm

Kudos also to Margaret Doyle and Debbie Keller for their invaluable work making it such an enjoyable success and to Parker White for hosting the event at the Ferris White home

Art and Sue Scotland

Thank You!

To CCTLA's June 14, 2018 Spring Reception & Silent Auction Sponsors!



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CCTLA thanks everyone who supported The Giving Pool and donated items for the silent auction! This year, we raised $113,989 for Sacramento Food Bank & Family Services, and we couldn't have done it without all of you.

SACRAMENTO Food Bank & Family SERVICES

CCTLA Capitol City Trial Lawyers Association

"Betty Rocker Papers" exhibit installed in Sacramento Central Library vault

By: Linda Dankman, CCTLA Board Member

BETTY ROCKER

Betty "the Rock" Rocker, nee Potok then Dankman by her first marriage, accomplished many firsts in her short career as a public defender. When she retired in 1988, she was the only practicing grandmother, the highest placed woman in the Public Defender's office and the only grandmother to have defended felony (or misdemeanor) criminal cases in the Sacramento courts, to name only a few.

She was one of the first attorneys to use the battered woman's defense to successfully defend women accused of murdering their husbands and the first attorney in Sacramento to petition the court to have her clients brought into the courtroom unshackled outside the presence of the jury. Toward the end of her career, she fought for equal retirement rights for female county employees who received less in benefits than their male counterparts.

Rocker's list of firsts began during her law school education in the 1970s when she fought for and won the right for women law students to serve in the Folsom Writ Program, in which law students entered the prison to assist inmates with their legal defenses, and the right of women to ride along in sheriffs' cars on the beat. Before Rocker's protests, those programs were limited to men only.

Coupling those firsts with her aggressive and unique personality, Rocker and the cases she defended received a good deal of press, and she chronicled her career by keeping scrapbooks of many of those articles, one of which is illustrated by her aunt, Ruth Horn, then a local artist. Those scrapbooks and other memorabilia comprise "The Betty Rocker Papers," a permanent exhibit in a vault recently installed in the Central Library's Sacramento Room.

A scrapbook of her early life as a young woman attending her senior prom, as a patron of the arts, a roller skater and world traveler is included in the exhibit to elucidate the dichotomy between "The Two Bettys" — Betty Rocker, the housewife and mother of three who didn't work outside the home, and Betty Rocker, one of Sacramento's top criminal defense attorneys of her time, a street fighter with a fury for justice, a groundbreaker, teacher and mentor to many other attorneys.

Sacramento prosecutors considered Rocker such a fierce adversary that the District Attorney's Trial Section used to present a "Piece of the Rock" trophy to any attorney who managed to win a conviction against her in a jury trial. Perhaps the highlight of the exhibit is the trophy itself. For her part, Rocker found the custom offensive, quipping: "To me, a case is too serious to be a game."

Betty Rocker and her daughter, Linda Dankman

The exhibit is part of the collection on "Important Women in California History" and is presented as an inspiration to women in general and particularly to those who want to pursue a career in the legal field. The exhibit may be viewed, upon request, at the Central Library, 825 "I" Street and will be previewed at a special reception to be hosted at the Sacramento County Bar office at 425 University Avenue, Sacramento, on a date and time to be scheduled. Watch the Sacramento County Bar announcements and newsletters for details on the reception.

Below is the description of the exhibit, written by James Scott, librarian and certified archivist, who arranged to add the exhibit to the library:

Betty Rocker served as an attorney for the Sacramento County public defender's office from 1974 to 1988. Her influential life and career is expressed through the collection of images, ephemera, awards, scrapbooks and newspaper clippings.

Betty Potok was born on August 13, 1931, in Brooklyn, Kings County, New York, to Mac Potok, a clothing salesman and native of Germany, and Alice Potok (nee Kraisler), a native New Yorker. She went on to attend James Madison High School, learned French, became an amateur roller-skater, and took advantage of New York's world famous opera and theater offerings. In 1950, she married Herbert Dankman who soon took a job as a civilian engineer at Sacramento's McClellan Air Force Base. The couple had three children - Linda, Carolyn, and Alan - but divorced in 1962. Settled in Sacramento, Betty married Edwin Rocker in August 1963. For much of the 1960s, she both worked in real estate and owned and operated an employment agency called the Keller Agency. In 1968/69, she then pivoted to the study of law. Even without an undergraduate degree - she did attend Sacramento State College from 1967 to 1969 as a business major - she scored so well on her law school admission test that the University of the Pacific's McGeorge School of Law admitted her in 1969. To fund her coursework, Rocker won a number of scholarships while also working fulltime as a night shift telephone company supervisor. Rocker went on to graduate fifth in her class in June 1973. Within a year, she was working for the Sacramento County Public Defender's Office where she specialized in spousal abuse law and developed a reputation as a dauntless adversary for prosecutors and a committed defender of the underdog. Rocker died in May 1988.

***

Linda Dankman is Betty Rocker's middle child and an attorney in practice who concentrates on private probate and personal injury law.

In a Win for Workers, the California Supreme Court Broadens the Definition of an Employee

By: William Lee, J.D. Candidate 2019/Law Clerk at Kershaw, Cook & Talley PC

The California Supreme Court recently issued a landmark decision in Dynamex Operations W., Inc. v. Super. Ct., 4 Cal. 5th 903 (2018), in which the court upended decades-old precedent and adopted a new worker-friendly standard that makes it more difficult for businesses to classify workers as independent contractors. The case involved two delivery drivers suing, on behalf of themselves and a class of similarly situated drivers, Dynamex Operations West, Inc., a national delivery company. They alleged that Dynamex misclassified delivery drivers as independent contractors rather than employees since 2004. *Id.* at 914.

Under both California law and federal law, the question of whether a worker is properly classified as an employee or an independent contractor is of significant consequence to workers, businesses and the public. For example, businesses bear the responsibility of paying federal social security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance and complying with federal and state labor laws for its employees. *Id.* at 913. On the other hand, businesses bear no such responsibility with respect to independent contractors. *Id.*

In California, the Industrial Welfare Commission (IWC) issues wage orders to regulate minimum wages, maximum hours, and working conditions of employees, including but not limited to overtime compensation, meals and rest breaks. Indus. Welfare Comm'n v. Super. Ct., 27 Cal. 3d 690, 700-03. IWC wage orders embrace the legislature's efforts to provide workers minimum protections that "accord them a modicum of dignity and self-respect":

> The adoption of the exceptionally broad . . . California wage orders finds its justification in the fundamental purposes and necessity of the . . . legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. Dynamex, 4 Cal. 5th at 952.

Under the new "ABC" test adopted by the court, a test already used in other states, a worker is considered an employee for the purposes of IWC wage orders unless the hiring entity satisfies *each* of three conditions:

> **A.** The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; *and*
>
> **B.** the worker performs work that is outside the usual course of the hiring entity's business; *and*
>
> **C.** the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Id. at 957.

