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Inside This Issue

We can do it . . . and did!

By: Wendy C. York
President, CCTLA

As I look back at this year and my time serving this excellent organization as your president, I want to thank you again for the opportunity to serve you. Despite grim economic news that affects court funding and access to courts, CCTLA and its members have continued to weather the storm with great success. First, despite extensive budget cuts, the Sacramento Superior Court leadership has been effective in getting civil cases into courtrooms, meaning access to justice and an opportunity to hold tortfeasors and insurance companies accountable for the harms they caused.

Second, as promised, CCTLA has finished creating an expert database, available exclusively for CCTLA members, where we can share information about defense experts. This project has been a long time coming, and I am proud to have the project completed while serving our members.

Third, many CCTLA members have risen above the current economic and legal challenges with amazing success, meaning justice for injured victims and consumers. Among the many successes of our CCTLA members include Roger Dreyer and Robert Bale, who did an excellent job in the Master Craft verdict in Butte County, and Chris Whelan, who won a race-harassment case against Sears in Sacramento County (see page 16). Roger Dreyer and Chris Spagnoli had a successful design-defect verdict in Sacramento County (page 15). Travis Black and Joseph Weinberger were successful in El Dorado County, and Timothy Smith, Kirk Wolden and Jack Vetter each won verdicts this year. These are only some of CCTLA's many successes this year.

Looking forward, there is so much more that our CCTLA members can do to protect consumers and injured victims while holding tortfeasors, insurance companies and corporations accountable for their malfeasance. First and foremost, I encourage our members to become more involved in and support Consumer Attorneys of California (CAOC), our statewide organization that protects our interests both legislatively and politically. In supporting CAOC, we can ensure that we minimize the interests of powerful corporations and insurance companies that seek legislation to immunize themselves from liability and damages. I encourage each one of us to step up to the plate and support CAOC in every way that we can.

Finally, I wish to thank the CCTLA board for its tremendous support and for providing great leadership and educational seminars for our members. It has truly been a pleasure serving our members.

Allan's CORNER

By: Allan J. Owen

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

Deposition of Foreign Resident. In Toyota Motor Corporation v. Superior Court, 2011 DJDAR 11254, the Second District holds that the trial court may not compel employees of a defendant corporation who are Japanese residents to attend depositions in California. The depositions were noticed as individual witnesses, not as corporate representatives on specific areas of inquiry.

Workers' Comp—Rebuttal of Rating Schedule. In Ogilvie v. WCAB, 2011 DJDAR 11500, the court issue is: What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the ratings schedule? The court holds that the schedule can be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule. A second way is where the injury impairs his or her rehabilitation and for that reason the diminished future earning capacity is greater than reflected in the employee's scheduled rating (citing LeBoeuff v. WCAB). The court concludes that an employee may challenge the presumptive scheduled rating by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the ratings schedule, or by demonstrating that due to industrial injury, the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the ratings schedule.

Product Liability. In Mansour v. Ford Motor Company, 2011 DJDAR _____, the court holds that it was proper to refuse an instruction on the consumer expectation test for product defect in a roof crush rollover case. Court notes that the plaintiff must provide evidence concerning the use of the product, the circumstances surrounding the injury, and the objective features of the product which are relevant to an evaluation of its safety. In this case, the third prong test that the Court of Appeals applies is that objective features must be shown in such a way that the jury

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2011 CCTLA Officers & Directors

HOWELL: LESSONS AND OPPORTUNITIES

Trial Lawyers Tell the Truth

By J. Jude Basile
Trial Counsel in the Rebecca Howell Case

When a tortiously injured person receives medical care for his or her injuries, the provider of that care often accepts as full payment, pursuant to a pre-existing contract with the injured person's health insurer, an amount less than that stated in the provider's bill. In that circumstance, may the injured person recover from the tortfeasor, as economic damages for past medical expenses, the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person? We hold no such recovery is allowed, for the simple reason that the injured plaintiff did not suffer any economic loss in that amount.

Rebecca Howell v. Hamilton Meats & Provisions Inc., Ct. App. 4/1 D053620; S179115; San Diego County; Super. Ct. No. GIN053925; August 19, 2011.

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On that date, the California Supreme Court issued its decision in Howell vs. Hamilton Meats—no doubt destined to take its place among the Golden State's pantheon of justice. A true "landmark" case.

The main issue was whether courts should remove the proven value of medical special damages incurred by a plaintiff injured through the negligence of another IF the tortfeasor could show that the injured victim had private insurance that never actually paid all the sums due the health-care providers.

At the center of the controversy was the sanctity of the long cited "Collateral Source Rule." All eyes were focused upon this "medical bill" issue as the case made its way through the system.

The trial court had said yes, such reductions in a plaintiff's medical specials could occur. The court of appeal reversed and said no—no such abrogation of the "Collateral Source Rule" should be tolerated.

Then, our state's Supreme Court weighed in. The appellate court was reversed.

And with that decision, plaintiffs seeking a full measure of justice AND who happened to be lucky enough to hold insurance coverage with a company having the ability to negotiate with health care providers for lower prices found their ability to collect the reasonable value of their medical services stripped away. Instead, they awoke on the 20th of August 2011 to discover that—henceforward—they can only collect the actual amounts their managed care plans paid on their behalf. Predictably, the decision led to much wailing within the California plaintiff bar about the further erosion of long upheld plaintiff rights.

As Becky Howell's trial counsel, I was tempted to wail along with them, realizing—as I did—that the verdict we had obtained would be reduced by over $135,000 as a result of this ruling. Somewhere amid all the wailing, though, I got to thinking about what it all meant. Where I ended up was a far piece from where all the Supreme Court's deliberation took them.

The truth is that many lawyers and insurance adjusters use the amount of past medical expenses to be the cornerstone of

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evaluating all the damages in a case. Courts do the same thing sometimes. I guess we shouldn't blame juries for following suit, IF that's how they are led.

How often do we hear as the first case-evaluation question asked: "How much are the meds?"

This concentration on the amount of the medical bills is supposedly an easy and quick way to gauge the "value" of a case. It evolved over time into the insurance company's method of pegging a value on an injured person's claim for justice. It became the basis for some settlement mills to exist and operate. Somehow, somewhere, somebody even formulated the myth that "three times the medical costs" could give a reasonable general damage figure for a victim's pain, suffering and anguish.

And so many lawyers ask, just as the insurance industry hoped they would: "How much are the meds?"

While many addressed a victim's request for justice in this mechanical way, the embracing of human experience and the life-numbing misery resulting from another's wrongful conduct begin to disappear. The human condition, suddenly altered from what had existed before, was seldom perceived with any real detail or empathy. But, boy, many wanted to concentrate on those meds.

I wanted to remind all of us that this decision is a wake-up call for many—a call to remember what our cases are really about: The people we represent. Medical bills, health insurance companies, hospitals, liens, and other "economic" stuff, are only a tiny part of what our cases are about. Our cases are about real people and their changed realities—lives changed in an instant when some other person or corporation betrayed them.

I have been a lawyer since 1982. I have spent most of my career representing people. Since 1985, I have been in private practice representing individuals and families. I have tried many cases. Cases are about people, not "the meds."

As I said before, I was the trial lawyer in the Howell case. The day I was asked to take the case, I knew Becky Howell was someone special. She was an extraordinary athlete, attending Stanford on an athletic scholarship. She was a world class surfer. She surfed most days of her life. She was married to a musician, poet, songwriter, entertainer, who was also a first-class lawyer for people. Her husband asked me to take Becky's case, and it did not take long for me to agree to help if I could.

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Becky was driving along the Coast Highway in Encinitas when a Hamilton Meats delivery truck slammed into the side of her Explorer. The driver was inexperienced with the route, got lost and made a sudden attempt at a U-turn directly into Becky's path. The defendants, after months of litigation, finally admitted liability but denied Becky was injured beyond a temporary soreness.

Shaken badly in the collision, and after months of enduring needle-like pain, fatiguing numbness and a frightening inability to move her previously athletic arm in full motion, Becky went to a doctor for help.

Before long, she ended up with two neck surgeries.

The second surgery was terrible for Becky because the surgeon had to scrape out the material between her neck bones and drill screws and metal bars into her upper spine to hold all the vertebrae in her neck together. Please note I am not describing these procedures as involving a herniated disc at C-5/C-6 with radiculopathy requiring laminectomies and internal fixation, etc. That is doctor/ lawyer/adjuster talk—not the sort of talk that passes between ordinary human beings. When we forget to talk like the human beings entrusting their lives to us, we distance ourselves from the human connection.

Being the person she is, Becky dedicated herself totally to reclaiming her health and her life. She did all she could possibly do to reach a full recovery. I was amazed at her strength and considered her the Bethany Hamilton of her day. (See the movie *Soul Surfer*, if you want to know more about this reference!) A determined competitor her entire life, Becky worked hard in her recovery and at managing her considerable pain. Her guts and determination got her through those awful life-phases. I watched her struggle and often thought: Becky is the kind of person we all admire and hope we can emulate.

Her medical bills were $180,000 or so, but her insurance carrier settled these for about $40,000. The judge let the $180,000 go to the jury but reduced

it after the trial was over to the $40,000 actually paid, setting the stage for the Supreme Court opinion ultimately to come.

The defense did a sub-rosa video, spying on Becky surfing and other things. Although we asked to see all of the video footage, the defendants refused to show us the whole thing. As a result of this "selective editing," the trial judge excluded all of it. I suspect there were some pretty nasty things they did not want us to have.

