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The LITIGATOR

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Inside

CCTLA embarks on a new year of challenges — and successes

Daniel S. Glass
CCTLA President

Welcome to CCTLA and the 2024 calendar year. In order to write this message, I started with a little research, like all lawyers should do when writing. I reviewed the inaugural message of past presidents to see what the focus of past years' first message has been. Tradition holds that in the first issue of *The Litigator*, the president states how honored they are to have become president of this organization. In keeping with tradition, I humbly accept the reward and challenge of the presidency, and I cannot even begin to state how much this honor means to me.

I sort of began my legal career in September, 1979, when I graduated college and got my first real job as an insurance claim representative in Los Angeles. I was trained to handle litigation matters and work with "our" insurance defense law firms. This was before the "in house" counsel revolution. I drank the insurance-flavored "kool-aid" and, as a young 22-year-old, believed my superiors and lawyers when I was told that most plaintiffs were, at best exaggerating their claims for profit, and at worst, were just plain lying. Nevertheless, I was successful at resolving my claims, eventually going to law school and becoming that "insurance defense" lawyer.

Amazingly, in the 1980s, as a claims person, I went to insurance seminars and heard the defense lawyers tell us that it was "reasonable" to resolve claims for FIVE TIMES special damages. Yes, I am sure I heard that and used it as a guide when I was a claims person.

My, how things have changed at the insurance company level. Those types of voluntary settlements are rare. Yet, injuries and pain have not changed, so why the reduction in value from the insurance company view?

At my first lawyer job, the 50th lawyer at an insurance defense firm, I learned, not about true claim resolution, but about the "billable hour." I weathered the "billable hour" stress for seven years, through two firms, one large and one small, always fearing that if I did not make my quota, I might be unemployed.

I took the leap to a solo practice in 1997, without taking any insurance clients with me. However, by now I knew that the "insurance kool-aid" was a sugary distraction, and there was a real need for lawyers to actually help those who were injured and to protect them from being "run over" by the insurance company train. I have never looked back—and I credit a good part of that decision to CCTLA and the support it provided to me, and provides to all plaintiff's lawyers, about how to navigate plaintiff's personal injury work.

I discovered CCTLA within a few years of beginning my sole practice, and for the

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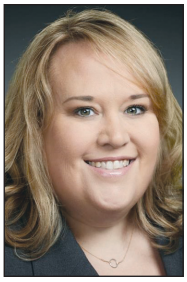

Marti Taylor, Wilcoxen Callaham LLP, CCTLA Parliamentarian

NOTABLE CITES

By: Marti Taylor

NICOLETTI v. KEST
2023 2DCA/8 California Court of Appeal, No. B319377 (November 14, 2023)

APARTMENT COMPLEX OWNER DOES NOT HAVE A DUTY TO INJURED PERSONS WHEN DANGEROUS CONDITION IS OBVIOUS

FACTS: On Apr. 9, 2020, Susan Nicoletti took her neighbor's dog for a walk around the Dolphin Marina Apartments in Marina Del Rey, CA. Nicoletti had lived at the apartment complex for approximately 13 years and was familiar with the premises.

It was raining that day, with thunderstorms. Nicoletti observed that the concrete on a driveway at the complex was wet and that rainwater had formed a current that was running down the driveway. Despite noticing the water, Nicoletti proceeded to cross, and the rainwater knocked her down. She fell down the driveway and hit a gate at the bottom of the driveway. As a result, she sustained an injury to her right shoulder, left knee and face.

On Nov. 9, 2020 Nicoletti filed a complaint against Dolphin, alleging negligence and premises liability because Dolphin had failed to warn of the running water with caution tape or other warning signs.

On Aug. 12, 2021, Dolphin filed a motion for summary judgment, arguing that because the running rainwater was open and obvious, Dolphin had no duty to warn. The trial court granted that motion, which Nicoletti appealed.

ISSUE: Is the force of a water current an open and obvious condition?

RULING: Affirmed.

REASONING: The rainwater current in the driveway was open and obvious and thus there was no duty imposed on the landowner to warn.

"Whether a duty should be imposed on a defendant [in a premises liability action] depends on a variety of policy considerations, known as the Roland factors." J*acobs v. Coldwell Banker Residential Brokerage, Co.* The "most important" of these factors is "the foreseeability of injury to another" *Osborne v. Mission Ready Mix.* A harm is typically not foreseeable if the "dangerous condition is open and obvious." *Jacobs v. Coldwell Banker Residential Brokerage, Co.*

Moreover, "the presence of standing water and the manner in which it drained…would have been obvious and apparent to any reasonably observant person, as would the danger that the water might create slippery surfaces and cause one to slip and fall. *Sanchez v. Swinerton & Walberg, Co.*

The court found that the running water in the driveway was a more obvious danger than standing water that had been previously held to be open and obvious in Sanchez. The court noted that it was common knowledge that wet concrete is slippery when on a slanting incline like a driveway. Thus, the dangerous condition was open and obvious, and Dolphin had no duty to warn Nicoletti of its danger.

OSWALD v. LANDMARK BUILDERS
2023 1DCA/3 California Court of Appeal, No. A165272 (November 15, 2023)

UNAVAILABLITY OF COURTROOMS DOES NOT AUTOMATICALLY LEAD TO A FINDING OF IMPRACTIBILITY OR IMPOSSIBLIITY TO BRING CASE TO TRIAL WITHIN FIVE YEARS

FACTS: On Jun. 28, 2016, Jack Oswald and Anne Sealy filed suit against contractor Landmark Builders, alleging construction defect. The statutory deadline for plaintiffs to bring the action to trial was Dec. 28, 2021. No trial ever commenced, and the trial

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A NEW DISCOVERY TOOL / OBLIGATION?

CCP 2016.090 (INITIAL DISCLOSURES)

By: Robert Nelsen

Robert Nelsen, Tower Legal Group, is a CCTLA Board Member

In the coming months, those practicing in state court will start seeing the implementation of a new discovery tool and a statutory increase to discovery sanctions. This article intends to introduce everyone to CCP section 2016.090–Initial Disclosures–and the newly modified discovery sanctions pursuant to CCP section 2023.050. But first, some background on the legislation that got us here.