Prong A is, more or less, a restatement of the old balancing test in S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341 (1989). In Borello, the California Supreme Court held that a hiring entity's degree of control over the means and manner in which work is performed is the most important of several factors to be considered when evaluating whether a worker is an employee or an independent contractor. *Id.* at 350. Secondary factors include ownership of equipment, place of work, opportunity for profit and loss, and the apparent intent of the parties. *Id.* at 354.

In construing the Borello test, the court recognized that no single factor is dispositive which "makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified" and "affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its workforce into disparate categories." Dynamex, 4 Cal. 5th at 954-55.

By adopting the "ABC" test, the court simplified the law by *presuming* that all workers are employees rather than independent contractors and shifting the burden of *rebutting that presumption* to the hiring entity. Moreover, by eschewing a balancing test in favor of a conjunctive test, the court agreed that "'permitting an employee to know when, how, and how much he will be paid requires a

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Win for Workers

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test designed to yield a more predictable result than a totality-of-the-circumstances analysis that is by its nature case specific.'" *Id.* at 954 (citation omitted).

Prongs B and C significantly raise the bar for being classified as an independent contractor. Prong B requires the independent contractor to perform work outside the usual course of the hiring entity's business. *Id.* at 959-961. For example, a clothing manufacturer may hire as an independent contractor a plumber to repair a leak or an electrician to install a new electrical line.

However, the clothing manufacturer may not similarly hire as an independent contractor an outside seamstress to make clothes for sale because the outside seamstress is part of the hiring entity's usual business operation. *Id.* at 959. Prong C requires the independent contractor to have made the decision to go into business for himself or herself by taking the usual steps to establish and promote his or her independent business through incorporation, advertisements, routine offerings to the public, etc. *Id.* at 962.

In addition to safeguarding worker's rights, the court noted public policy reasons favoring the "ABC" test. The court sought to level the playing field not only between workers and businesses but also between competing businesses. The "ABC" test protects businesses by eliminating, or at least mitigating, anticompetitive effects related to intentional misclassification:

> California's *industry-wide* wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices... "[T]he [old] legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability."

Id. at 952, 955 (emphasis in the original) (citation omitted).

The "ABC" test has the potential to seriously impact California's labor market, with particularly significant repercussions for California's "gig economy." Millions of California workers who were considered independent contractors under the old test may now be deemed employees. This will require all California businesses with independent contractors to conduct a thorough investigation of such workers to determine whether they are improperly classified under threat of individual and class liability.

Mike's Cites

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good public policy to impose liability.

The appellate court also determined that there was no basis in the record to conclude that a duty to exercise reasonable care in protecting patrons from yellowjacket nests would impose a heavy burden on golf course operators. The appellate court also felt that the imposing the cost of injuries by yellowjackets on golf courses would induce them to protect people which was in the community's interests. It is also appropriate to assign moral blame to the golf course because it exercised greater control over the risks at issue.

There was no evidence in the record that the availability or cost of insuring against the risk would make it hard or excessively difficult for insurance coverage to cover injuries to golf course patrons from yellowjacket attacks.

The golf course went so far as to argue the court should not impose a legal duty that a land owner must find and kill animals found on its natural property because animals are living creatures. Plaintiff argued that the policy of protecting human life outweighs the policy of protecting animal life.

BE CAREFUL OF DEFAULT PROVE-UP AMOUNT

Airs Aromatics, LLC vs. CBL Data Recovery Technologies, Inc.
2018 DJDAR 5045, 2018 Cal. App. LEXIS 494; May 23, 2018

FACTS: Airs Aromatics, LLC, sued CBL Data Recovery Technologies, Inc., for breach of contract in 2011. The complaint alleged damages "to exceed $25,000.00." CBL answered, and discovery ensued. At a settlement conference, Airs demanded $5 million.

In August 2012, the parties stipulated to withdraw CBL's answer and allow Airs to obtain a default. Airs filed a request for court judgment seeking over $3 million in damages.

The trial court held a default prove-up hearing and in November 2012, entered default judgment against CBL in the amount of $3,016,802.90. Almost five years passed when CBL filed a motion to set aside the default under CCP §580(a) and CCP §585(c).

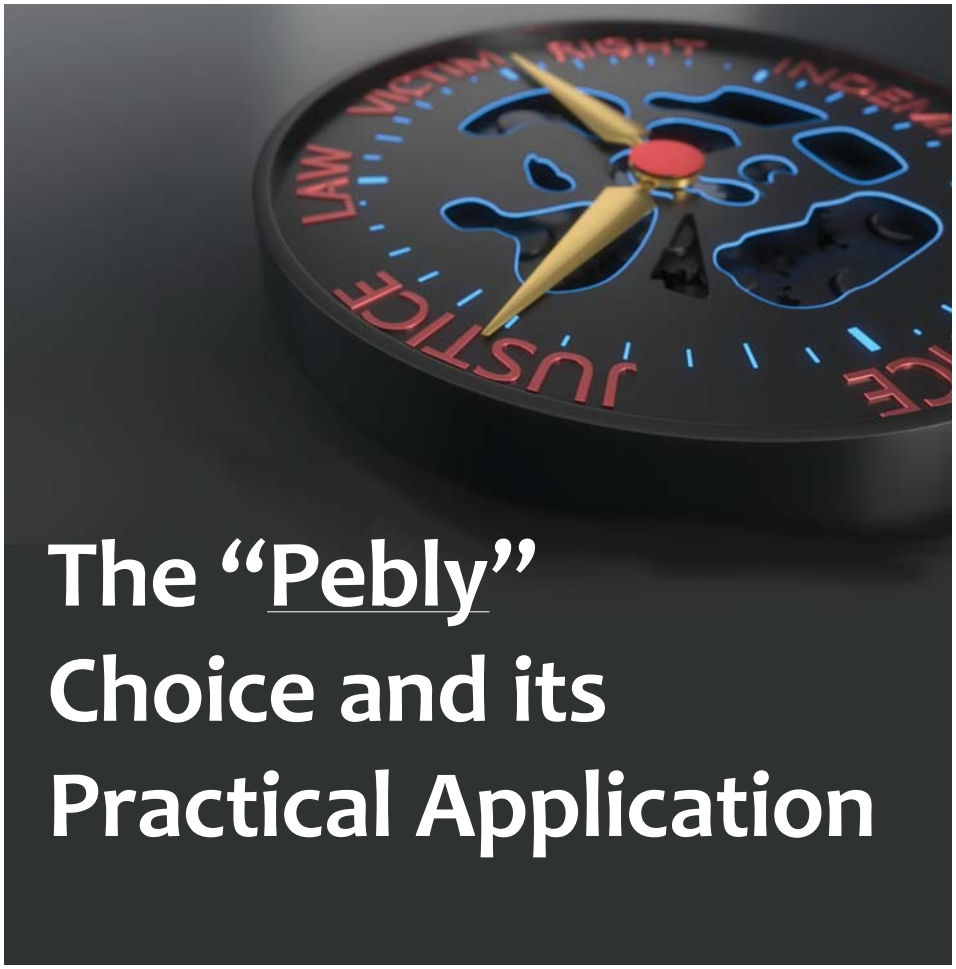
CBL argued that the court could not enter a judgment awarding damages greater than that specifically demanded in the complaint.