The footage of their edited spy video that was shown to us had her surfing again. This was a reality we had NEVER denied. Her pure grit got her back in the water, but not with the effortless athleticism she possessed before that betraying Hamilton Meats' U-turn.

Who knows what video footage existed that they refused to show us? Maybe they had some shots of Becky rinsing off at the beach shower, or maybe they had footage of her painfully struggling with her wetsuit. We will never know what sort of invasion of privacy that hidden footage revealed. We asked to see it, but the cowards never showed it to us.

After the trial, I received a motion from the defense seeking to reduce the amounts awarded to Becky for her medical bills, all as supposedly required by the Hanif case. I contacted John Rice, an expert in this area, to help. Is it not weird that a trial lawyer has to get an EXPERT to help force a negligent driver to PAY for the reasonable value of the medical bills his negligence caused the plaintiff to incur? Am I the only one who thinks that is as peculiar as hell?

Anyway, John helped, did a great job, and the case was off to appeal after the trial court granted this defense motion to reduce the medical bills to what Becky's insurance company actually paid. I am a trial lawyer, and I could see straightaway that I would need some assistance on the appellate issues. Given this, appellate counsel was hired (Gary Simms) and Consumer Attorneys of California (formerly California Trial Lawyers) helped, with Scott Sumner's office leading.

The judgment now handed to all of us by the California Supreme Court is consistent with the pro-business attitude of most of the judicial branch of government. It will create a quagmire in trying cases, IF we continue to focus on the past medical bills as the basis for evaluating a case. This is a wake-up call. We must become more understanding of and empathetic with the people we represent and with all of the members of our juries.

Our system of justice requires tremendous TRUST. We trust that people will do what is right. We trust people will follow the law. We trust in The Golden Rule, to do unto others as you would have them do unto you. We trust each other in basic daily activities. We trust others to follow the rules of the road, stop at stop signs, not to use drugs or alcohol and drive, to be attentive, to not speed, to not use a cell phone while driving, etc. We trust businesses to be honest. We trust trucking companies to be extra careful when they are making a profit by operating vehicles much larger, more dangerous and thus capable of causing much more damage than other ordinary vehicles on the public roads, which all of us own. We trust them to properly train and supervise the drivers of these huge machines, which bring the companies immense incomes. The more dangerous the instrumentality or activity, the more we must trust those in control of it.

TRUST is the basis of how we live.

Sometimes this trust is broken. It is broken sometimes by not paying attention. On other occasions, the trust is forsaken

for greed and for the all-important "bottom line." There are always motivations for breaking this trust. The motivations must be explored in every case.

When the trust is broken, harm follows—sometimes great harm. Medical bills are but a small part of the broken trust. Medical bills are the given, for crying out loud. If you break something because you were not behaving as others had a right to truly expect, then you should pay to fix what you broke as best it can be fixed. But human beings are not things. Car fenders do not bleed. Cars do not need oxygen when being fixed. Cars do not need diapers on them as they lay in the repair shop. Cars do not feel. Even knowing all this though, so much of insurance company and lawyers' "case evaluations" are rooted within the costs of repair, or the "What are the meds?" inquiry.

What is often missing is an empathetic concern for the human experience.

Have you ever tried to actually experience what the people we represent go through? Have you crawled into a hospital bed and tried to use a bed pan? Have you laid there in that hospital room and tried to eat with one hand, when no one else is present to assist? Do you have any understanding of how lonely that feels? Have you spent a night in your client's home, sharing their altered realities, their tears and their pain? Have you gotten up with them at night when the fear and the pain will not let them sleep? Gone to the doctor's office with them and sat trembling in the examining room wondering what new surgery will be unveiled by the doctor? Is there is nothing else we can do along these lines?

In Becky's case, I spent lots of time with her and felt honored to do it. I went back and met with her high school teachers, learning what a driving force she had been even as a kid. I went with her to her favorite surf spots. I visited neighborhoods where she grew up. I stayed at her house and saw her morning routine. She told me how the ring and little finger on one hand felt constant numbness and pressure 24/7, so I tightly wrapped my ring and little finger with rubber bands for a 24-hour period to try to feel like she was feeling. I learned very private stories of her life and intimate details of her relationships with her parents and siblings. I came to love and respect her, her husband and her family more than I even imagined was possible.

The judgment now handed to all of us by the California Supreme Court is consistent with the pro-business attitude of most of the judicial branch of government. It will create a quagmire in trying cases, *if* we continue to focus on the past medical bills as the basis for evaluating a case. This is a wake-up call. We must become more understanding of and empathetic with the people we represent and with all of the members of our juries.

There is nothing more important than understanding who the people we represent are and how they must live with the changes crashing into their lives. When you seek this understanding, you begin to love these folks. You become their storyteller and their champion.

I am sure there will be ongoing discussions and seminars crafted so we can learn to deal with the Supreme Court's decision in Howell. There will probably be Howell motions required in the trials of the future. I would not be a bit surprised to watch as a whole cottage industry of experts germinate from the ground like clover to deal with the medical billings issues in trials yet to come.

Becky Howell stood up and took this case about medical bill fairness to the California Supreme Court. While she was willing to make that fight, Becky was never only about the medical bills paid by her insurance company. She was never only about insurance company reimbursement agreements, managed care or lawyers who only look at numbers.

There is a LOT more to THIS lady.

Becky Howell is a human being of unbelievable courage and stature. She is quiet and unassuming and probably wishes I was not writing this about her. She is about being human and fulfilling her human potential in every way she can. She does it so simply and as a matter of such routine that I doubt she realizes her efforts are heroic.

As lawyers, we should pry away the ultimate lesson from the Howell case: Cases are about PEOPLE. If we want to get to know and understand them, we just might start by looking at and understanding ourselves. Why do we do what we do? Is it for our own financial self-enrichment? Are the numbers what we are looking to put up? Is *THAT* why we look at "the meds" or the property damage sums, because we are focusing on the numbers in our *OWN* lives?

I am suggesting that everyone heed this Howell wake-up call. Let us truly look at ourselves first. Why do we do what we do? Have we really ever reversed roles with the people we represent and seen their world through their eyes before, during and after the event? Do we take the time to ask who these people are in a soulful way or do we mechanically look at numbers? Take the time to share the humanity which defines your client. It is there and it is powerful—more powerful than all "the meds" in all the cases ever tried. Allow yourself to feel the love such sharing will engender within your heart.

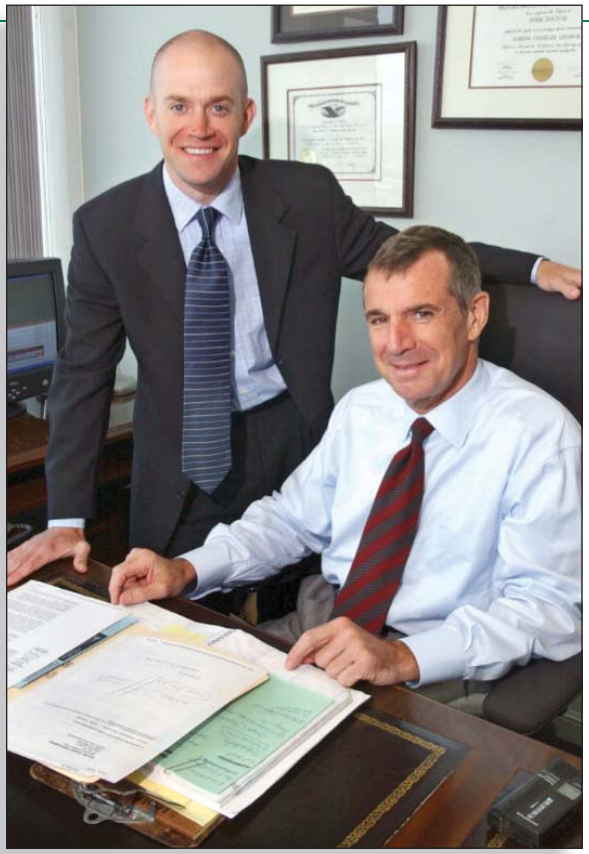
And, guess what? Those heart-gifts can never be given totally away. They come back to you, like the timeless swallows. Sharing of this type, stirring—as it does—"the better angels of our nature," will cause your own humanity to bloom as never before. Budding humanity within an open, caring heart will trump mechanical concentration upon "the meds" every time. I would guarantee it…but, once you feel it, no guarantees are required.

"Pillah" Talk©

with Joseph C. George, Ph.D, Esq.

An ongoing series of interviews with pillars in the legal community

By: Joe Marman



Father-and-son legal team Joseph George Jr. and (right) Joseph C. George, Ph.D.

Q. When did you first start to represent victims of sexual molestation?

After being admitted to the Bar in November 1985.

Q. How many cases have you handled during your career or in the last 10 years for sexual molestation victims?

Hundreds.

Q. What other types of law do you practice?

Mental health malpractice cases focusing on harmful exploitative relationships and therapist-patient sex, and personal injury cases representing persons who have suffered a traumatic brain injury. During my 25 years, the majority of my cases have been outside of Sacramento County.

Q. Could you give some history of your work as a lawyer, or even your history leading up to becoming a lawyer?

I was originally trained as a psychologist, and I am both an attorney and licensed psychologist in California. After completing an internship in clinical psychology, I commenced to fulfill an obligation to the United States Air Force. I was assigned as a psychologist to David Grant Medical Center, Travis Air Force Base, California. While at Travis, I earned my law degree at McGeorge.