These changes came from Senate Bill 235, which was a significant part of CAOC's legislative agenda last year. SB 235 was introduced by Senator Tom Umberg from Orange County. Senator Umberg chairs the California Senate Judiciary Committee and has been a longtime ally of consumer advocates such as us, having also introduced the legislation that increased MICRA caps in the past, among others. Umberg first proposed this legislation back in 2019, but the bill was gutted and only provided the Initial Disclosure requirement when there was a stipulation by all parties. The meat of the bill was finally added last year and was signed into law, effective Jan. 1 of this year.

The bill was intended to tackle a lot of litigation abuses that delay litigants from getting the necessary information by putting the obligation on all parties to provide certain information and by increasing the discovery sanction to at least $1,000 from $250. The following statement was given by Senator Umberg regarding this piece of legislation:

> "Discovery is a very important pretrial stage of a trial. It is the process of collecting information in preparation for trial, when both sides engage to collect facts, identify witnesses, and evaluate a case. Unfortunately, the discovery process is often abused by parties, and especially those with more resources – irrespective of the merits of the matter. These abuses lead to disputes that have become increasingly common, expensive, and time consuming. Currently, California law does not condemn strongly enough that abuse of the discovery process will not be tolerated. SB 235 will reduce this discovery abuse by requiring certain initial disclosures to be mandatory and by changing the current suggested sanction to a mandatory $1,000 minimum sanction imposed on lawyers that: fail to timely respond to a documents request, intent to cause unnecessary delay, and fail to meet and confer to resolved any dispute regarding the request."

According to CAOC, this legislation was a key priority because members–especially those in Southern California–were seeing long delays in having discovery motions heard, which was leading to months of delays before witness info could be obtained, documents could be acquired, insurance limits secured and depositions could proceed unobstructed.

The goal of SB 235 was to streamline the discovery process by requiring the parties to disclose the key information up front and, simultaneously, to increase the penalties to those attorneys who do not engage in the discovery process in good faith.

This statute will expire on Jan. 1, 2027, unless the state legislature extends it.

So what does SB 235 actually do?

First, SB 235 modifies CCP section 2016.090 to apply to all civil matters and implements a new Initial Disclosure procedure that, when triggered by any party, requires all parties who have appeared on the matter respond with up-front disclosures of the identities of all relevant witnesses, documents, insurance policies, etc. The statute takes example from Federal Rule of Civil Procedure Rule 26(a)(1), but expands on the disclosure requirement by having parties identify not just those witnesses, documents, etc. that support their claims, but instead must identify all of those items which are "relevant to the subject matter of the action" or who are "likely to have discoverable information."

Second, SB 235 modifies CCP 2023.050 to increase the discovery sanction from $250 to $1,000. CCP 2023.050 also grants the court discretion to report any lawyer subject to this discovery sanction to the California State Bar within 30 days of the imposition of the sanction. The legislature is sending the courts a strong message: discovery abuse should be sanctioned.

What cases will see Initial Disclosures?

CCP 2016.090 only applies to those cases filed after January 1, 2024. So this procedure cannot be applied retroactively to older civil cases. It applies to all civil cases, but has carved out an exception for cases that have been granted preference under CCP section 36, or for non-civil matters that apply the Discovery Act such as those in the family law.

What happens when a party demands an Initial Disclosure?

Any party can demand an Initial Disclosure. However, once that is done, any and all parties who have appeared must respond to that demand within 60-days of the demand. This includes the party who made the demand.

In its disclosure, each party will have to identify each and every witness who either, (1) likely has discoverable information, (2) that the party intends to use in support of their claims/defenses, and/or (3) that is relevant to the subject matter. The parties do not have to disclose the identities of any retained

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experts/consultants, nor do they have to identify anyone who would be used solely for impeachment purposes. So in a standard personal injury car crash scenario, this would likely entail all witnesses to the subject incident, any responding officers, the medical practitioners who treated the Plaintiff, etc.

One thing Plaintiff lawyers might need to be wary of is the requirement to identify witnesses who you intend to support your claim, as this could easily be interpreted as seeking the names of the surrounding damages witnesses you might call at trial. While the Second District Court of Appeal held in *Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269 that surrounding witnesses not disclosed in response to Form Interrogatory No. 12.1 may still testify at trial, there is still a precedent for excluding witnesses when the failure to identify these witnesses is intentional. So it might be better to be safe than sorry in this area.

The parties will also have to identify and/or provide copies of all documents that either support their claims or are relevant to the subject matter of the case. Fortunately, this does not require a party to identify or produce any documents that might be used for impeachment purposes. So for the Plaintiffs in personal injury matters this likely means any police reports, medical records, bills, etc. For Defendants this might be a far less burdensome task unless it is a more complicated case.

All parties–most importantly the defendants–will also have to investigate and produce all insurance information. This not only includes the limits information, but also the policies themselves as well as a representation as to whether a coverage dispute exists

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or not. Lastly, the disclosure has to be verified, either by a declaration executed by the client or signed by the responding attorney. *See Initial Disclosure Check List on the right.*

Will this help?

Arash Homampour of Los Angeles, who also was instrumental in working with CAOC on this legislation, had the following to say about this new legislation: "This is huge. It boosts the fairness of the civil discovery process by ensuring that all parties have early access to a complete set of information. Both sides will now be required to include far more information in their initial disclosures, including all existing relevant witness information and documents."

CAOC indicated that this bill was not universally supported by its members. And that is certainly understandable. Personally, I have concerns that this change in the statutory scheme won't stop bad actors on the other side from continuing in their evasive tactics.

The increased sanction amount and threat of being reported to the state bar should also help, but that depends on how strictly the judges intend to enforce the sanction(s). Further, with the plaintiffs having the burden of proof, we will more likely be the ones with more work to do in our disclosures.

It will be interesting to see how we all feel about these changes in three years when the statute is set to expire and whether we want them to remain in place. Whatever the case, it is certainly going to be a very dramatic change to the way we all prosecute our cases.