Airs argued that the default judgment was merely voidable, not void. Airs further argued that since CBL's motion to set aside the default was years after the entry, the motion to set aside could not be granted. A voidable default must be challenged within six months of entry. Manson, Iver & York v. Black (2009) 176 Cal App 4th 36.

The trial court denied CBL's motion to set aside the default focusing on whether CBL had adequate notice, whether it had a reasonable opportunity to defend the action, and whether it had assumed the risk of an adverse judgment by failing to do anything for almost five years.

HOLDING: CCP §580 does not allow a default to be taken that exceeds the amount alleged in the complaint, and therefore, the trial court is reversed, and the case remanded to allow the plaintiff to amend the complaint. CCP §580 requires formal notice of damages sought through the complaint and therefore constructive notice is not relevant. Greenup v. Rodman (1986) 42 Cal 3d 822, 816. [Note: This is a breach of contract case; CCP §425.11 expressly excludes personal injury and wrongful death cases from CCP §580.]

The appellate court offered to strike the default judgment that exceeded the $25,000 pleaded, but decided to remand for the plaintiff to move to amend the complaint.



The "Pebly" Choice and its Practical Application

By: Daniel R. Del Rio, CCTLA Board Member,
and Ryan M. Harrison Sr., with Del Rio & Associates, PC.

A person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort. (Malone v. Sierra Railway Co. (1907) 151 Cal. 113.) This simple legal premise has become more elusive over the past century amid the milieu of complexities commensurate with the interplay between personal injury law, the administration of healthcare, and the health insurance industry. The more complicated our system becomes, it seems, the more relentless the insurance defense bar's arguments become about why their client ought to pay less to the injured victim despite their negligence. Making our clients whole again within the confines of the law has never been more difficult than it is today.

On May 8, 2018, the plaintiffs' bar finally caught a break in Pebley v. Santa Clara Organics, LLC (2018) 22 Cal.App.5th 1266, 1269. The central issue in the case involved the plaintiff, Dave Pebley, who was injured in a motor vehicle accident caused by the defendant, Jose Pulido Estrada, an employee of defendant Santa Clara Organics, LLC. Although Pebley had health insurance, he elected to obtain medical services outside his insurance plan with the total billed amount asserted as a lien against the settlement or jury award.

At trial, the jury found the defendants liable for Pebley's injuries and awarded him damages including the billed charges on liens. Defendants appealed, arguing Pebley should have treated under his pre-existing medical insurance which would have resulted in substantially reduced medical bills. Defendants argued they should not be required to pay the full medical bills because Pebley was not frugal in his pursuit of medical care i.e., he did not mitigate his damages.

Defendants relied on a long line of appellate and Califoria Supreme Court precedent that has been chipping away at plaintiffs' rights for several decades. The central thesis of their argument came from the "Avoidable Consequences Doctrine," which stands for the proposition that a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. (See State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026.)

The Court of Appeal agreed with the trial court, holding in no uncertain terms that "a tortfeasor cannot force a plaintiff to use his or her insurance to obtain medical treatment for injuries caused by the tortfeasor. That choice belongs to the plaintiff." (Pebley, 22 Cal.App.5th at 1277.) The effect of that simple statement will have a significant impact into the future because now plaintiffs need not be concerned about overcoming defendant's objections regarding plaintiffs who choose to treat on a lien with independent medical providers.

The Practical Application

The defense bar may have been dealt a blow with Pebley, but they are immediately responding with a variety of arguments. In our recent trial in June 2018 Sacramento (Venkus v. Biondi Paving, Inc. Super. Ct. Sacramento, 2018, No 34-2016-00204507, $1,670,689 verdict where the jury awarded the full billed charges for past medical specials, most of which were on full bill liens), we ran into an array of responses to Pebley, including contentions that: Pebley was an aberrant ruling departing from existing case law and should not be followed; the contention that the Court of Appeal only justified its ruling because

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Pebly Choice

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the plaintiff decided to go outside of his health insurance network for better quality medical treatment; and lastly, that Pebley is simply a workaround to allow plaintiffs to blackboard the outrageous and unreasonable billed charge amounts.

Pebley is Just Another Natural Extension of the Law

Pebley is not new law. It is the natural extension of law which has existed since Hanif v. Housing Authority (1988) 200 Cal.App.3rd 635 and Nishihama v. City and County of San Francisco (2001) 93 Cal.App.4th 298, namely that the plaintiff is entitled to the lesser of either the amount paid by health insurance or the amount owed. Just as Katiuzhinsky v. Perry (2007) 152 Cal.App.4th 1288, Uspenskaya v. Meline (2015) 241 Cal.App.4th 996, and Moore v. Mercer (2016) 4 Cal. App. 5th 424 merely defined the Hanif/Nishihama's amounts paid or amounts owed rule to include amounts owed through medical financing, Pebley simply extended the analysis to also include liens as an amount owed. Thus, it is merely an extension of the same rule where, unless health insurance has paid off the plaintiff's bills, the amount that the plaintiff can claim includes the amount owed, whether by outstanding bill (Bermudez v. Ciolek (2015) 237 Cal.App.4th 1311), medical financing (Katiuzhinsky/Uspenskaya/Mercer), or lien (Pebley).

Inquiry into the Reasoning of the Plaintiff is Dangerous and Should Not Be Undergone

Another defense bar contention is designed to limit the Pebley decision to situations where the plaintiff was explicitly seeking "better quality medical care." The problem with this argument is it is asking the court to decide what reasons are good enough for a patient to leave there medical network and what reasons are not. In other words, the argument asks the court to not only inquire as to the thought process of the plaintiff but also to decide what is a valid reason and what is not to leave one's medical network. This is a perilous inquiry as it invites the court to weigh people's private decisions that concern their own healthcare, which involves well-settled legal principles of holding the fundamental right of privacy. (Roe v. Wade (1973) 410 U.S. 113, 154.