As a comment staff writer and assistant editor for the *Pacific Law Journal* at McGeorge, I authored an article proposing a mandatory reporting law for incidents of psychotherapist-patient sex.

Subsequently, after earning my law degree and fulfilling my obligation to the Air Force, I served as a member of the California Senate Task Force on Psychotherapist-Patient Sexual Relationships, and authored Civil Code 43.93, which imposes liability on psychotherapists for sexual contact with a current patient and with a former patient for up to two years following termination of the psychotherapist-patient relationship.

While attending McGeorge, I was an intern at the U.S. Attorneys Office-Civil Division, and worked under (now) Judge Garland Burrell, so I could be gain courtroom experience. At the time, I wanted to learn as much as I could about trial practice. Ultimately, during an interview down in the Bay Area, I was told point blank that I was not going to be hired because I had already "functioned as a professional Ph.D. psychologist" and that would cause a problem with the incoming group of first-year lawyers. I also interviewed with (now) Judge Kevin Culhane and interestingly, he recommended that I go into private practice because I would have far more autonomy and flexibility than joining a large law firm.

After becoming a lawyer, the Sacramento County District Attorneys Office had a program for inexperienced lawyers where a lawyer could volunteer for a month to try cases. Basically, we showed up, were handed a DUI case and informed to go to Department X and try the case. In retrospect, that was exciting and enjoyable. Also, I was able to obtain consultations and general support from experienced lawyers in the community like Doug deVries and then-retired Judge Michael J. Virga. Their advice and support was extremely helpful, and I have always been very grateful to them.

I served eight years in the Anthony Kennedy Inn of Court at McGeorge, which was extremely enjoyable. I enjoy the Inns of Court because we have dinners with judges and lawyers and have presentations and thoughtful discussion, which promote ethics, civility and professionalism in the legal profession.

Currently, it has been an interesting experience to practice law with my son. Again, I was originally trained as an a psychologist, and in many ways, think as much like a psychologist as a lawyer which is reflected is some poorly worded questions in a deposition and trial. By contrast, my son, who was originally a deputy district attorney and thereafter trained and worked with a well-known plaintiffs product liability attorney in

major products cases involving (airline and automobile), is far more precise and detailed which makes for an interesting combination since I bring the psychological expertise to the practice. That was reflected in our last trial verdict ($1.35M) for a child molest victim against her adopted father. By the way, she was over 26 years old when that claim was filed, and we survived a MSJ and directed verdict motions regarding the statute of limitations. We recently were retained to represent some of the children victims for the acts of sexual molestation by the principal of the Creative Frontier Church in Citrus Heights.

Q. How did you begin to focus your practice on representing child victims of clergy sexual abuse?

I always had a boutique practice in mental health malpractice, usually involving cases of sex between a psychotherapist and patient, and child sex abuse. Most of my cases were in Southern California. Insurance coverage (lack of) had a huge effect on undermining financial recovery for victims of child sex abuse by babysitters, etc. Beginning in the late-1980s, an occasional victim of clergy sex abuse would contact me about a potential civil claim.

However, in the mid-1990s, more clergy sex abuse cases began to surface after Father Oliver O'Grady (Stockton Diocese) was arrested, convicted and sentenced to a prison term at Mule Creek State Prison. After Cardinal Law and the Boston Diocese investigations became public, a revival statute was passed in California. With help from of the CAOC and Ray Boucher the statute of limitations was tolled for victims of sexual abuse. Essentially, in 2003, any one victim of sexual abuse (regardless of their age) could file a claim against their abuser and an employer if the victim could show that the employer knew or had reason to know about the child sexual molestation.

Q. Did you partner up with any of the larger law firms in LA for San Francisco to handle some of those coordinated clergy cases?

Yes. We worked with Larry Drivon, Stockton, CA, now retired and former CTLA president, and Jeff Anderson, St. Paul, MN who is the leading clergy child sex abuse trial attorney in the United States.

Q. How have you been prevailing on the statute of limitation issue for those plaintiffs that have not raised their claims until they were in their 30s?

Understanding that survivors of childhood sexual abuse suffer long-lasting injury well into adulthood, the Legislature has amended the applicable limitations statute four times since its enactment. With each successive enactment, the limitations period has been extended for longer periods and/or broadened to apply against larger groups of defendants.

The current version of CCP 340.1, provides a victim has until their 26th birthday to file an action, or within three years of the date that the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later. For example, the three-year window enables someone who is 32 years of age to file suit if they had not been aware of an adult psychological injury that had been caused by the child sexual abuse. Events later in life often trigger connections for victims who have been ashamed and silent about what happened to them.

In short, the California Legislature recognized the substantial and devastating effects of childhood sexual abuse are complex, and a "one size fits all" approach should not be used against victims of childhood sexual abuse. As a result, the CCP 340.1 delayed discovery provision enables victims who have not disclosed their molestations, and certainly not received treatment, to file claims after their 26th birthday, if the facts of their abuse and their adult psychological illness meets the statutory requirements.

Q. Have you been able to obtain insurance coverage for many of these cases?

We have been able to. We have to show that under a negligence theory that the upper level administrators knew or had reason to know of the child sexual abuse that has been going under their "supervision." The majority of the sex abuse settlements are funded entirely by insurance dollars, while the other settlements are funded by both insurance and defendant dollars. On a few rare occasions, the available insurance has been exhausted and liable defendant funds the entire settlement.

To me, I am still amazed that the Catholic Church continues to act with arrogance and refuses to act aggressively to stop any further sexual molestation by its priests. In 2011, on a daily basis, victims of Clergy sexual abuse continue to contact our office.

Q. Have you heard of any dire consequences of what is happening to the great wealth of some of the major churches that have been hit hard financially with these lawsuits?

I do not believe there has been any long-term financial hardship. Religious institutions were using public relations campaigns to promote the nonsense that they were going to have to shut down schools and social services in order to pay for their decades of criminal cover-ups (for which they purchased insurance). In fact, while some schools have closed, they typically were in poor neighborhoods where enrollment, tuition and parishioner donations were down. The churches and schools in the more affluent areas have remained cash cows for religious institutions and are certainly not threatened in any way.

During this time of claimed "financial crisis," tens of millions of dollars were raised and spent on renovations to at least three different Roman Catholic cathedrals in California. Author Jason Berry recently published a book, *"Render Unto Rome: The Secret Life of Money in the Catholic Church,"* which is an investigation of financial intrigue in the Catholic Church. That book showed how the money has and continues to flow uphill to the Vatican.

The Roosters' Revenge, or, Trial Lessons From a Chicken Fight

By: Lee Schmelter

Lee Schmelter is an attorney in general civil litigation practice, with emphasis on real property, contract, and elder law issues. He is a frequent contributor to CCTLA's Listserv, and may be contacted at saclaw@surewest.net.

A jury trial I had this summer was so unusual I share it here with my colleagues. The 82-year-old client breeds and sells gamecocks on his 20-acre ranch, as he has since age 22. In years past, Client won state fair and local competitions. Neighbor's unleashed dog dug under Client's fence and killed 72 prize roosters in an instinct-driven frenzy before Client discovered and shot the dog on client's own property. Animal Control responded 38 minutes later. Client's damages: $30,400 fair market value (FMV) of birds killed.

Defense (Allstate) claimed Client kept and sold these birds with the intent to sell them to those who would fight them, making them "derivative contraband" for which no recovery could be had. Next to child molesters and drunk drivers, the public most hates those who would fight chickens or dogs. Predictably, defense stonewalled and sought to prejudice the jury, offering nothing until Mandatory Settlement Conference. Never one to chicken out of a fight, I took on this case at the request of initial counsel. Allstate claimed that Client's high sale prices, poor records and lack of a Buyers List evidenced illegal intent to sell to those who fight gamecocks. A "double damages" statute for this kind of trespass and a "prevailing plaintiff" attorney fees statute also enticed me to take a chance on an elderly client who could not otherwise afford representation for his loss.

Fun facts: My USDA expert valued the birds exactly as client claimed: up to $1,000 each. Expert was an old country boy, so nervous in court after withstanding a tough cross-exam that as he left the witness stand, *he kissed my paralegal* as he walked behind me! The next morning, I put him back on the stand to testify he never met me or my clerk or the client before this case, and that he was "…so nervous he would have kissed defense counsel had he been standing there." The jury laughed and forgave him, quashing jury speculation of improper relationship.

Result: $60,800 award as doubled per statute, plus prevailing plaintiff attorney fees and costs.

Here are some ideas for you, based on what worked for me:

• **Jury instructions and verdict forms** should be your starting points from case intake.

• **Motions in Limine rule.** Plaintiff won 23 of 24 MILs made to exclude anticipated defense tactics, such as calling Client a "cockfighter," and excluding defense presenting extraneous pictures and "evidence" about and surrounding those who fight gamecocks, which had no relation to my client. *Remember to put MIs and the basis for the ruling "on the record."*

• **Evid. Code 776 rocks.** Defendant (D) was my first (and adverse) witness. Because he didn't know what was coming next, D admitted more than he had to (or "couldn't remember."). D's version of facts was immediately refuted by the reporting animal control officer and by neighbors, then by Client. By the time Client testified, the jurors had serious reason to doubt D's veracity. D admitted there were no prior complaints about Client's operations and that the defense of claimed illegality was not his idea but arose for the first time immediately after the harm he caused. I think the jury would fill in the blanks, that this was a fabricated defense. *Consider calling D first.*

• **Experts rule:** The reporting animal control officer testified to all factual observations forming the basis for his opinion and that in his expert opinion, my client was running a perfectly legitimate operation. Neither he nor my USDA expert on FMV were mere hired guns.