CCP 2016.090 Initial Disclosure Cheat Sheet

- This procedure only applies to cases filed after Jan. 1, 2024;
- Any party can demand an Initial Disclosure;
- Once a party demands an Initial Disclosure, all parties who have appeared must respond, even the party who made the demand;
- Does not apply to cases that have been granted preference under CCP Section 36 or to parties who do not have representation;
- Any party involved in the Initial Disclosures may demand a supplemental disclosure twice before the initial setting of the trial dates;
- Each party who has appeared has 60 days to respond to the demand and must include the identities of the following:
  - Identities of witnesses that either: (1) likely have discoverable information, (2) that the party intends to use in support of their claims/defenses, and/or (3) that is relevant to the subject matter;
  - Copies or descriptions of documents that the party possesses and may (1) use in support of its claims/defenses and/or (2) that is relevant to the subject matter;
  - Any and all contracts or insurance policies that may cover the subject incident that identify the parties, show the limits of the coverage, and all documents showing whether the coverage is disputed.
- The disclosure must be verified, by either the client, client's representative or the attorney.

President's Message

Continued from page 1

past 20+ years, I have come to treat this entire organization as my own "big law firm." At a 50-lawyer firm, there is great wisdom just down the hallway. There is always someone at the firm who has already written the motion you need to write. There is always someone at the firm who has already had a trial where "that issue" came up. Sole practitioners, or even small practices of plaintiff lawyers, do not have that "hallway" to walk down for advice and to bounce ideas off of the lawyer who has already crossed that bridge—unless they are a CCTLA member.

It is the experienced plaintiff lawyers of all CCTLA member firms, large and small, thath make CCTLA one of the greatest "brain trusts" practicing law in California.

The advantage of CCTLA membership is grand. Educational programs that help every lawyer get better results for their clients. A list serve that allows members to not only share ideas but also to obtain information which would be available to a law firm of 400+ lawyers. Simple things, like: "The defense just disclosed 'X' as an expert, and I am going to take X's deposition - does anyone have past deposition transcripts for X?" Or, "Hey, I am in the middle of trial and the [judge] [defense][witness] just did this ---, any suggestions on how to respond?" And, one or more of our esteem members will respond. Assistance like that is not even available at the biggest of law firms.

This coming year, like all past years, CCTLA will jointly host a two-day seminar in Sonoma in partnership with CAOC, the statewide plaintiff organization, March 8-9. There will be CCTLA's annual Spring Fling on Jun. 6, a fundraiser for the Sacramento Food Bank, which has routinely raised about $100,000 to help feed those who need help, and of course, in December, our annual end- of-year party and awards event, where we recognize the attorney of the year, a judge of the year (and his/her clerk).

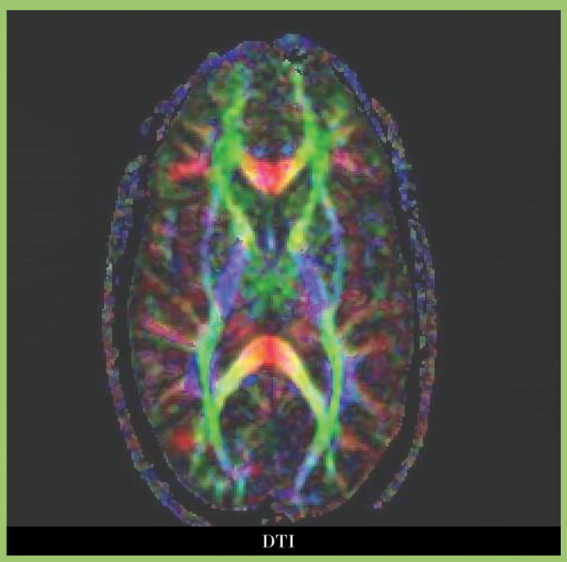
Last year, under the leadership of then-President Justin Ward, CCTLA established a small scholarship program for a law student from each of our local law schools (McGeorge, Lincoln and U.C. Davis). Of course, there will be many individual lunch seminars on legal topics near and dear to plaintiff attorneys, and our monthly Q&A Zoom sessions where members can freely discuss particular issues they may be having on a case with other members and receive "second opinions" to address the problem/issue.

So, other than this first president's message being an expression of my true gratitude for allowing me to take a turn at the helm of the greatest organization that I have ever been a member of, and a solicitation for new members who want to be better plaintiff lawyers, I share what I learned from reviewing the past President's Messages, going back as far as 2006. Our hurdles to justice have not really changed. Finding jurors who are not actively hostile to plaintiffs and their lawyers is not easy. The propaganda of the insurance companies is much louder than the cries for justice and fair compensation. CCTLA and its members must do their part to continue to be the voice of those who need us. We do that by taking to trial those cases that need to be tried and engaging in the constant discussion about how to deal with specious defense assertions.

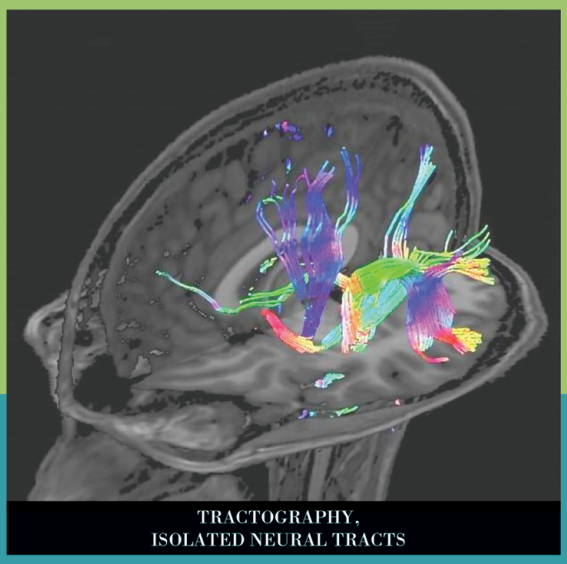
At the helm for 2024, I will stand on the shoulders of those who came before me, and vigorously support the continuing education of our members as we participate in the informal monthly Q&A sessions and through more formal seminars on specific issues and trial skills— medical liens; jury selection; expert depositions, openings and closings, etc.— all put on by lawyers with phenomenal histories of great success, mostly CCTLA members.

I look forward to continuing the great traditions of this organization and, as the year progresses, hopefully adding at least one new avenue of education and assistance to our members to make their practices better and more profitable for this year and in the future.

Standard MRI



DTI



TRACTOGRAPHY,
ISOLATED NEURAL TRACTS

DTI *and* TBI

DTI stands for diffusion tensor imaging, a type of medical resonance imaging (MRI) scan.