A Plaintiff Must Show His Past Medical Expenses Are Reasonable and Customary

The Pebley case did not change the recovery formula for past medical expenses: a plaintiff is entitled to recover the lesser of (1) the amount incurred or paid for medical services, and (2) the reasonable value of the services rendered. (Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541) (Howell). The Court of Appeal found the fact that Pebley chose to pay for those services out-of-pocket, rather than use his insurance, was irrelevant so long as these requirements were met.

Therefore, plaintiff must still show that the billed amount for past medical services are "reasonable and customary in the community." Expert testimony is an absolute and essential requirement to establish this fact. (Bermudez v. Ciolek (2015) 237 Cal. App.4th 1311) (Bermudez) (Evidence of the medical bills is insufficient, by itself, to establish the reasonable value of the services rendered.) In short, a plaintiff must testify (1) to the billed amount owed, and that testimony must be followed up with (2) expert testimony credibly asserting that the billed amount is reasonable and customary in the community.

In Pebley, the plaintiff's medical experts confirmed the bills represented the reasonable and customary costs for the services in the Southern California community. Additionally, Pebley testified that he was liable for the costs regardless of litigation, and his treating doctors stated during testimony that they expect to be paid in full. The court permitted defendants to present expert testimony that the reasonable and customary value of the services provided by the various medical facilities is substantially less than the amounts actually billed, and defendants' medical expert opined that 95% of private pay patients would pay approximately 50% of the treating professionals' bills. The jury rejected this expert evidence and awarded Pebley the billed amounts.

This is nothing new for the plaintiff's bar, but we would recommend retaining and working with billing experts even more in advance than usual because they may now have to evaluate billed charge amounts which can require more work. For example, in our trial, an outpatient surgical facility was used rather than a hospital, which created an interesting problem when attempting to compare it to other local facilities. There were no viable local comparisons. The inpatient facilities/hospitals have a different pricing structure for a multitude of reasons including the extensive variety and volume of procedures that they could accommodate. Furthermore, the only other local outpatient facility was not equipped to do the procedure that was done in our case. Thus, comparison to a like facility within our geographic area was nearly impossible. In situations like that, your expert may have to result to either a larger geographic area for comparison, or an entirely different geographic area, or even an entirely different method of analysis of the medical bills.

Pebley has certainly helped to protect the plaintiff's choice of health care and in doing so preserved the full account of their damages but it may require additional trial preparation in order to prove that billed charges amounts are reasonable.

What is settlement planning — and why do personal injury attorneys need it?

By: Margaret H. Fulton and Ashley Clower of Robinson & Fulton Law

Personal injury attorneys spend countless hours getting a great result for their clients. If the injured client is a minor or is relying on needs based public benefits, the assistance of a settlement planning attorney can be useful in guiding the personal injury attorney through these complex legal areas so the injured person's matter can be efficiently resolved. The injured person will receive long-lasting benefits as a result of settlement planning.

Settlement planning attorneys (also known as estate planners or special needs attorneys) can assist with understanding public benefits and help the injured person decide whether a special needs trust or other planning tools are most appropriate, on a case by case basis.

Settlement planning attorneys quickly determine whether an adult with capacity can establish a special needs trust to preserve crucial public benefits, whether court involvement will be necessary, or if the establishment of a conservatorship should be considered. Settlement planning attorneys work with the injured clients and their trusted loved ones to create and execute a settlement plan that will help the injured person meet the injured person's goals and needs.

This article will help personal injury attorneys identify when settlement planning is needed and how to recognize issues that could cause problems for their clients. A list of frequently asked questions by the personal injury attorneys is included at the end of this article.

1. How do personal injury attorneys know when it's time to use a settlement planner?

Personal injury attorneys should know whether their injured client is on needs-based public benefits. Usually, the personal injury attorneys are aware of the fact that their client is on Medi-Cal because of their access to multiple medical records and bills. Personal injury attorneys may have a gut feeling that they need to do something to help their client to protect their benefits, but their client does not seem very concerned about keeping their benefits or the consequences of receiving even a modest settlement. The injured client assumes the settlement proceeds will last much longer than they ever really do, they didn't want to be on Medi-Cal in the first place, or they feel that they will just spend the money immediately and not lose benefits.

When the injured persons lose their public benefits, they will struggle with how to get back on the benefits, and the settlement proceeds are quickly used up. It is not up to personal injury attorneys to protect the injured persons from every single bad thing that could happen, and the personal injury attorneys are not suddenly required to become an expert on settlement planning, but it is the right thing for the attorneys to protect their clients to the best of their abilities.

It would be beneficial for personal injury attorneys to know some basic information on how the settlement is going to affect their client's eligibility for public benefits because lower courts have held that not considering and planning for a client's means-tested government benefits can result in a legal malpractice claim. See the unreported Texas cases Grillo v. Pettiette, et al. NO. 96-145090-92, 96th Dist. Ct., Tarrant Cty., Texas (2001); Grillo v. Henry, No. 96-167943-96, 96th Dist. Ct., Tarrant Cty., Texas (1999). Courts have also found that not considering and planning for the client's means-tested government benefits can result in a breach of fiduciary duty or dereliction of duty if not considered by a fiduciary or denied by a court. Department of Social Services v. Saunders, 247 Conn. 686, 724 A. 2d 1093 (1999).

At a minimum, personal injury attorneys should protect themselves by informing their clients of how settlement planning can assist their clients with management of the settlement proceeds and if their clients choose not to utilize settlement planning, personal injury attorneys can document their file that the advice was given and ignored or refused.

This is where settlement planners can assist personal injury attorneys. Using a team approach, the settlement planner can look at the injured person's big picture and bring in financial planners, structured settlement brokers, accountants, public benefits specialists and private fiduciaries, depending on the person's needs. No one person can address all of the issues that come with settlement planning. The personal injury attorney can rest easy knowing that he or she has done a necessary service for the injured person.

To help guide you as the personal injury attorney, Robinson & Fulton Law has created a checklist to determine if you should require assistance from a settlement planner. We hope it is useful in your daily practice. You can find this checklist included at the end of this article.

2. How do personal injury attorneys know if their injured client is on needs-based public benefits? Why does the personal injury attorney need to assist the client in understanding what types of benefits the client receives?

Not every injured person needs to consider settlement plan-

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Settlement planning

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ning. The first question the personal injury attorney should ask the injured party is: "What type of benefits do you receive?" The answer is almost always inevitably, "Disability." However, not all disability benefits are needs-based and not all types of disability will require settlement planning. According to Social Security, an adult person is considered disabled if the person has a physical or mental impairment that will last 12 months or longer (or will soon lead to death) that prevents the person from engaging in substantial gainful employment (working and earning $1,180 a month). A person with a disability is able to create a special needs trust or join a pooled trust.

Why is it important to determine the injured party's disability and eligibility for benefits? Injured parties who are only on entitlement benefits, such as Social Security Disability or Medicare, are not required to do any settlement planning. Injured parties who are on needs-based public benefits, such as Supplemental Security Income (SSI) and Medi-Cal, need to consider settlement planning.