• **Prep the client, Set the Stage:** It was well worth the *hours* I spent hearing client's life story to enable me to present it at trial in the best light. Client's life story set the stage in rural America and won jurors who in this computer age might otherwise not understand why someone would raise colorful roosters for exhibition, or that someone would spend $1,000 for a rooster for exhibition or to strengthen their flock. Client's *honorable* military service and 40 years as a repairman with the same employer gave him credibility. Client's poor record-keeping was a result of his third-grade education, his recent loss of his wife of 56 years (she kept the books), and his inability to use a computer.

• **Case Theme:** Defense sought to demonize Client for the types of birds he raises, their theme being circumstantial evidence. However, Plaintiff's theme pre-

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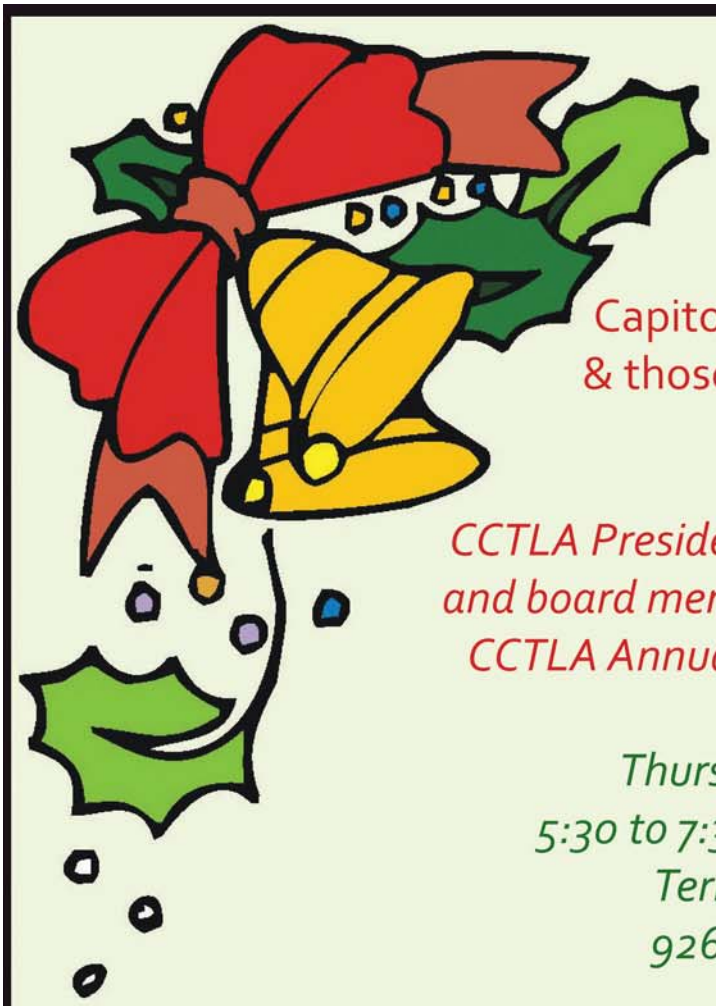


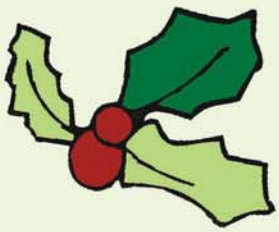
To all members of the
Capitol City Trial Lawyers Association
& those who make our jobs possible ...

CCTLA President Wendy York & CCTLA officers and board members cordially you to attend the CCTLA Annual Meeting & Holiday Reception

Thursday, December 8, 2011
5:30 to 7:30 p.m. at The Citizen Hotel
Terrace Room • 7th Floor
926 J Street, Sacramento

The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee

Reservations must be made no later than Friday, December 2, 2011 by contacting Debbie Keller at 916-451-2366 or debbie@cctla.com



During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

We thank you in advance for your support and donations.

The Roosters' Revenge

Continued from page 9

empted: D failed to take responsibility for his animal, then or now, and is trying to distract the jury from that truth: "CJ the dog didn't have to die; my client's 72 roosters didn't have to die. The death of these animals was due to D's failure to take responsibility for his dog." I used David Ball's tactics, presenting other neighbors who had been terrorized by D's dogs (including the chicken-killer), to show D's knowledge of the unusually dangerous propensity of his dog.

•**Jury Selection Assistant:** Be they secretary, paralegal, or friend, having a savvy and sensitive assistant to take notes and suggest questions helps *a lot*. Note you *might* win fees for an attorney or paralegal licensee, but *not* for a secretary or non-attorney friend (the possible fee award is only a collateral benefit). A key *voir dire* question here: "This case involves a dog being shot by my client on Client's own property. Would that keep you from being fair in this case?" Interestingly, some prospective (but ousted!) jurors said no dog should ever be shot unless it was attacking a human. I asked about juror's pets, and considered as friendly juror prospects with parakeets or cats, or who were clearly responsible dog owners.

• **Invert defense arguments before they are made:** Clearly, defense would claim in Closing Argument that *circumstantial evidence* of illegality supported their affirmative defense of illegality. In Closing Argument, I argued that the *real* circumstantial evidence was not Client's poor record-keeping, but that the defense claim of illegality arose only *after* this claim against D arose, suggesting a *fabricated defense*. There had been no complaints about Client's operations before or since the incident.

• **Be bold:** I told the jury of the origin of the classic "red herring" defense, which arose from escaped prisoners who dragged a fish across their trail to throw of the bloodhounds. I truthfully related my surprise as a young law student to learn that a classic defense with the same name went like this: "When the facts are in your favor, argue the facts; when the law is in your favor, argue the law; when neither is in your favor, drag a stinking fish across the courtroom and argue that the smell is coming from the other party." I projected on a large courtroom viewscreen and on every monitor in front of every juror a picture of bright pink herring and asked the jurors to recognize the defense for what it was: a red herring. I feared this would be too dramatic, but with demonstrative evidence at Closing Argument, counsel has the widest latitude to argue *any reasonable inference* from the evidence. The jury agreed with Plaintiff, 11-1.

• **Attorney fees:** A defense Motion for New Trial was denied. My motion for statutory attorney fees with a contingency multiplier will be heard shortly. For a case that Allstate *could* have settled initially and directly with Client for $17,000, and for which they offered $5,000 at MSC, Plaintiff won a judgment for $60,800. Allstate has additional potential exposure for Plaintiff's attorney fees and costs of over $100,000. This small victory for justice is one I will always remember.

CAPITOL CITY TRIAL LAWYERS ASSOCIATION
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Valerie T. McGinty, Esq.
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EARN 3 MCLE CREDITS ~ (2 = general civil litigation & 1 = ethics)
All seminar attendees will receive written materials regarding the seminar topic.
*** This program is presented in cooperation with CAOC as to the written material ***

(CCTLA reserves the right to substitute speakers)

Governor signs CAOC safety bill

Reprinted from the CAOC.com website, dated October 10, 2011

Gov. Jerry Brown has signed a bill sponsored by the Consumer Attorneys of California that will help protect patients by ensuring the inviolability of electronic health care records.

The electronic health records bill, SB 850 by Sen. Mark Leno (D-San Francisco), builds on CAOC's record as a watchdog of patient safety that includes a new law that took effect early this year to guard against the dangers of radiation overdoses during CT scans.

It also marked a perfect clean sweep for the four CAOC-sponsored bills that reached the governor's desk to date.

Previously, the governor signed a CAOC-sponsored measure, AB 621 by Assemblyman Charles Calderon (D-Whittier), to ensure that victims of auto accidents caused by foreign tourists will be able to seek accountability and reparations. Brown also signed measures helping plaintiffs in the voir dire process and checking the costs of filing complex legal cases.

Leno's electronic medical records bill ensures that information vital to a patient's safety cannot be inadvertently deleted and that health care providers can't intentionally cover up mistakes by eliminating part of a patient's record with a few computer key strokes.

The bill, which takes effect Jan. 1, will add a crucial element of patient safety to the transition from paper to electronic medical records. It requires any change or deletion in electronically stored information be recorded and included in medical information given to the patient.

At times, records are deleted or changed accidentally, making it impossible for later healthcare providers to accurately evaluate and adequately treat the patient. In some extreme instances, records are intentionally modified or deleted, perhaps in an effort to cover up medical errors.

One such case took place at Stanford Hospital, when relatives of a 72-year-old woman learned that several of the woman's records had been destroyed after she died, possibly as the result of medical negligence.

Traditional paper medical records typically have clear documentation of any changes made, but to date, electronic records systems have not all used the same protocol.

"As we continue to fight troubles with medical errors, preserving the integrity and accuracy of electronic health records is a crucial factor in reducing the occurrence of mistakes in our computer age," said CAOC President John Montevideo. "This measure will augment patient safety and, in some cases, could help save lives."

The "yak" bill, meanwhile, has endured a legislative journey fitting of it nickname.

The idea for the legislation stems from a CAOC-member attorney, 2010 President Christopher B. Dolan, who had to hire a courier in Tibet who used a yak to deliver legal papers to a rental car-accident defendant in the Himalayan kingdom. Hence, the birth of the "yak" bill.

Calderon pushed through the measure last year with bipartisan support, but it was vetoed by former Gov. Arnold Schwarznegger. The bill was reintroduced this year and again won hefty approval in both houses of the Legislature and ultimately, Brown's signature.