The DTI MRI is more sensitive than regular MRIs, so it will give you more details about a head injury, whether an explosion, anoxic injury, motor vehicle accidents, fight, fall, or another violent event was experienced. The DTI validates the injury. So, if the brain trauma does exist a DTI is your best option to detect an injury. It's more accurate than the PET Scan, CAT Scan or SPECT for determining the presence and severity of your traumatic brain injury. Particularly in cases where a CT or even a normal MRI doesn't show abnormalities, the DTI can show the real impact of your high-velocity accident.

The DTI software runs on MRI machines, with a 3T magnet at University Medical Imaging. It runs concurrently with regular MRI scans. DTIs have been used long enough here at University Medical Imaging, with a solid preponderance of evidence to hold up in court. If you are seeking a DTI MRI, a doctor must send a medical referral to us. **Contact us at 916-922-6747**

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Packing a case from the start...

By: Kelsey DePaoli

Take a breath, you did it and you ARE doing it! 2024 has started with new motivation, determination and new things to accomplish. In 2023, we saw our Capitol City Trial Lawyers Association streamline education seminars to make them available in person and by Zoom. We had some great speakers who continued to help us learn and grow as lawyers and professionals in our community. I personally left each seminar I attended with a hunger to grow, learn more and implement new things into my practice.

The one thing I always leave educational seminars thinking about is: Did that seminar speak to all the lawyers in the room? Did it speak to the first-year and the 21-year lawyer? It is more difficult to put on a seminar that would provoke meaning to an attorney who has had one trial, versus a seasoned attorney who has had several trials. It is my belief that we are missing a gap in our teaching, and I have been trying to think of how to fill that gap. I do not have the answer yet, but one thing I know for sure is that we need to talk about what works and how to prepare a case from the time you sign it.

Capital City Trial Lawyers Association does have a mentoring program, and there are many seasoned lawyers willing to talk about cases and trial experience, but sometimes you just want to know how to do it yourself. The fundamentals of practice and trial are connected; you must implement systems in your practice that are always preparing your case for a potential trial. I was lucky enough when I started out to have some mentors and watch some great people put things in motion and prepare a case for trial.

Kelsey DePaoli, Law Office of Black & DePaoli, is a CCTLA Board Member

However, I have talked to lawyers on the eve of trying their first case, and it is abundantly clear that somewhere in our education and practice, we are not providing the tools to teach from beginning to end. For me, it was only when I finally implemented a trial mindset at our intake stage that the cases got stronger, and we were so much more prepared. This is a constant and gradual development for me, and I think most lawyers.

If you have a desire to try cases and to get better settlements, you must start thinking of the result from the start. Your strategy and outline for this will take time to develop. Most of us are constantly still learning and developing as we go. If you start thinking about your case going before a jury from you open the case, you will not miss as many things, and you will be prepared to teach the jury how to take the facts of the case and reach the right conclusion. Think about what will the defense argue? What evidence will you need to combat that issue? Look at the jury instructions, what do you need to prove and what witnesses or documents will get you there? What motions do you want? Is there anything that should be excluded, and how would you exclude it? What deposition needs to be taken?

I have had mentors with a lot of actual trial experience who have been open and shared what they do in their firms, but I think we can all provide more education on what we do in day-to-day practice to prepare the case from the start.

We have an obligation as leaders to learn and then to teach what we have learned. It is our duty and calling as plaintiffs' lawyers to keep growing and teaching. We should always have at the front of our minds that we need to represent our clients with our full potential, this will lead to better settlements, better verdicts, and an overall respect for our profession. We must protect our clients and our justice system. Our justice system is at risk, and it is our role to prevent further threats to an already fragile system.

As leaders, we can do better at teaching the less experienced lawyers how to package their case and be thinking about the result sooner rather than later. This thinking will help cases develop at an earlier stage, and you will find out more about a person's current injuries, prior injuries and any other facts that come up as the case is ongoing.

You will get to know your clients and their families better, which will help paint a better picture of how the case has impacted their life.

You should always be thinking of what information you need from the defense doctor and then use what you get from them to protect your client's case from harmful wrong conclusions that the

We have an obligation as leaders to learn and then to teach what we have learned. It is our duty and calling as plaintiffs' lawyers to keep growing and teaching. We should always have at the front of our minds that we need to represent our clients with our full potential, this will lead to better settlements, better verdicts and an overall respect for our profession. We must protect our clients and our justice system. Our justice system is at risk, and it is our role to prevent further threats to an already fragile system.

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defense expert will make.

Evidence Code 801.1, effective 1.1.2024, contains a new provision that will raise the standard for defense experts testifying about medical causation. It requires defense experts to give causation opinions to a reasonable degree of medical probability. This is a hot topic, and I have heard lawyers who try a lot of cases talk about how to use it in their favor. If you have a defense attorney blaming your clients' current symptoms on prior injuries, or subsequent injuries, for the cause of your client's pain, set the defense doctor's deposition. In that deposition, ask them about the prior crash, and ask them if they can say those injuries in the past contributed or caused these injuries to a reasonable degree of medical probability. When they say no, you can then put that in your motion to exclude this prior injury.

This helps plaintiff lawyers, as the defense doctor's testimony will need to be supported by medical evidence, and this rule will give plaintiff lawyers a new basis to exclude expert testimony. This is part of packaging your case for trial during pre-litigation and while in discovery.

Always be thinking which parts of your case get your client full value. Identify the strengths and weaknesses in your case; not just identify them, analyze them: How they can help or hurt your case, and is there a way to lead the other side to the right conclusion. I like to identify themes. It is easier to tell the story of the case when you negotiate it, mediate it or prepare for trial. Gather the witness statements, documents and information early on. If there is a liability dispute regarding how the crash happened, GO TO THE SCENE. When we do this, it provides a clear and straightforward understanding and helps you argue why your client's version is the correct one.

I think we, as lawyers and professionals, can get caught up in the daily grind and forget how successful we can make a case if we focus on the result from the beginning.

It really is all about putting our clients first and making sure you get them full value. If you package your case from the start, collaborate with the right people and continue to learn and teach, we will all be better for our clients.