Other programs, such as CalFresh (food stamps), Housing Choice Voucher Program (Section 8 housing) and In-Home Supportive Services (IHSS) can all have a needs-based component to them and should also be considered in settlement planning. If the injured party is not quite sure what type of benefits he or she is currently receiving, Social Security can be contacted, and a benefits statement can be provided upon request of the injured party or the representative of the injured party. Injured parties can receive a combination of Medicare, Medi-Cal, Social Security Disability and SSI.

A person who falls within Social Security's definition of disability should qualify for SSI if that person has low monthly income and has resources worth less than $2,000. Exemptions do exist. A person can own one primary residence, one vehicle of any value, irrevocable pre-paid funeral contracts, etc. If a person can qualify for even $1 of SSI, the person will automatically qualify for Medi-Cal. However, a person CAN qualify for Medi-Cal based on the poverty level and not based on disability. These individuals will be unable to create a special needs trust as only disabled persons can create special needs trusts under 42 U.S.C. §1396p(d)(4)(a).

SSI is a federal program that provides a modest income stipend to persons who meet a certain eligibility criteria. SSI will pay a person up to $910.72 per month in California in 2018. SSI is available to those who are aged (over 65), those who are blind and those who are disabled, as long as they are also able to meet the resource and income limitations. A person receiving SSI will be penalized for up to 36 months for gifting away assets.

Public benefits are incredibly complex, and the injured parties rarely understand the complexities behind the benefits they receive. As a personal injury attorney, it is crucial that you assist your client in determining what benefits the client receives. If there is any question that your client receives needs-based public benefits, any amount of settlement proceeds will likely change your client's future benefits. A settlement planner should be consulted to determine the exact benefits that your client receives and the best course of action to take for your specific client. Each individual is different and each of the injured party's unique circumstances should be considered when engaging in settlement planning.

3. What tools are used to maintain needs-based public benefits and planning for the injured person's post-settlement financial life?

Various tools can be combined to maintain needs based public benefits for the injured person. The tools that are most successful for the injured persons include:

➤ *Invest the settlement in "exempt" resources (the "spend down approach").* A primary residence, a vehicle, and certain other items do not count toward the asset/resource limitation for needs-based public benefits. For example, the injured person can use the settlement proceeds to purchase a home, improve the existing home, buy medical equipment or purchase a car and still maintain needs-based public benefits.

➤ *Fund an ABLE account.* An ABLE account can be funded with up to $15,000 per year. A disabled individual can only have one account and can only create an account if the disability occurred prior to the age of 26. A helpful website for information on all 50 states' ABLE accounts and a tool to compare each state's program to other states can be found at www.ablenrc.org.

➤ *Transfer settlement funds to a pooled trust.* The pooled trust, also called a (d)(4)(C) trust, is a trust established and managed by a non-profit association. The pooled trust management invests the assets and makes distributions to the beneficiary. It can be used in conjunction with a structured settlement and it is the only viable trust option available to preserve needs-based public benefits for persons over the age of 65.

➤ *Establish a first party special needs trust.* A first-party special needs trust (SNT), also known as a litigation SNT, payback SNT or a (d)(4)(A) trust, is used when an individual receives assets, such as a settlement or an inheritance, that would otherwise disqualify that person from receiving needs-based public benefits. 42 U.S.C. §1396p(d)(4)(A) authorizes the creation of the first-party SNT wherein the settlement proceeds may be retained in the SNT for the sole benefit of the injured person with a disability who is under the age of 65 without the injured person losing eligibility for needs based public benefits.

The first-party SNT also must provide that, on the death of the beneficiary, the trustee must repay Medicaid (Medi-Cal) for all benefits received by the beneficiary during his or her lifetime to the extent that funds remain in the trust at the beneficiary's death. The first-party SNT provides flexibility by allowing the injured person to choose a trustee who will manage the assets for the injured person and by allowing the injured person and trustee to choose the investment options that work best for the injured person. The first-party SNT integrates well with structured settlements, Medicare Set Aside arrangements, investment accounts and non-liquid assets. During the injured person's lifetime, the first-party SNT can pay for several types of items to enhance the

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injured person's quality of life.

➤ *Gifting of the assets when the injured party is on needs-based public benefits, but is not "disabled."* In certain circumstances, an injured person may be on needs-based public benefits, such as Medi-Cal, but does not meet the definition of "disabled" under the Social Security Act. In these rare occasions, a settlement planning attorney can help design a plan in which the injured person participates in a "spend down approach" on exempt assets and/or a strategy involving gifting of assets to a trusted family member who can then protect these assets for the injured person. This is a complex area and requires very careful planning that is dependent on the injured person's specific situation.

4. What are the most frequently asked questions that personal injury attorneys have about settlement planning?

➤ *Can I still put the injured person's money in my trust account*? Yes. However, it cannot just sit there for a long period of time (could result in a loss of public benefits to your client), and if you attempt to make small distributions over a long period of time, it will still result in a loss of benefits to your client.

➤ *If my client engages in settlement planning, will it hold up disbursements from my trust account for fees and costs and other liens?* No. It is beneficial to get a settlement planner involved early for a multitude of reasons. The personal injury attorney can still negotiate liens and make disbursements as necessary while settlement planning is occurring.

➤ *Do the defendants/insurance companies have to fund the injured party's special needs trust directly or cut separate checks for the amount to be funded into the injured party's special needs trust?* No. The personal injury attorney can receive the checks in the same manner as they always do. The personal injury attorney can then make the check from the trust account payable directly to the trustee of the special needs trust.

➤ *Do I need to have special language put into the settlement release?* No. Your client will still receive the settlement proceeds as usual. The planning will be done by the client post-settlement, so settlement planning has no effect on the release language.

➤ *Is the injured party required to do a structured settlement?* No. The injured party needs to look at his or her own individual needs and circumstances. Involving a team helps the injured party to see the big picture and make wise investment decisions. What worked for your last client may not work for your next client.

➤ *If I have my client receive a structured settlement with small monthly payments, won't that keep my client on public benefits?* Not necessarily. A structured settlement may be an effective tool for the right client in the right situation. However, in the ever changing world of government benefits, even the smallest payments paid out over your client's lifetime from the structured settlement could become problematic. The most effective way to utilize a structured settlement is to use it in conjunction with a special needs trust. The structured settlement is not

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a replacement for creating a thorough, individualized plan for the injured client by the settlement planner.

➤ *Do I need to do a Medicare Set Aside Trust for my client?* The answer is: Maybe. This is a decision that needs to be carefully considered by the personal injury attorney with the settlement planner. If a Medicare Set Aside trust is necessary, it should be placed within a special needs trust, or the money in the Medicare Set Aside Trust could be considered a resource or asset and your client could lose benefits.