It will help assist drivers and the state by making sure that the insurance a car renter buys can actually be relied upon as intended. Under the measure, car rental companies will be required to serves as the agent for service of process of claims against motorists from outside the U.S. who rent a car in California, get in an accident, then head home well before the legal dust settles.

Brown also signed AB 1403, which will ensure that both defense and plaintiff's attorneys are provided enough time prior to trials for the proper selection of juries. In addition, the governor signed SB 384 by Sen. Noreen Evans (D-Santa Rosa), clarifying the filing fees for complex civil cases. In some spots around the state, courts were charging excessive fees that created a barrier to the justice system for California consumers.

***

Consumer Attorneys of California is a professional organization for nearly 3,000 plaintiffs' attorneys representing consumers who utilize the civil justice system to seek accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

Column coming on "Dispute Avoidance"

By: Betsy S. Kimball

I am writing this while en route home from two weeks in Ghana—a trip largely devoted to learning and conferring about (alternative) dispute resolution at all levels of Ghanaian society, from what we would call "street front," to traditional, to the highest level of the judicial system. Really impressive.

The purpose of this writing is to introduce a "column" that I hope to be writing regularly for *The Litigator* on what, in my current mindset, I will call the subject of "dispute avoidance." From where I sit, the practice of law, especially representing injured plaintiffs, is becoming more and more difficult. I do not need to tell you the reasons why. In the decades that I have represented attorneys, I have seen so many disputes that could have been avoided or at least really minimized. I hope to use this column to help you to avoid disputes with your clients, the Bar, and even with each other over clients and fees.

One caveat: Nothing I write should be considered legal advice or a substitute for legal advice. What I write will be far too general, and I do not intend it to be legal advice. One invitation: If there is a topic that you would like me to address, please let me know.

***

Betsy Kimball the only attorney in California who is certified as a specialist in appellate law and legal malpractice law by the State Bar of California, Board of Legal Specialization. She explains that "one of the key parts of my practice is keeping my lawyer clients out of disputes or helping them with little disputes before they become big disputes."

Medical Malpractice

In Hairston v. Regents of the University of California, **Brooks Cutter & Eric Ratinoff** prevailed with a $7,624,318 verdict for their client. Because of MICRA, the non-economic damages will be reduced to $250,000, pointing out the fundamental inequity of this cap, which has been in place, unindexed, for over 30 years.

Case History: D'Knawn Hairston woke up on December 18, 2003, with numbness in her legs and back pain. She was 14 years old. Her mother took her to the pediatrician who then sent her to UC Davis for emergency care. There the doctors thought she might have Guillaun Barre Syndrome, an auto-immune disorder that can cause ascending paralysis. They also were considering the spine. She was admitted and sent for an MRI in the early morning hours of Dec. 19, 2003. The MRI was read as normal, and the doctors treated her for Guillaun Barre. She spent a week in the hospital and gradually regained feeling in her legs and the ability to walk. She was discharged Christmas Day.

She went back to school with some residual weakness and got notes from her pediatricians to have more time going from class to class and to not run in PE. She graduated from high school. That summer she got pregnant.

February 1, 2008, D'Knawn woke up with the same symptoms as in 2003. She was rushed to the Methodist ER where they considered the Guillaun Barre and did another MRI. This time, the MRI showed a mass, an arteriovenous malformation, on her thoracic spine that had bled out and damaged her spinal cord. Surgery was performed, but it was too late. D'Knawn is a T4 paraplegic, with no movement below her chest. She has a three-year-old son.

Plaintiff's expert radiologist looked at the 2003 film and said the mass was actually evident back then and had been missed. In Discovery, Plaintiff also learned that the Radiology Department at Davis had varied from its standard protocol for doing this kind of study, which would have included views in two planes—sagittal and axial. The study had some axial views of her lower spine but none at this level.

The trial focused on the breach of the standard of care by the Radiology Department in failing to take the proper views and failing to identify the mass that was there. UC Davis's expert conceded the mass was there but said it was within the standard of care to miss it. UC Davis postulated that the views hadn't been done because the patient was uncomfortable in the machine, but the evidence was that she was sedated and had no difficulty with the study. Also, an internal log book showed that the axials had not been done "per Dr. Mack," but Dr. Mack was a second-year resident at the time who testified that he would not have done that.

UC Davis also blamed D'Knawn's parents for going to her pediatrician instead of back to the Neurology Department at Davis after discharge notwithstanding having been instructed to return. They argued that had she returned with her continuing symptoms they would have eventually figured out the misdiagnosis.

The case raised questions about the procedures for ordering studies and making sure they are completed, as well as the manner in which they are read. D'Knawn's MRI was read by an attending physician, but she simply discussed her findings with a first-year resident who was responsible for generating 60-70 reports a day based upon these discussions. Nobody involved remembered reading the film, but it was evident that the mass was either just missed, or perhaps it was seen, but not accurately reported.

The Verdict: The jury returned a verdict of $200,000 for past non-economic loss; $1,000,000 for future non-economic loss; $5,519,415 for future medical care; and $904,903 in lost earnings for a total of $7,624,318. The jury apportioned fault 58% to UC Davis and 42% to her parents. This will not affect the economic damage portion of the verdict. (Of course, if the MRI had been read correctly, D'Knawn would have had the surgery in 2003 and would never have been discharged with a misdiagnosis that she was asked to return for.)

Trial Judge: Garrett Wood

Defendant Counsel: Bob Zimmerman

Plaintiff's Experts: Alex Barchuk, M.D. (physical medicine and rehabilitation expert); Carol Hyland (rehabilitation and life care planning consultant); Robert W. Johnson (economist); Barton Lane, M.D. (radiologist)

Defendant's Experts: Thomas Hedge, M.D. (physiatrist); Kee Kim. M.D. (neurosurgeon); Marvin Nelson, M.D. (pediatric neuroradiologist); Donald Olson, M.D. (pediatric neurologist); Linda Olzack (life care planner); Barry Tharp, M.D. (pediatric neurologist); K. Erik Volk (economist)

Medical Malpractice Settlement

David Smith and Elisa Zitano of the Smith Zitano Law Firm report the settlement of a medical malpractice case in which the defendant primary care physician (PCP) negligently failed to diagnose L2 – L5 "Cauda Equina Syndrome" in a 32-year-old male, who ultimately required multi-level spine surgery, and which resulted in permanent lower extremity paralysis, incontinence, recurrent bladder infections, ED, chronic neuropathic pain, chronic DVTs and depression secondary to his injuries and significant permanent functional limitations.

Settlement: $2,500,000: Failure to Diagnose Cauda Equina Syndrome

Case History: Cauda Equina Syndrome occurs when the nerve roots below the L1 level become compressed or trapped, affecting sensation and movement. Nerve roots that control the function of the bladder and bowel are especially vulnerable to damage. Cauda Equina Syndrome may be caused by a ruptured disc (as in this case), tumor, infection, fracture, or narrowing of the spinal canal. Cauda Equina Syndrome is universally recognized as a surgical emergency because if left untreated it can lead to permanent loss of bowel and bladder control and paralysis of the legs.

The 32-year-old male plaintiff was physically active and in good health until the fall of 2008 when he experienced the gradual onset of bilateral leg pain. He was examined by his primary care physician, who

initially diagnosed "leg cramps" but did not order any diagnostic testing. In the following four weeks, the plaintiff's leg pain spread to his calf muscles, and it became progressively difficult for him to walk. Plaintiff sought treatment and care from his PCP on three additional occasions during September 2008, and on each occasion, the PCP recommended exercise but failed to order any diagnostic testing.

For an early October 2008 visit, Plaintiff was required to use a borrowed wheelchair because he could no longer stand unassisted or ambulate more than a few feet. The PCP finally ordered diagnostic testing—but a totally inappropriate Doppler study to rule out a DVT. At this visit, the PCP told the plaintiff that his "problems were all in his head" and told him to just get up out of the wheelchair and walk!

Days later, the plaintiff developed incontinence and total paralysis of his legs and was taken by family members to the emergency room where an MRI demonstrated multilevel lumbar disc herniation and spinal cord compression. Emergency neurosurgery and multi-level discectomies failed to restore motor or sensory function. Even after protracted 12-month rehabilitation efforts, Plaintiff suffers significant and permanent physical and emotional injuries. Economic damages included the costs of lifetime medical care and in home assistance.

Settlement: The case was settled at mediation before Craig Needham of San Jose.

Plaintiff's Experts: Liability and damages experts included Dr. Eric Disbrow (PCP), Dr. Philip Orisek (spinal surgery), Dr. Robert Kessler (urologist), Dr. Alex Barchuk (PM&R), Dr. Gary Belaga (neurology), Carol Hyland (life-care planner) and Craig Enos (CPA).

Interesting features of the settlement include the creation of a Special Needs Trust with the assistance of attorney **Stephen Dale**, to be managed by "Professional Fiduciary" Carolyn Young and the diversification of the settlement proceeds including the acquisition of two separate annuity policies, each for a $500,000 premium, and the deposit of the balance of the net settlement proceeds into flexible investment account managed by the Alcaine Group.

Motor Vehicle-Personal Injury

Matt Donahue was awarded $327,000 for his client who had been in a rear-end collision. The insurance company was Golden Eagle, and the defense attorney was Christine Carrington. Defense Offer: $90,000.