Introducing CCTLA's Newest Board Members

IAN BARLOW is a partner at Kershaw Talley Barlow PC whose practice focuses primarily on complex litigation in both state and federal courts. He handles cases involving consumer class actions, wage and hour claims, product liability, mass torts, fraud, whistleblower claims, and individual actions, among other practice areas. He has litigated significant and complicated matters against multinational corporations, including cases coordinated and consolidated as multidistrict litigation or Judicial Council Coordinated Proceedings.

Ian is from Sacramento and is a member of local, state and national legal organizations and active in the Sacramento community. For instance, in addition to the Capitol City Trial Lawyers Association, Ian is involved in organizations and community groups such as: American Association for Justice, Public Justice Class Action Preservation Project, Consumer Attorneys of California, Federal Bar Association – E.D. Cal. Chapter, Sacramento County Bar Association, Sacramento Filipino American Lawyers Association, Sierra Oaks K-8 School Site Council, Luther Burbank High School Law & Social Justice Academy and the NAACP Legal Redress Clinic.

He is a graduate of UCLA School of Law with concentrations in the Public Interest Law and Policy and Critical Race Studies programs and has a Master's degree in Public Policy from the Luskin School of Public Affairs at UCLA. Before law school, Ian was a staff member for a California State Assemblymember and worked on issues such as affordable housing, developmental disabilities, transportation, and education.

Ian and his wife have two kids, Myles and Bennett, and enjoy spending time together including as avid Sacramento Kings fans.

CCTLA welcomes our three new members to the Board of Directors: Ian Barlow, Anthony Garilli and Shahid Manzoon, who were inducted at CCTLA's Reception and Annual Meeting in Decemeber

ANTHONY J. GARILLI served our country as a U.S. Marine for six years and prosecuted crimes on behalf of the People of the State of California as a Deputy District Attorney for nearly four years.

As a Marine, Anthony worked in the Intelligence field. He received additional training in reconnaissance, survival, advanced marksmanship, as well as attending Army Airborne and Ranger schools.

As a Deputy DA, he tried numerous cases to jury verdicts and has spent a significant part of his legal career litigating in the courtroom. He has prosecuted and tried cases ranging from juvenile matters to felonies and strike cases, including part of the prosecution trial team on an eight-month capital murder trial.

Anthony joined Dreyer Babich Buccola Wood Campora in 2018 as an associate attorney after spending nearly four years at a class action, mass torts and personal injury firm in Sacramento. He became a partner in 2023.

He presently works as a member of Roger Dreyer's trial team, where he continues to advocate for the rights of injured victims and families who have lost loved ones.

In 2019, Roger Dreyer and Anthony obtained a $23.2-million verdict on behalf of a young woman who suffered an above-the-knee amputation in the propellers of a rental boat in Lake Tahoe. In 2021, Roger Dreyer and Anthony obtained settlements of $45 million on behalf of a catastrophically injured construction worker, as well as a $27.9-million settlement on behalf of two men catastrophically injured at a dangerous intersection. Anthony has additionally obtained numerous seven-figure settlements and arbitration awards on behalf of his clients.

SHAHID MANZOON, MD, Esq

First, I would like to thank the CCTLA for nominating me and allowing me the privilege of serving on the Board of Directors. I am a native of Sacramento and received all my primary education in Sacramento.

I graduated from McGeorge School of Law in 2012 and have been practicing law for nearly a decade here in Greater Sacramento. I also have a Medical Degree (M.D.) and have practiced medicine for nearly two decades.

My practice entails Plaintiff Personal Injury, Family Law and Civil Contract disputes (which includes insurance bad faith). I have my own practice and am fortunate to have an excellent associate attorney and supporting staff. I practice in both state and federal courts. I am admitted to the Eastern District of California, the Northern District of California and the United States District Court. I have been admitted to the United States Court of Federal Claims, and I am on the Pro Bono panel of the United States District Court, Eastern District of California, where I assist inmates in their civil rights (Constitutional violation) cases.

I am excited to be on the CCTLA board and look forward to serving on it and assisting the plaintiff attorneys' bar in its future endeavors.

CCTLA

There were 460 attendees for the 41st Annual Tort & Trial program held on January 24, 2024. Many thanks to the speakers who spent countless hours reviewing cases to provide this very informative program: Mark Davis, Kirsten Fish, Ann Kepner, Valerie McGinty and Michael Penn

a joint TLA event

What's New In Tort & Trial

2023 A Year in Review

MEET THE SPEAKERS

Mark Davis

Kirsten Fish

Anne Kepner

Valerie McGinty

Michael Penn

A SPECIAL THANK YOU TO CCTLA'S SPONSORS OF THIS YEAR'S TORT & TRIAL SEMINAR:

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Does your client receive public benefits (like SSI, Section 8 housing, Medi-Cal)?
Did you just work hard to receive a positive result for your client?
Do you want to ensure that your client knows all of the options available?

Don't let your hard work become a problem for your client. Let's discuss all available options for your client and try to preserve public benefits for that person. Ashley Clower is a former personal injury attorney and current CCTLA member who has been in your shoes. Settlement planning by an estate planning attorney ensures that your client knows all of the options, gets individualized attention, and most importantly, makes the personal injury attorney look like the hero that you are!

* Settlement planning (determining the best course of action for your client)
* Special Needs Trusts (drafting, funding, notifications to the proper agencies)
* Estate planning, probate, conservatorships (if needed)
* Free 30 minute consultation for personal injury attorneys

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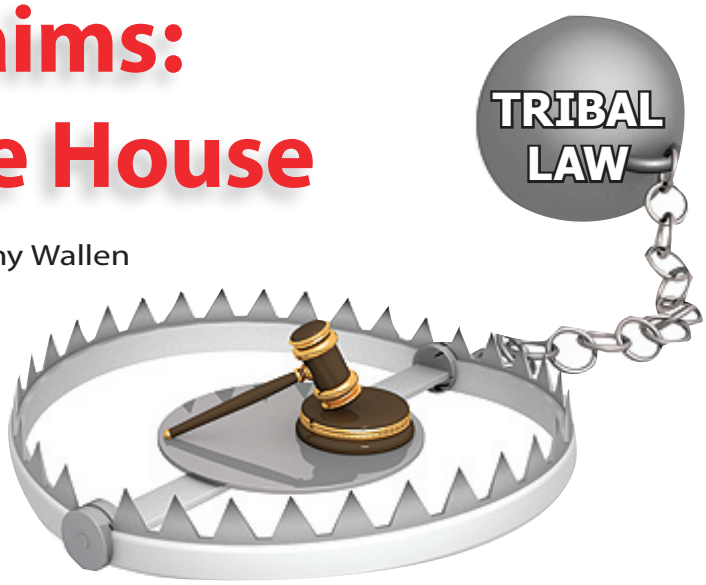
Tribal Casino Claims: Be Wary of the House