➤ *If I have my client put the settlement proceeds into a special-needs trust, can I avoid satisfying the Medi-Cal lien that I have received?* No. Pursuant to 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 CFR §§433.145-433.146, when reimbursement is sought from a third party through an assignment provision, the state is the first to retain that portion of any amount collected as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed and the remainder of such amount collected shall be paid to the individual. See the line of cases that have determined that the recipient's settlement funds first must satisfy the state's lien and the remainder then may be transferred to a special needs trust: Cricchio v. Pennisi, 90 N.Y.2d, 683 N.E. 2d 301 (1997); Cuello v. Valley Farm Workers Clinic, Inc., 91 Wn. App. 307, 957 P.2d 1258(1998); In re Estate of Calhoun, 291 Ill. App. 3d 839, 684 N.E.2d 842 (1997).

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Checklist for Attorneys

Should Settlement Planning Be Considered?

Question 1: What benefits does your client receive? Please check all those that apply.

Entitlement Benefits:		Needs Based Benefits:	
Social Security Retirement	☐	Supplemental Security Income (max limit per month is $910.72 as of July 1, 2018)	☐
Social Security Disability	☐	Medi-Cal	☐
Social Security Disabled Adult Child	☐	IHSS (In Home Support Services)	☐
Medicare	☐	Section 8/HUD housing	☐
Alta Regional Center	☐	Food stamps (SNAP)	☐
		Veteran's Disability Pension	☐
		Veteran's Aid and Attendance	☐

If yes to ONLY the entitlement benefits listed above, your client will be entitled to keep these benefits even after a settlement. No settlement planning to protect these benefits is necessary.

If yes to ANY of these benefits, your client needs to consider settlement planning. Go to Question 2.

Question 2: What is your client's disability/disabilities? Check all of those that apply.

☐ Disability occurred prior to the age of 22 ☐ Development disability ☐ Blindness

☐ Disability occurred prior to the age of 26 ☐ Mental Illness

☐ Substance abuse issues ☐ No known disability, but on needs based benefits

☐ Physical or mental impairment that will last 12 months or longer (or could soon lead to death) that prevents your client from engaging in substantial gainful employment (working to earn $1,180 a month)

If your client is disabled, your client should consider settlement planning. Even if your client is not "disabled" per Social Security's definition, we can create a plan to keep them on needs based benefits.

Question 3: What is the age of your client with a disability?

☐ Under 65, consider special needs trusts ☐ 65 and over, consider pooled trusts

Question 4: Does your client have legal capacity? ☐ Yes ☐ No

If no, then is there an existing:

☐ Conservatorship

☐ Power of Attorney in effect

☐ Trusted family member alive, well and willing to help?

If your client has capacity, under current law, your client is able to engage in his or her own settlement planning, including the creation of a special needs trust for his or her own benefit. If your client does not have capacity, a family member can utilize the court to protect your client's settlement and keep the client on needs based public benefits. Also, a conservatorship may become necessary.

Question 5: What is the amount of assets being received by the injured person?

☐ Less than $15,000.00 (can consider ABLE account or spend down)

☐ Between $15,000.00 and $250,000.00 (consider special needs trusts, pooled trusts, spend downs, gifting depending on disability)

☐ Over $250,000.00 (consider special needs trusts with a Medicare Set Aside)

Question 6: What is the person's current living situation?

☐ Living independently in home or apartment ☐ Living in a group home

☐ Living with assistance in home or apartment ☐ Institutionalized

Settlement planning may be beneficial here to ensure that the settlement proceeds keep your client safe and in the living situation that works best for him or her.

Question 7: What is the person's working ability?

☐ Has not ever worked and/or unlikely to work ☐ Working but modest earnings

☐ Likely to return to work in the future ☐ May be able to work with career change

If your client receives no needs based public benefits, but your client is unlikely to work again in the future, your client may qualify for future benefits and should be instructed to apply for benefits. Settlement planning should be considered for all clients who cannot work or are only capable of earning a modest living.

Avoiding Delays in UIM Coverage in Work-Related Injury Cases

By: Peter Tiemann of the Tiemann Law Firm and CCTLA Board Member and Erika Lewis, an associate at the Tiemann Law Firm

Avoiding delays in litigation should be a goal we all strive to meet. It allows for the efficient management of caseloads, makes clients happy, and simultaneously satisfies the business function of a law firm. A proper intake system is essential to avoiding delays later in litigation. This article shows you how to modify your intake checklist to avoid a common delay before it happens in your case.

During your intake consultation, make sure to ask your client what he does for work and if he was in the course and scope of his employment at the time of the motor vehicle collision. Based on this information, you should ask whether he has an open workers compensation claim. Beware: Clients often explain that they did not open a claim and how they did not want to involve their employer with the collision. They may further explain that they did not intend to miss any work and that they sought medical treatment through their private health insurance.

Beware: Clients often explain that they did not open a claim and how they did not want to involve their employer with the collision . . . What the client doesn't realize is that employers generally have a policy to report all injuries to the workers compensation carrier, which results in a claim being opened. It is necessary to investigate if a worker's compensation claim was opened at intake to avoid delays later during the claims process.

Fast forward six months. The client has since had surgery for his injuries from the crash, and all of his treatment has either been through his personal health insurance or through attorney-authorized liens. The third-party liability insurance has already tendered its minimal policy limits and all of the settlement documents are completed. A settlement demand is then sent to the Underinsured Motorist Policy carrier, since the at-fault's insurance policy was not enough to properly compensate the client. Unfortunately, the first-party claim's adjuster refuses to make an offer, claiming that coverage has not been triggered.

At this point, you should formally demand arbitration and request that they provide the policy language upon which they are relying in making the determination that coverage has not been triggered. Typically, your demand to commence arbitration is sent to the UM/UIM carrier and is thereafter forwarded to the handling defense attorney. Surprisingly, you may get a reply to the demand stating: "Your client has an open workers' compensation claim related to this incident. There is case law stating that a UIM claim is stayed until such time that worker's compensation claim is resolved."

The issue in this example is one that arises frequently where the UM/UIM arbitration of the work-related personal injury case is stayed until you can prove that no workers compensation claim remains open. If you desire to get your UM/UIM case moving, the burden will be on you to prove that all workers compensation claims related to the collision have been closed. This article explores the issue and provides ways to avoid the complications that it causes.

The Relevant Law

An employee who is injured on the job is not required to open a worker's compensation claim. However, if the employee does decide to pursue a worker's compensation claim and subsequently receives workers compensation benefits, any arbitration of the claimant's UM/UIM claim is stayed until the workers compensation claim is resolved. This is because benefits issued pursuant to UM/UIM coverage are reduced by any amounts paid "under any workers compensation law." California Insurance Code Section 11580.2(h); section 11580.2(p). The underlying policy is that the insured is meant to be provided with the same insurance protections he would have enjoyed if the adverse driver had been properly insured. Thus, allowing the UM/UIM coverage to take a reduction for the workers compensation benefits prevents the claimant from double dipping.