Plaintiff suffered substantial impact with cervical spine injury. Doctors Orisek, Henrichson and Montesano stated that the plaintiff needs surgery to correct the three level degeneration that was rendered symptomatic in this 61-year-old plaintiff. He did not have surgery before the trial, and the defense took the position that he would never have surgery. Dr. Henrichsen, the DME doctor, testified that the need for surgery would have developed anyway because of the degeneration but admitted the collision started the symptoms. Dr. Orisek testified the surgery would make the plaintiff 85% to 95% better.

The breakdown was as follows: past meds: $17,709; future meds: $205,000; past pain and suffering: $100,000; future pain and suffering: $5,000

Defense made a motion to reduce future meds by the amount the insurance company would have paid, but the motion was denied as speculative. Defense offered no experts on this issue, and the court said there was no evidence of the amount that would have been paid for the future surgery.

Design Defect—Products Liability

Roger A. Dreyer; Christine D. Spagnoli, past president of CAOC; **Robert B. Bale,** member, CCTLA Board of Directors; and **William C. Callaham** were victorious for their claims with a verdict of $73,063,649.

Case: Susan Mauro, individually and as Successor in Interest to Anthony Robert Mauro, deceased, Michael Mauro, Cody Mauro, Alexander Bessonov and Marlene Shirley v. Ford Motor Co. Inc., Goodyear Tire & Rubber Company, Sears Roebuck & Company, Wal-Mart and Suburban Ford, No. 06AS01071

Facts & Allegations: On April 9, 2004, William Brownell, 48, was operating a 15-passenger Ford E-350 Econoline van on northbound Interstate 5 in Kern County, coming home from a statewide tour by a Fair Oaks Presbyterian Church musical youth group. The van was carrying a group of volunteer musicians accompanying the church's teen choir. Van passengers included Plaintiff's decedent right front seat passenger, 42-year old Anthony Mauro; middle seat passenger and choir director, 43-year old Plaintiff Marlene Shirley; and 24-year old Plaintiff Alexander Bessonov. Mauro, a printer for Cable Data, played bass, and Bessonov, a computer hardware tester for Siemens Technology, played drums. Shirley had her seat belt loosely fastened as she slept on the middle seat. The van skidded off the roadway after the tread separated on its rear right tire, a Goodyear Load Range E that was subject to a voluntary replacement campaign initiated by the manufacturer. The van, which was traveling at approximately 70 mph when the tread separation occurred, rolled four times. Brownell and Mauro were both ejected from the van and were pronounced dead at the scene. Bessonov and Shirley sustained injuries.

The Mauro and Brownell survivors, along with Bessonov and Shirley, all filed suit against Sears and Roebuck (the tire installer), Suburban Ford of Sacramento (the Ford dealer that regularly serviced the van); and Goodyear Tire and Rubber Company, in addition to Ford Motor Company. All plaintiffs settled with Defendants Church, Sears and Suburban Ford before trial; the Brownell Plaintiffs settled with Ford on the eve of trial. The case proceeded to trial with Ford as the sole remaining defendant.

Plaintiffs contended that the van was defective and unreasonably dangerous due to design defects that increased the vehicle's propensity to lose control and rollover as the result of an external event like a tread separation. Plaintiffs also contended that the separated tire was a defective Ford component, since it was supplied by Ford as original equipment on this model van.

In the late 90s, Goodyear, the tire manufacturer, recognized that this particular tire, which had 4-plies but did not include a nylon cap overlay, was susceptible

Continued on next page

Continued from previous page

to delamination and separation, especially when used on 15-passenger vans. Goodyear determined that adding a nylon cap ply virtually eliminated tread separation on this line of tires, and notified Ford to start replacing 4-ply tires with tires that featured the nylon cap in 2000. In 2002, prompted by a NHTSA investigation, Goodyear agreed to replace, at no charge, all Load Ranger E 4-ply tires on 15-passenger vans, including the Econoline 15-passenger model at issue.

Goodyear notified Ford about the voluntary replacement program, and Ford was involved in the NHTSA investigation that led to the campaign. Despite this, Ford executives in charge of administrating recall and replacement programs elected not to notify Ford's extensive dealer network that the Goodyear tires should be replaced. Ford admitted that it controlled a proprietary software program used specifically to notify dealers about recalls, that it regularly used that program to advise about such programs, and that it could have notified the dealers had it chosen to do so.

Suburban Ford employees admitted at trial that they never received any notification about the Goodyear program and that had Ford told them about it, they would have made sure the tires on the subject van were replaced. This was important because Plaintiffs introduced uncontroverted evidence that the subject van was regularly serviced at Suburban Ford and that it had been serviced there numerous times after the 2002 tire replacement campaign, including two weeks before the fatal accident. Plaintiffs claimed that Ford chose not to tell its dealers about Goodyear's 2002 notification because Ford was still coming off a recall of Firestone tires on Ford Explorer SUVs that cost the company $2 billion.

Ford contended that neither Brownell nor Mauro was belted and that Mauro would have survived had he been properly restrained. Ford also contended that Marlene Shirley used her seat belt improperly. Ford also argued that even if the company had elected to notify its dealers about the tire campaign, the subject van would not have been included in that program because it left the factory as an, "incomplete vehicle" that was later modified to add additional bench seating.

Injuries/Damages: Anthony Mauro died at the scene. He was survived by his wife, Plaintiff Susan Mauro and his two sons, Michael and Cody. The family sought recovery for Mauro's past and future loss of financial support, funeral and burial expenses, past and future loss of household services and loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training and guidance from the date of the accident to the present.

Alexander Bessonov sustained injuries to his neck, back and face, including permanent scarring. He sought to recover past medical and loss of income damages and past and future non-economic harm.

Marlene Shirley sustained a closed head injury resulting in cognitive impairment, severe abdominal injuries including a lacerated liver, tears of the small bowel and colon, multiple abrasions and contusions, a partially collapsed right lung and right rib injury, a right knee injury, a right leg injury, a fractured right wrist, as well as injuries to her neck and back. She sought recovery for past and future medical expenses; past and future lost income; and past and future non-economic harm.

Result: The jury found that Ford was negligent and that its negligence was a substantial factor in causing harm to the plaintiffs. The jury found that the design of the van, with respect to its handling, failed to perform as safely as an ordinary consumer would have expected and that the risks of the design of the handling outweighed the benefits. The jury also found that the design of the handling was a substantial factor in causing harm to the plaintiffs. The jury did not find Anthony Mauro to be negligent. The jury did find that Shirley was negligent and that her negligence was a substantial factor in causing her harm. The jury apportioned a liability of 59 percent to Ford and 41 percent to Goodyear for the harm to Mauro's family for his death. The jury apportioned a liability of 58.5 percent to Ford, 40.5 percent to Goodyear and 1 percent to Shirley, for harm to Shirley. The jury apportioned a liability of 59 percent to Ford and 41 percent to Goodyear, for harm to Bessonov.

The jury also determined that Ford acted with malice or oppression, and it awarded punitive damages of $50 million in favor of the Plaintiffs against Ford.

Demand: In June, 2008, Plaintiffs Mauro tendered a 998 to settle for $4,000,000. The offer was rejected by operation of law. Ford also turned down an offer to settle the Mauro claims for a total of $750,000 prior to trial.

Offer: None reported.

Court: Superior Court of Sacramento County, Sacramento, Judge David W. Abbott presiding

Defense Counsel: Warren E. Platt and Daniel S. Rodman of Snell & Wilmer, Daniel S. Rodman, Snell & Wilmer, L.L.P., Costa Mesa, CA (Ford Motor Co. Inc.)

Trial Length: Seven weeks

Jury Deliberations: Four days

Plaintiff Experts: Mickey Gilbert, P.E., vehicle handling and dynamics; Wilson Hayes, Ph.D., biomechanical engineer; Stan Andrews, M.S., accident reconstruction; Dennis Carlson, P.E., tire failure analyst; William Kitzes, product safety/hazard control; Barry Ben-Zion, Ph.D., economist.

Defense Experts: Lee Carr, vehicle handling and dynamics; Geoffrey Germane, accident reconstruction; Jefferey Pearson, seat belts; Robert Piziali, Ph.D., biomechanics.

Race Harassment & Retaliation-Employment

On October 21, after deliberating for approximately two days, a Sacramento County jury returned a verdict for Medro Johnson in the amount of $5.2 million against Defendants Sears Holding Corp. (parent to Sears and Kmart), its subsidiary Sears Home Improvement Products, (jointly "SEARS") and Paul St. Hilaire, for race harassment and retaliation. The jury's award included $3 million in punitive damages since SEARS acted with malice, oppression, or fraud.

CCTLA Advocate of the Year **Chris Whelan** and his nephew, **Brian Whelan,** of the Fresno law firm, **Law Offices of Walter W. Whelan**, represented Medro Johnson, an African-American who worked as a project

consultant for SEARS CA., selling home improvement products out of the Sears Home Improvement Products office in Natomas. The harasser, St. Hilaire, was also a project consultant and one of SEARS biggest producers, ranking number 24 out of 1,500 project consultants in the county. Their immediate supervisor, District Sales Manager William Bailey, admitted St. Hilaire was a "very valuable employee" to SEARS, and St. Hilaire testified "Sears loves me."

Case History: The trouble for Medro Johnson began at what was described as a company barbecue by Bailey's supervisor, District General Manager Phil Nanni. At that August 24, 2008, party, Johnson was standing with his wife and young children, talking to other SEARS employees. St. Hilaire came up to Johnson and loudly announced, in "slave" dialect, "Medro calls me masta," and started laughing hysterically. Everyone was in shock, and no one said anything.