By: Glenn Guenard & Anthony Wallen



The first tribal casino was built in Florida by the Seminole Tribe in 1979.[1] Other tribes in other states soon followed suit—contrary to state and local laws that forbade casino gaming. State governments challenged these business ventures, and the ensuing lower court decisions laid the framework that segued the challenges all the way to the Supreme Court of the United States (SCOTUS).

In 1987, SCOTUS decided that state and local governments did not have the authority to enforce anti-gambling laws within tribal reservations without the express consent of Congress. (*Cal. v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207, 211-212.) Tribal gaming was parallel with federal interests of tribal self-determination and economic development. (*Id*. at pp. 218-219.) As a result, SCOTUS signaled to Congress that statutory construction needed to be created to regulate tribal gaming within the states and avoid future litigation.

As a result, in 1988, Congress enacted the Indian Gaming Regulatory Act of 1988 (IGRA) as the federal statute governing tribal gaming in the United States. The purposes of IGRA, amongst others, were to provide a statutory basis for the operation of gaming by tribes as a means of promoting tribal economic development and self-sufficiency. IGRA made certain gaming activities lawful on the lands of federally recognized tribes if such activities were: (1) authorized by a tribal ordinance; (2) located in a state that permitted such gaming; and (3) conducted in conformity with a gaming compact entered between the tribe and the state.

In 1998, Californians overwhelmingly passed (62.38%) Proposition 5, which allowed tribes and the State of California to enter in compacts to establish gambling facilities on tribal lands—in exchange for a portion of the gaming revenue.[2]

California had a legitimate interest in promoting the purposes of IGRA for federally recognized tribes within California. However, California also had an equally legitimate sovereign interest in regulating gaming activities and avoiding undesirable elements related to public policy.

In 1919, SCOTUS affirmed that tribal governments were sovereign authorities and enjoyed sovereign immunity from lawsuit. (*Turner v. United States (1919)* 248 U.S. 354, 357-358.) However, tribes and California were faced with an issue of first impression. By building gaming facilities across the state, the tribes would be inviting and enticing thousands of non-members onto their lands for the first time. What if someone got hurt because of tortious conduct while at one of the gaming facilities? How could sovereign immunity from suit be equitable?

California addressed this issue in the initial compacts they signed with the tribes. Proposition 5 went into effect in 2000. In anticipation of the new law, California entered into compacts with 58 different federally recognized Indian tribes in late 1999.[3]

Glenn Guenard (above), CCTLA President-elect, & Anthony Wallen both of Guenard & Bozarth

A purpose of the compacts was to maintain the tribe's sovereign immunity—but carve out well-delineated exceptions. One exception was tort liability.

In the early compacts, the tribal gaming operation had to carry $5,000,000 in public liability insurance for claims and must waive immunity to suit for money damages resulting from negligent injuries to persons or property at a gaming facility. The tribe had to adopt a tort liability ordinance setting forth the procedures for processing claims. They also agreed to request that its insurer settle all valid claims promptly and fairly.

However, the compacts provided no guidance as to what laws would be followed or what procedures would be expected. It was left up to the respective tribe to determine the statute of limitations, what was prompt, fair, or what was a valid claim. As one could imagine, this scheme was ripe for abuse, inconsistency and ambiguity.

What has resulted is a patchwork quilt of different procedures—many conflicting—and many that could be interpreted as an advantage to the house. The most concerning initial procedural issues are the many built-in statute of limitations malpractice landmines. Although the initial claim must be made within a certain time, there are often other built-in sub-deadlines. If they are

Continued on page 16

[1] *Fletcher, Matthew. "The Seminole Tribe and the Origins of Indian Gaming." Florida International University Law Review 9 (2014): 255-275.*
[2] *https://ballotpedia.org/California_Proposition_5,_the_Tribal-State_Gaming_Compacts_Initiative_(1998).*
[3] *http://www.cgcc.ca.gov/?pageID=compacts.*

Continued from page 15

not followed, the claim is forever barred. In tribal casino cases, the tort ordinance is the supreme law of the land.

Where does one start when a potential client calls with a tort claim for an injury he or she sustained at a tribal casino?

The first place to start is the respective tribe's tort ordinance. Using the most draconian tort ordinance we have faced, we will examine the tort ordinance from the Bear River Band of the Rohnerville Rancheria ("Tribe") and how it applied to a recent case. The California Code of Civil Procedure is over 1,000 pages, the Tribe's tort ordinance is **16** pages. The deadline to file a claim is 180 days (although we have seen some as short as 90 days) from the date of the injury. The Tribe has 30 calendar days from the receipt of the claim to determine if the "Claim seeks a remedy created by and available under this Ordinance" or is "certified." Whatever that means.

In our case, our client fell off an unguarded 10-foot retaining wall at night that was just at the edge of the parking lot and sustained major injuries. We argued that it was a dangerous condition.

If the Tribe determined that the claim was not certifiable, then they would send a "Rejection of Claim," stating all the grounds for denial within 60 days (or was deemed rejected if no response at all in 60 days) of receipt of the claim or that the claim was certified (yes, that conflicts with the 30-day rule above). My office received a letter a few weeks later that stated: "The Bear River Tribal Gaming Commission has denied your claim…the decision to deny your claim is based on the laws of the Bear." That was it.

There was an appeal provision that provided for $120, a complainant could re-submit the claim. Along with the appeal, our client had the right to an evidentiary hearing regarding the "propriety of the rejection of the claim" and discovery governed under the federal rules.

A few weeks later, we got a letter indicating that the Tribe was affirming the appeal based on surveillance footage that they had no duty to produce. Several more back and forth letters were sent out by our office reminding them of what their tort ordinance provided. Soon, we were ignored.