However, in instances where no benefits were paid through workers compensation, there is no reason why arbitration should be stayed since the UM/UIM claim would not be afforded any reduction.

Issue: Mysterious Workers Compensation Claim

In the scenario above, the UM/UIM policy is refusing to commence arbitration of the claim on the contention that the

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Getting Your Slice:

The Cheesecake Factory's Recent Wage Violations Concerning Subcontractors

By: Elizabeth Bertolino, J.D. Candidate 2019/Law Clerk at Kershaw, Cook & Talley PC

In a decision issued in June 2018, the California State Labor Commissioner's Office found The Cheesecake Factory, Inc., jointly liable for $4.6 million in unpaid wages. The restaurant chain, which subcontracted out janitorial staff with Magic Touch Commercial Cleaning through Americlean Janitorial Services Corp., will have to pay hundreds of underpaid workers at eight California locations in Orange and San Diego counties.

The janitorial staff, who primarily worked night shifts, alleged they were kept at the restaurant from midnight until morning without breaks. Under California law, employers must permit non-exempt workers to take a 10-minute rest break for every four hours worked and a 30-minute meal break if the workday is longer than five hours.

Additionally, they alleged they were required to stay for morning inspections, which often resulted in longer workdays. These practices resulted in employees working up to an additional 10 hours of unpaid overtime each week which, under California law must be paid as time and a half.

According to California Labor Commissioner Julie A. Su, investigation into The Cheesecake Factory began in 2016 following wage theft reports. These reports, which came from the San Diego-based nonprofit Employee Rights Center, resulted in further inspection of all Cheesecake Factory locations cleaned by Magic Touch Commercial Cleaning.

The case follows two California labor laws that seek to protect subcontracted workers from employers who attempt to avoid responsibility for fair pay. The first law, which added Section 2810.3 to the California Labor Code, creates employer liability for workplace violations originating from a contractor. The statute, which took effect in 2015, "require[s] a client employer to share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage." Effective the following year, Section 238.5 of the California Labor Code ensures an employer may not attempt to avoid liability by contracting out service labor.

The recent Cheesecake Factory case is instructive for employer and contractor liability involving wage violations concerning subcontractors.

Avoiding delays

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claimant opened a worker's compensation claim. The claimant is adamantly stating he purposefully did not open a workers compensation claim because he did not wish to seek treatment through workers compensation, and he did not receive any benefits through the workers compensation system. So, why is the defense attorney insisting that a worker's compensation claim is open?

What the client doesn't realize is that employers generally have a policy to report all injuries to the workers compensation carrier, which results in a claim being opened. It is necessary to investigate if a worker's compensation claim was opened at intake to avoid delays later during the claims process.

One way to determine if a claim was opened by the employer is to contact the workers compensation carrier and ask if there is an open claim. If there is, you should request that the claim be closed if no benefits were issued and request a "closure" letter from the carrier in order to provide verification to the UM/UIM carrier that there is in fact, no open workers compensation claim. Additionally, ask the carrier to provide a financial statement to show that zero benefits were paid to the injured employee.

An even better approach so as to avoid unnecessary delays is to find out the client's employer name and contact information during the initial intake. Thereafter, contact the employer and ask if they have opened a worker's compensation claim, even if the client is adamant that no workers compensation claim is open. As stated above, many times an employer will automatically file a report about the employee's work-related injury without telling the employee, thus triggering the opening of a claim.

Finally, another way to learn if there is an open workers compensation claim is to run a claim search through the Electronic Adjudication Management System (EAMS) sometime after the collision. This search engine provides public access to open workers compensations claims, including the injury date, employer, and case location.

Obtaining verification that the potential workers compensation claim is closed will help avoid delays in settling the UM/UIM claim or in setting the arbitration. If the defense attorney responds to the demand for arbitration with the assertion that your client has an open workers compensation claim, you can respond quickly with a meet-and-confer letter and attach the proof that there is no open claim. At this point, if the defense continues to allege that the arbitration is stayed until the workers compensation claim is resolved, the claimant should file a Petition to Compel Arbitration and attach the proof that there is no open workers compensation claim as an exhibit.

Conclusion

Many clients who are injured on-the-job by a third party make the decision to avoid opening a worker's compensation claim or treating for their injuries through workers compensation system. If there is a potential UM/UIM claim in the client's future, take early precautions to determine and obtain written verification that there is no open worker's compensation claim. Otherwise, there is a likelihood that when it comes time to negotiate or arbitrate the claim, the UM/UIM carrier will refuse to either negotiate or to begin the arbitration process and the claimant will ultimately fall into the "delay" trap.

Are you aware of your clients' alternatives?

For more than 30 years, The Alcaine Halterbeck Group has worked with plaintiffs and attorneys to implement comprehensive investment plans, structured settlements and much more. Structured settlements are a great strategy for catastrophically injured people with a serious dependency on their settlement for recovery, as well as those who cannot manage a large sum of money and run the risk of being a spendthrift. Do you know someone who could benefit from our services?

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Carlos Alcaine – California Insurance License 0A81941
Stephen Halterbeck – California Insurance License 0F23825

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Verdicts

Verdict: $1,670,689

Attorneys Ognian Gavrilov and Daniel Del Rio obtained a $1,670,689 jury verdict in Venkus v. Nolasco, et. al. 34-2016-00204507, Sacramento County, Dept. 35, Judge Perkins.

After a motor vehicle accident that was relatively minor, Plaintiff was able to drive his vehicle from the accident scene. Liability was disputed until one week prior to trial.

Plaintiff developed low-back pain that culminated in a single-level lumbar surgery and reported a complete recovery after the surgery and went back to working manual labor.

Plaintiff had a 998 offer of $1M. During mediation, Plaintiff's best offer was $850K and Defendant's best offer was $650K. The jury's verdict came in at $1,670,689, and there are pending costs and interest of $180,000.

Plaintiff's trial counsel were Ognian Gavrilov of Gavrilov & Brooks, and Daniel Del Rio and David Trent of Del Rio and Associates, PC. Defendant's counsel was Brian Gunn of Wolfe & Wyman.

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Cost of Proof Sanctions: $75,825

Attorneys Ognian Gavrilov and Eliezer Cohen obtained $75,825 in cost of proof sanctions in Tanev v. Toribio, et. al. C16-01585, Contra Costa County, Dept. 9, Judge Craddick.

The cost of proof sanctions stem from a $154,500 jury award. Defendant unreasonably disputed liability and proximate cause.