Johnson, a descendant of slaves, was humiliated to be called a slave in front of his wife and children. He felt he could do nothing, not only because of St. Hilaire's favored status, but also because however he responded to this horrific public event, he could give his children the wrong message of how to react to racism. Johnson decided to just keep doing the fine job he was known for and not report this terrible racial slur.

Seven weeks later, on October 23, 2008, Johnson addressed the master-slave comment to St. Hilaire during an outside sales call. St. Hilaire's responded angrily to what he saw as criticism, and threatened: "I will get you, and you won't see it coming." Johnson, fearful of this threat of violence, which Johnson testified he believed would be carried out with a gun, immediately called and reported St. Hilaire's angry response, the threat and the "masta" racial slur to SEARS managers Bailey and Nanni. According to Bailey, St. Hilaire also made a phone call at that time. Bailey claimed to have taken notes and turned those notes over to Nanni when SEARS was served with a summons in this case. Those notes were never produced in the case.

In his call from Johnson, Bailey initially seemed very concerned, but when Johnson returned to the office approximately 1-1/2 hours later, Bailey's attitude had changed. He told Johnson that he could take the report and complaint, however, the typical response from H/R and corporate was to just terminate both parties. Johnson got the message: the high earner, St. Hilaire, was protected, and if Johnson sought protection from racial harassment or threats of violence, he could be terminated himself if the offender was a highest earner in the office, i.e. St. Hilaire

Johnson was intimidated from going forward. St. Hilaire not only was not terminated for what could be terminable offenses, he was not disciplined in any way or given any training.

Five weeks later, on December 2, 2008, at a training session at the Natomas offices, St. Hilaire carried out his threat and got Johnson when he wasn't looking. The first incident occurred at an early break. St. Hilaire stood between Johnson and another employee he was talking to. When that did not get a rise out of Johnson, St. Hilaire turned and hit Johnson with his shoulder as he walked by. Johnson said and did nothing.

Approximately one hour later, at another break, St. Hilaire found an opportunity to bash Johnson even harder with a shoulder when he wasn't expecting it. Johnson responded with, "Watch it Paul." St. Hilaire challenged Johnson and said, "What are you going to do about it?" Johnson, who was described even by Nanni and Bailey as the "consummate gentleman," again walked away. At that point St. Hilaire called Johnson a "n-----r." Johnson asked, "What did you say?" St, Hilaire would not respond. Johnson again walked away.

A few minutes later, as Johnson was standing drinking his coffee and eating his bagel, St. Hilaire came up and blindsided him with a shoulder into Johnson's chest and spilled Johnson' hot coffee all over Johnson's chest. Johnson looked down to his burning chest, and when he looked up, he saw St. Hilaire leaning in for what appeared to be a fourth assault and battery that day. Johnson reflexively made a sweeping jab/punch to clear St. Hilaire away from him and caught St. Hilaire on the lip.

HR got involved because this was a public event, and there was no way to completely cover it up. Regional HR manager from Texas started directing the response and the investigation by Nanni. Medro Johnson's written statement forwarded to HR described the racial slur "masta," the threat, the three intentional bumps, and the "N" word racial slur. The HR regional manager identified Johnson's punch and any self defense, justification, along with the adequacy of Nanni's and Bailey's alleged investigation of the events of October 23, 2008, additional issues for Nanni's investigation. According to Dale, Nanni misrepresented to her that the "masta" slur and the threat had been investigated and found to be baseless, when, in fact, no such investigations had occurred, and no such conclusions were reached.

Within 48 hours of Johnson's report to HR, he was terminated for a false accusation of workplace violence as a result of a decision by Bailey, Nanni, Hibbison and Dale. At that point, the investigation was not complete, fair or thorough regarding any of the identified issues. Immediately upon Johnson's termination, the investigation of Bailey and Nanni abruptly ended before it began, as did any investigation of St. Hilaire's reported conduct.

Johnson was now branded as a violent person, terminated for workplace violence, and he found it difficult, if not impossible, to find employment. He became an independent real estate agent in Elk Grove and has found it very difficult to earn enough to support his family.

Result: $5.2 million, including $3 million in punitive damages. His special damages were approximately $700,000.

Defense Counsel: Gary Basham and Nancy McCoy of the Basham Law Group.

Offers Before Trial: At the first day of trial, defense counsel offered $1.5 million.

Plaintiff's Experts: Economist: Charles Mahla, Ph.D., of Econ One Research, Sacramento; Graphics: Cynthia Nicholson, Court Visual Expert; Consultant: Judy Rothschild, Ph.D.; Executive Presentations—video clips, Wayne Johnston.

Trial Judge: The Hon. Kevin Culhane

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Allan's Corner

Continued from page 2

could understand why the roof crushed in on the decedent.

Appeal. In Powell v. County of Orange, 2011 DJDAR 11927, the court holds first that no appeal lies from an order denying a motion for reconsideration. The court also holds that an order of dismissal is not a judgment under Code of Civil Procedure §581(d) unless it is in writing signed by the trial court and filed. A minute order not signed does not qualify. In this case, there was a minute order on an OSC for dismissal for lack of prosecution. That means that a motion to set aside the judgment was premature because no judgment had yet been entered and also there is no appellate jurisdiction because there had been no judgment of dismissal.

Workers' Comp. 2011 DJDAR 12115, the court holds that the cost-of-living increase for life pensions increased prospectively commencing on January 1 following the date on which the injured worker first becomes entitled to receive and actually begins receiving the benefit payments, not back to 1994 like the Court of Appeal had determined. This is a Supreme Court case.

Elder Abuse. In Carter v. Prime Healthcare Paradise Valley LLC, 2011 DJDAR 12295, Trial Court sustained demurrers on the wrongful death claims being time-barred and that the elder abuse cause of action did not state facts sufficient to constitute willful misconduct. Court holds that the plaintiff must allege and ultimately prove by clear and convincing evidence: (1) that defendant had responsibility for meeting the basic needs of elder or dependent adults, such as nutrition, hydration, hygiene or medical care; (2) that defendant knew of the conditions that made the elder or dependent adult unable to provide for his or her own basic needs, and (3) denied or withheld goods or services necessary to meet the basic needs either with knowledge that injury was substantially certain to occur or with conscious disregard of the high probability of such injury (first is oppression, fraud or malice; second is recklessness).

Medical Special Damages. In Howell v. Hamilton Meats and Provisions, Inc., 2011 DJDAR 12533, the California Supreme Court holds that in personal injury cases where the plaintiff was treated under a PPO plan where his health insurance had a pretreatment agreement in place which paid the providers a reduced rate under the billing rate, the most the plaintiff can recover in medical special damages for past treatment would be the reduced rate paid the providers. In other words, the amount of time that an injured worker spends in his employment in exchange for health insurance is time spent for the benefit of the liability insurers in this state. *(See related article beginning on page 3 of this issue of The Litigator)*

Punitive Damages. In Bullock v. Phillip Morris USA, Inc., 2011 DJDAR 12485, jury awarded compensatory damages of $850,000 and punitive damages of $13.8 million. Court held that the award was not unconstitutionally excessive where company's conduct was highly reprehensible.

Privette Cases. In Seabright Insurance Company v. US Airways, Inc., 2011 DJDAR 12750, the California Supreme Court takes another slap at working Californians. The court holds that when a party hires an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees. Without explaining how this can be, the Supreme Court holds that this rule applies even to non-delegable duties under the Labor Code. They "distinguish" a prior Supreme Court case by saying that decision did not consider the issue under the current laws which they claim are more restrictive (but if you read

Allan's Corner

them, they are actually more expansive). The Court holds that the hiring entity's non-delegable duty to comply with statutory or regulatory safety requirements (OSHA) runs only to its own employees. They don't explain why the Legislature passed a law that specifically held that the OSHA regulations were admissible on the standard of care issue since, of course, the employees of the hiring entity can't sue their own employer.

Health Insurance—Bad Faith. In Martin v. Pacificare, 2011 DJDAR 13478, the Fourth District agrees with the case of Watnabe v. California Physicians Service, (2008) 169 Cal App 4th 56, holding that Health & Safety Code §1371.25 bars a cause of action seeking to hold a health care service plan vicariously liable for the acts or omissions of a health care provider (in other words, you can't hold the health insurer liable for the acts of the HMO/PPO doctors).

Government Tort Liability—Dangerous Condition. In Salas v. California Department of Transportation, 2011 DJDAR 13320, the court affirms a summary judgment which found no dangerous condition existed. There is an excellent discussion of objections to evidence in support of and in oppositions to motions for summary judgment and also of the dangerous condition of public property theory. This is a *Third DCA* case so a must-read if you have any dangerous condition cases here.

Discovery Sanctions. In Kayne v. The Grande Holdings, Ltd., 2011 DJDAR 13593, Plaintiff sought document discovery, the responses were mostly objections, Plaintiff filed a motion to compel and eventually through meet-and-confer, a narrower document production was agreed upon and entered as an order by the trial court. Grande produced over 30,600 pages of documents; Plaintiff complained that most were documents Grande knew plaintiffs already had from other lawsuits (all but 28 pages) and that entire categories of documents, which had agreed to be produced, were not produced.