We then sent the Tribe a letter stressing that the Tribe did not get to enjoy sovereign immunity and should ignore their own tort ordinance. My firm cited a case (*Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Incorporated* (9th Cir. 2013) 715 F.3d 1196) which suggested that a tribe could arguably be sued in federal court if they do not allow a claimant to exhaust all tribal remedies and acted in bad faith.

A few weeks later, my firm received a call from the chief of the Tribe indicating that they were referring the case out to counsel for discovery and to schedule an evidentiary hearing.

The parties conducted discovery, and my firm took some interesting PMQ depositions (where we found out that another individual subsequently fell off the same retaining wall and almost died), and had a failed mediation. What was left was an evidentiary hearing. We asked the Tribe's attorney what the evidentiary hearing's procedure was, and he responded he did not know. He asked his client, who claimed to not know either and stated they had never done a hearing.

They soon decided that the evidentiary hearing would be decided by their chief judge, who was employed and paid by the Tribe. Was not due process decided by a neutral factfinder an issue we fought for a long time ago?

We had our evidentiary hearing over video conference while the judge sat in his gaming chair in what appeared to be his home office. We are awaiting the final decision. Do not fret though, both sides have the right to appeal the decision with the final non-appealable decision to be decided by the Tribe's Tribal Council. Nonetheless, we just heard that they built a fence blocking the dangerous unguarded retaining wall.

Although this is a drastic example, other tort ordinances, but not all, follow a clearer administrative process with the end of the road decided through the JAMS process. However, the landscape appears to be changing. The compact signed in 2017 between California and the new casino in Elk Grove has a much more detailed torts claim process with a JAMS requirement.

The takeaway? Many of these tort ordinances are nearly impossible to follow for a non-lawyer and are clearly calculated to make the claims process inaccessible and designed to make a majority of lawyers stay far away from such cases. Nonetheless, with so many casinos popping up and so much revenue derived from them, these draconian practices could soon create "bad law" for the tribes when their compacts expire.

Where does one start when a potential client calls with a tort claim for an injury he or she sustained at a tribal casino? The first place to start is the respective tribe's tort ordinance. Using the most draconian tort ordinance we have faced, we will examine the tort ordinance from the Bear River Band of the Rohnerville Rancheria ("Tribe") and how it applied to a recent case.

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Capitol City Trial Lawyers Assocation

Tom Lytle Luncheon

THE STATE OF THE SACRAMENTO COURT: 2024 AND BEYOND

Presiding Judge Bunmi Awoniyi & Supervising Civil Judge Steven M. Gevercer

Judge Awoniyi and Judge Gevercer will provide an update on electronic filing, trial procedures, the status of getting civil trials out and the changes made to the law and motion calendars. In addition, the judges will announce the latest civil department judicial assignments, talk about budgetary and administrative issues, and inform you about the status of the new courthouse. The judges prefer a question-answer format. This is a unique opportunity to obtain an insider's view of the workings of the Sacramento County Superior Court.

Wednesday, February 21, 2024 | 12 to 1:00 p.m. | In-Person
58 Degrees & Holding, 1217 18th St., Sac, CA 95811
1 Hour MCLE Credit | Cost: $35 Member — $45 Non-Member

COST: $35 CCTLA Member or $45 Non-member. Payment can be made by mailing a check to CCTLA, P.O. Box 22403, Sacramento, CA 95822 or online at www.cctla.com.

RSVP: Debbie Keller at debbie@cctla.com

MCLE: Credit has been approved with the State Bar of California for 1 hour of General credit. Capitol City Trial Lawyers Association is a State Bar of California approved MCLE provider. CCTLA will report to the State Bar your actual time spent in attendance at the program. It is up to each attendee to report to the State Bar if you only attended a portion of the seminar.

Luncheon Buffet will include: First course: Caesar Salad. Second Course: Wild Mushroom Bucatini, Chili Crusted Pan Seared Salmon or Filet Mignon. Sides: Carrots, Mashed Potato and Farro.

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Capitol City Trial Lawyers Association thanks these sponsors of the 2023 Annual Meeting & Holiday Reception

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Your support is greatly appreciated!

CCTLA Honors 2023's Best at Holiday Reception

Jay Renneisen accepts the Advocate of the Year Award for Edward Dudensing, presented by 2023 CCTLA President Justin Ward. Margot Cutter is pictured left

Above, Judge of the Year Richard Sueyoshi and Clerk of the Year Priscilla Lopez

Above, Judge of the Year Steven Gevercer and Amber Muir-Harrison, Courtroom Attendant of the Year with Justin Ward

From left, Bob Dale, Debbie Keller and Justin Ward

CCTLA recognized the best of the best at its Annual Meeting and Holiday Reception on Dec. 14 at The Sutter Club. The event was attended by 200 people, including 24 judges, which was record attendance. Attendees enjoyed delicious food, drink and music provided by Bob Bale and *Res Ipsa Loquitur*!

The Honorable Steven Gevercer and the Honorable Richard Sueyoshi, judges of the Sacramento County Superior Court, each were presented with CCTLA's Judge of the Year award. Also, Judge Gevercer's courtroom attendant, Amber Muir-Harrison, and Judge Sueyoshi's clerk, Priscilla Lopez, each received the Laura Lee Link Clerk of the Year award.

CCTLA member Ed Dudensing was voted Advocate of the Year, and his award was presented to his associate, Jay Renneisen, due to Dudensing being unable to attend the event.

2024 CCTLA President Daniel Glass presents outgoing President Justin Ward with a commemorative plaque

2023 CCTLA President Justin Ward reported that after his board had reviewed the CCTLA Bylaws, the board determined the bylaws needed updating. Revisions to the CCTLA bylaws were suggested to update corporate purpose, addition of a law student membership, one-year renewable term limit for board members, board termination protocols, and the addition of a mission statement for diversity. Ward then made a motion to adopt the revised restated bylaws, which had previously been provided to the membership via email for review. The motion was seconded and passed with no objections.



Scholarship winners, from left: Saleshia Ellis, U.C. Davis; Khalil Ferguson, McGeorge; and Emma Rodgers, Lincoln.