Plaintiff's trial counsel were Ognian Gavrilov and Eliezer Cohen of Gavrilov & Brooks. Defendant's counsel was Steve Mason.

Settlements

Settlement: $13,500,000

Onate v. Pulley: State of California; County of Sacramento

Attorney S. David Rosenthal, Rosenthal & Kreeger, obtained a $13.5-million settlement for his client, Amado Onate, a single 30-year-old Health Net employee, after he sustained a major traumatic brain injury while riding his bike to work along Folsom Boulevard and was struck by a delivery van operated by a State of California employee. The traffic collision report placed Plaintiff at fault for veering out of the bike lane into the number two east bound lane directly in front of the state van.

There was evidence Plaintiff had been riding eastbound on Folsom when he moved to the left to avoid some branches that extended from two trees on the south shoulder into the bike lane before being hit. The van driver testified that he was in the number two lane when the right front corner of his van suddenly and unexpectedly struck something. One witness' testimony seemed to corroborate the van driver's version. Another witness' testimony was that the impact occurred "near" the white line separating the traffic lane from the bike lane. The investigating officer placed the point of impact in the traffic lane and concluded that our client's violation of Vehicle Code §22107 caused the collision.

Plaintiff sued the driver of the van and the State of California, alleging that even if Plaintiff had left the bike lane, Defendant had seen Plaintiff in the bike lane as he approached and violated Vehicle Code §21760—the Three Feet for Safety Act—by failing to give adequate space as he passed. Plaintiff also sued the County of Sacramento and Regional Transit, the entities potentially responsible for maintaining the trees and keeping the bike lane free of obstructions. Ultimately, Rosenthall was able to establish that the county was responsible for maintaining trees within county rights of way and that the tree branches in the bike lane were in violation of §12.12.035 of the county code, which requires that trees be trimmed to provide 14.5 feet of clearance over roadways.

The county alleged that even if the trees obstructed part of the bike lane, Plaintiff was at fault for leaving the bike lane since the branches extended only halfway into the lane. Video taken by Rosenthal's investigator shortly after the incident showed bicycles moving to the left to avoid the branches but staying within the lane. Both defendants also alleged Plaintiff's failure to wear a helmet was comparative fault and the cause of all or some of his brain injury. Both sides retained experts to address this issue.

Plaintiff was close with his four sisters and had a girlfriend of 10 years at the time of his injury. He worked as a customer service representative for Health Net. As a result of his injuries, he will not be able to work again and will require lifetime medical attention, which was detailed in a Life Care Plan created by Deborah Doherty, M.D. The State of California contributed $10,000,000 and the county contributed $3,500,000 to the settlement, which included the establishment of a Special Needs Trust and Medicare Set Aside arrangement (*See: Lessons Learned, page 11*).

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Confidential Settlement: $2,100,000

Attorneys Ognian Gavrilov and Daniel Del Rio obtained a $2.1-million confidential settlement in a case where the plaintiff was injured during an altercation. Liability was contested.

Plaintiff developed neck pain that culminated in a surgery and reported a good recovery after the surgery for which no future care was necessary. Plaintiff had a 998 offer of $1M that was rejected. During mediation, Defendant settled for $2.1 million.

Plaintiff's counsel were **Ognian Gavrilov** of Gavrilov & Brooks and **Daniel Del Rio** of Del Rio and Associates, PC.

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Settlement: $200,000

Attorney Ognian Gavrilov settled a UIM Bad Faith claim, Sargsyan v. State Farm, 2:17-cv-01432-KJM-EFB, Eastern District of California.

The UIM case:

State Farm delayed paying a $100,000 under-insured motorist bodily injury policy in an attempt to settle the case for a lesser amount. State Farm tendered the policy limits one week prior to the scheduled arbitration hearing.

The Bad Faith Case:

The case was filed in Sacramento County and was removed by State Farm to the Eastern District of California. The case was mediated with retired Judge Gilbert and settled for $200,000.

Plaintiff's counsel on both the UIM case and the Bad Faith case was **Ognian Gavrilov** of Gavrilov & Brooks.

Fighting a Phony Determination of Fault

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Capitol City Trial Lawyers Association
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CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. If you would likemore information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com, Lori Gingery at lori@gingerylaw.com, Glenn Guenard at gguenard@gblegal.com or Chris Whelan at Chris@WhelanLawOffices.com.

SEPTEMBER 2018

Tuesday, Sept. 11
Noon, Q&A Luncheon
Shanghai Garden, 800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Wednesday, Sept. 12
CCTLA Problem Solving Clinic
"Finding Hidden Property Damage in Motor Vehicle Cases – What You Should Look For and What Your Experts Need to Know"
Speaker: John T. Martin
5:30-7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, Sept. 21
CCTLA Luncheon
Topic: "Trial Technology"
Speaker: Lawrance Bohm
Noon, Justice Centers of California,
3835 North Freeway Blvd.,
Suite 210, Sacramento 95834
CCTLA Members, $35

Thursday, Sept. 27
MONTHLY MEMBERSHIP MIXER
Program 4:30-6 p.m. / Mixer 6-7:30 p.m.
Justice Centers of California
3835 North Freeway Blvd.,
Suite 210, Sacramento 95834
CCTLA Members Only, Free

OCTOBER 2018

Tuesday, Oct. 9
Noon, Q&A Luncheon
Shanghai Garden, 800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Wednesday, Oct. 18
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30-7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, Oct. 19
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Noon, Sacramento County Bar Association
CCTLA Members, $35

Thursday, Oct. 25
MONTHLY MEMBERSHIP MIXER
Program 4:30-6 p.m. / Mixer 6-7:30 p.m.
Justice Centers of California,
3835 North Freeway Blvd.,
Suite 210, Sacramento 95834
CCTLA Members Only, Free.

NOVEMBER 2018

Tuesday, Nov. 13
Noon, Q&A Luncheon
Shanghai Garden, 800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Wednesday, Nov. 15
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30-7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Thursday, Nov. 29
MONTHLY MEMBERSHIP MIXER
Program 4:30-6 p.m. / Mixer 6-7:30 p.m.
Justice Centers of California,
3835 North Freeway Blvd.,
Suite 210, Sacramento 95834
CCTLA Members Only, Free

Friday, Nov. 30
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Noon, Sacramento County Bar Association
CCTLA Members, $35

DECEMBER 2018

Thursday, Dec. 6
CCTLA Annual Meeting & Holiday Reception
5:30-7:30 p.m., The Citizen Hotel
CCTLA Members and Guests Only

Tuesday, Dec. 11
Noon, Q&A Luncheon
Shanghai Garden, 800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Contact Debbie Keller at CCTLA at 916 / 917-9744 or debbie@cctla.com
for reservations or additional information with regard to any of these programs

CCTLA Calendar of Events