During meet-and-confer, Plaintiff requested that Grande describe its search efforts in response to the Discovery requests that were not produced and when Grande refused to do that, Plaintiff filed a motion to enforce the previous order. Motion was taken off calendar because Grande represented it had found additional documents and would produce them, and they produced another 60,000 pages which now Grande had "only recently uncovered." Apparently, these records were in complete disorder, and Grande refused to label the documents in accordance with CCP §2031.280(a), so Plaintiffs hired three attorneys to organize the documents by category and date to prepare for depositions. Plaintiffs sought $74,000-plus in sanctions because Grande employed a Discovery method in a manner or to an extent that caused undue burden and expense. Grande opposed the motion, saying they produced the documents in the same state they have been found.

Court granted the motion in part but delayed sanctions, allowing Grande to explain how the documents were kept during the timeframe from when they were requested until finally produced. Grande filed two declarations, but they did not show how and when the documents were discovered or how they had been kept in the possession and control during the relevant timeframe, and neither declarant had any personal knowledge as to the condition in which the documents were found or could explain from their own personal knowledge the disorganized condition of the production. Trial Court ordered Grande to pay the $74,809 as a sanction for willful abuse of Discovery procedures, and the Appellate Court affirmed.

Good Faith Settlements. In Pacificare of California v. Bright Medical Associates, Inc., Plaintiff sued Pacificare for bad faith based on delays of the insurance carrier in approving out of network care for decedent. Plaintiff sued the health insurer, only health insurer cross-complained against the doctor. During jury selection, doctor settled with Plaintiffs for $300,000 conditioned on trial court finding the settlement in good faith. Trial court granted the doctor's good-faith settlement motion and dismissed the cross-complaint. PacifiCare appealed, contending that the trial Court did not have authority to make a good-faith settlement determination because there was no joint liability for the damages. Appellate court found that since a good-faith settlement can be sought in any action in which two or more parties are alleged to be joint tortfeasors, the good-faith settlement motion was appropriate, and the settlement was affirmed.

Strict Liability. In Bailey v. Safeway, Inc., 2011 DJDAR 14109, Plaintiff sued Cook's Champagne and Safeway, the retailer, for strict liability design and sued Safeway also for negligence. Plaintiff settled with the manufacturer for $1 million plus assignment of equitable indemnity rights against Safeway. Case went to trial against Safeway. The jury found Safeway not negligent but liable under strict liability design defect. Plaintiff then filed a separate complaint for equitable indemnity against Safeway as the assignee, and a demurrer was sustained without leave to amend. Appellate Court affirmed finding that the doctrine of collateral estoppel precludes the assignee from re-litigating the negligence claim and that the manufacturer of a product found to be defectively designed cannot seek equitable indemnity against a retailer whose fault is based only on the same product liability theory.

Negligence. In Hennigan v. White, Lauren McMaster granted summary judgment in a claim that a cosmetologist injected permanent makeup into the eyelids and was negligent by failing to do a patch test even though the warning label required it. Plaintiff admitted at deposition that a patch test would not have prevented her injury because it takes several months for her to react to the dye. Appellate Court affirmed.

Summary Judgment. In Schugart v. Regents, 2011 DJDAR 14457, summary judgment was granted in a med mal case on the basis of expert declarations from Defendant stating there was no breach of duty or causation of any injury. The court granted the motions because the declaration of Plaintiff's retained expert was deficient because they failed to refer to the materials on which the expert relied in forming his opinion. The court denied a motion to continue the hearing to allow Plaintiff to submit supplemental papers including supplemental declaration from the expert which cured the defects. Appellate Court reversed as to the doctor finding that the documents he relied upon—medical records—were placed before the court in the declarations of the moving party.

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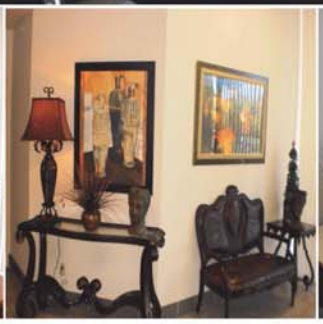

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Challenging Discriminatory Uses of Credit Histories in Hiring and Insurance Underwriting

By: Amy Radon, Public Justice Goldberg Attorney
November 2011

Juan Ochoa had been out of work for eight months when a staffing firm contacted him with a possible position as a data entry clerk. The firm pulled his credit report as part of its application process. Soon after, Ochoa learned that he was no longer a candidate for the position because there were "too many collections claims" against him.

For years, Patrick Ojo held a homeowner's insurance policy from Farmers Group. In 2004, Ojo learned that Farmers had increased the premium on his policy even though he hadn't made any claims. When he asked about the reason for the increase—which was a whopping nine percent—Farmers responded that it was due to "unfavorable credit information" obtained about Ojo through the company's own credit reporting system.

As Ochoa, who is Latino, and Ojo, who is African-American, discovered, credit information can affect much more than loan eligibility—especially for people of color.

In recent years, researchers have looked at the correlation between credit scores and race, and the results are staggering: across the board, African-Americans and Latinos have significantly lower credit scores than whites. During these days of high unemployment, credit-check policies by employers are thus especially harmful to minority job applicants.

Nevertheless, employers and insurance companies are continually turning to credit information as a quick-and-dirty way to decide who gets a job or who can obtain homeowner's insurance. Many of the major property insurers—including Allstate, Nationwide, Farmers, and Hartford Financial Services Group—use credit information to set premiums (lower scores appear to correlate with higher premiums). And in the employment context, employers are now pulling credit reports as a routine part of the applicant vetting process.

Yet the link between a credit score and likely job performance or insurance needs is questionable; there does not appear to be any empirical evidence to support it. In fact, one study even suggested that employees with blemishes on their credit report may end up performing better on the job: it makes sense, after all, that a person facing financial pressures has a greater incentive to perform well to merit a salary increase or promotion.

It's also important to remember that a job applicant may have a low credit score for reasons entirely beyond his or her control—such as disability, unemployment (as in Ochoa's case), medical expenses or identity theft.

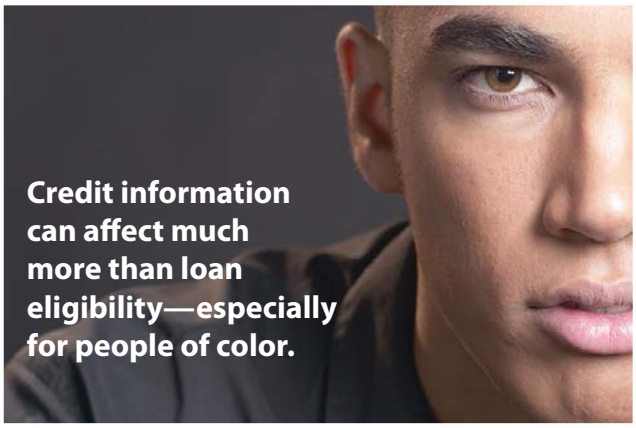
Whatever the reason, though, Ochoa,

Ojo and other victims of discrimination have the law on their side: Title VII of the Civil Rights Act and the Fair Housing Act. And they can fight back in court.

A plaintiff who files a lawsuit under Title VII of the Civil Rights Act need not prove that his or her prospective employer intentionally sought to discriminate on the basis of race. It is enough to show that the employer utilized an application process that adversely impacted members of a protected class. To date, only a handful of these lawsuits have been filed. (Because such efforts are in their infancy, it is difficult to predict whether these cases will prompt employers to abandon the use of credit information in hiring decisions.)

In the insurance context, meanwhile, minorities who are denied coverage or have seen an increase in premiums may be able to challenge the use of credit scoring to set those premiums under the Fair Housing Act. The Sixth, Seventh, and Ninth circuits have already recognized that provisions of the FHA outlawing discrimination extend to the underwriting of homeowners' insurance. The most notable outcome thus far has been the successful settlement reached between a class of minority insurance customers and Allstate.

Problematically, though, victims of discrimination through credit information often don't know their rights and are unlikely to reach out for help. The lack of awareness about this type of discrimination is significant given the tight limitation periods for Title VII and FHA filings: Title VII mandates the filing of an administrative claim within 300 days as a prerequisite to filing a lawsuit, while an FHA action must be filed within two years.



Given these short timeframes, it is essential that we start educating job seekers and consumers about their rights when it comes to credit scores. Workers' unions and grassroots fair housing organizations could be instrumental in this education and outreach effort.

Discrimination by way of reliance on credit scores is no more acceptable now than the more overt forms of discrimination that Title VII and the FHA were enacted to prevent decades ago. Although these cases will be far from easy to develop and litigate, this is a new and important battle in the fight against discrimination in this country.

Note: this article is reprinted from the Public Justice website: publicjustice.net and tlpj.com. Amy Radon is the Goldberg Attorney at Public Justice, where she practices in the firm's Access to Justice, civil rights, and consumer rights litigation areas. Prior to joining Public Justice, Amy worked for the Cambodian and South African governments, designing programs that ensured fair distribution of land and water rights. She can be reached at aradon@publicjustice.net.

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The Roosters' Revenge, or, Trial Lessons From a Chicken Fight

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CCTLA Calendar of Events

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Thursday, December 8
CCTLA Annual Meeting & Holiday Reception
Location: The Citizen Hotel
Terrace Room / 7th Floor
Time: 5:30-7:30 p.m.

Tuesday, December 13
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

JANUARY

Tuesday, January 10
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, January 19
CCTLA Seminar
Topic: What's New in Tort & Trial?
2011 in Review
Speakers: Craig Needham, Esq.
and Patrick Becherer, Esq.
Location: Holiday Inn, 300 J Street
Time: 6-9:30 p.m.
Cost: $125 CCTLA Members
$175 Non-members

FEBRUARY

Tuesday, February 14
Q&A Luncheon- Noon
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March 23 - 24
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More details to come!

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