Three law students, from U.C. Davis, Lincoln and McGeorge, were recognized, after being selected by the CCTLA board as the winners of CCTLA's law scholarships. Ward presented each student with a $1,500 check from CCTLA. Scholarships recipients were Saleshia Ellis, U.C. Davis; Emma Rodgers, Lincoln; and Khalil Ferguson, McGeorge.

Mustard Seed School representatives Stacey Johnson and Angela Hassell were presented with CCTLA's $1,500 donation. Including that $1,500 from CCTLA, a total of $14,200 was donated to Mustard Seed School by individual CCTLA board members, members and friends.

Margot Cutter and Marti Taylor were each given the President's Award for their valuable contributions to the 2023 board by Ward, who also presented CCTLA Executive Director Debbie Keller with two dozen roses and a $100 gift card as a thank you for all her work.

Ward then turned the gavel over to Dan Glass, 2024 CCTLA president, who presented Ward with a plaque and thanked him for all his work during the past year as president.

More photos on page 22

Mina Ziaei and George Chryssafis

CCTLA's Holiday Reception and Annual Meeting

Continued from page 21

Among those enjoying the CCTLA Holiday Reception and Annual Meeting are, from left: Dawn McDermott, Craig Sheffer, Kelsey Fischer and Hank Greenblatt

From left: Judge David De Alba (ret.), Judge David Brown (ret.) and Robert Nelsen

Outgoing CCTLA President Justin Ward presented President's Awards to two of his 2023 board members: Marti Taylor (above) and Margot Cutter (below)

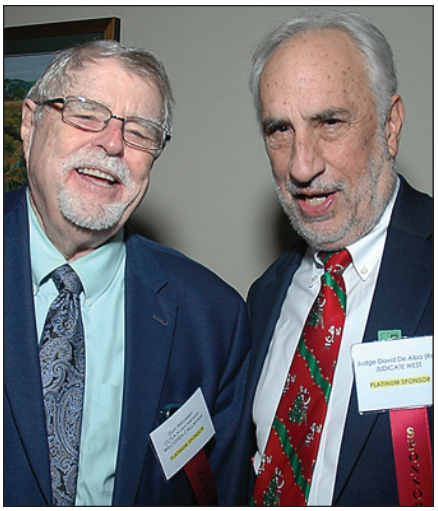
Above, from left: Judge Russell Hom (ret.), Judge Jill Talley and Judge Geoffrey Goodman (ret.)

From left: Judge Michael Bowman, Commissioner Martin Tejada, Commissioner Alicia Hartley and Judge Russell Hom (ret.)

Rick and Cynthia Crow

From left: Meredith Schaff, Jeff Schaff, Stuart Talley and Ryan Sawyer

From left: Judge Myrlys Stockdale Coleman, Judge Emily Vasquez (ret.), Justice Shana Mesiwala, Judge Misha Igra and Associate Justice Ron Robie



Dan Wilcoxen and Judge David De Alba (ret.)

PHOTOS BY: Joe Potch / Ana Maria Photography

Advice for Reducing the Amount of Medi-Cal Liens

By: Daniel E. Wilcoxen

Daniel Wilcoxen, Wilcoxen Callaham, LLP, is a CCTLA Board Member

Frequently, attorneys are called upon in lien cases to attempt to reduce the amount of the lien pursuant to Welfare & Institutions Code §14124.76. This statute was enacted by the State of California following the U.S. Supreme Court decision in *Arkansas Dept. Health Services v. Ahlborn* (2006) 547 U.S. 268 which in a 9-0 decision determined that the methodology to determine the amount of Medi-Cal funding subject to a government lien would be determined by placing the amount of the recovery over the amount of the value of the case, thereby creating a fraction. Said fraction is then multiplied times the total amount of the Medi-Cal lien.

Hypothetically, if we assume there is a $1,000,000 recovery, and the value of the case is $10,000,000, 10% would be multiplied times the amount of the lien, thereby determining the amount of the lien.

Welfare & Institutions Code §14124.76(a) was adopted in the State of California in August 2007 and incorporated language from the *Ahlborn* case. It is imperative that the attorney reviews subsection (a). Subsection (a) has basically three requirements: 1) reasonable efforts shall be made to obtain the director's advance agreement as to what portion of the settlement or award represents payment for medical expenses; 2) if the director does not agree with your assessment of the amount of the damages you should treat it as if it is a meet and confer with the representative from Medi-Cal. If an agreement is not reached, "the matter should be submitted to a court for a decision." This requires a motion to be filed, subject to regular law and motion procedures. 3) The court shall be guided by the U.S. Supreme Court decision in *Ahlborn*, supra. An easy description of how this can be accomplished is found in the case of *Lopez v. Daimler Chrysler* (2009) 179 Cal.App.4th 1373.

At right is a Declaration of Daniel E. Wilcoxen, filed in a motion to reduce a Medi-Cal lien in a product liabaility case that I settled. Paragraph 1 should be the best description you can make of yourself, to impress the court with how much you know about the area and how experienced you are. As you will see in the my declaration, I described myself as much as possible in order to impress upon the court that I knew what I was talking about.

Next in my declaration, you should attach reports specifically created to increase the value of the case over the amount you received in settlement. Remember, it is the amount received versus the amount of the value that is used to reduce the lien, creating a fraction putting the amount of settlement over the amount of the value of the case. You must remember that comparative fault does not matter, policy limits do not matter and the court is going to rely upon exhibits that you attach to determine what they think the value of the case would be based solely upon the injuries, not on the liability.

Seldom, does the state (I have never seen it happen) hire any experts to try and establish the value of the case. I believe this is because: 1) they don't want to pay for the reports, and 2) they did not handle the case, you did. Further, it should be obvious that the state did not intervene in the case, which they have a right to do. Had they done so, maybe they would have a clue about the value of the case. Make sure you argue that.

For a copy of my 10-page motion to reduce a Medi-Cal lien in a product liability case I settled, please contact me at dwilcoxen@wilcoxenlaw.com.

WILCOXEN CALLAHAM, LLP
DANIEL E. WILCOXEN, SBN 054805
2114 K Street
Sacramento, CA 95816
Telephone: (916) 442-2777
Facsimile: (916) 442-4118

SAMPLE

Attorneys for Plaintiff
JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ANONYMOUS

JANE DOE, Plaintiff, vs. NATIONAL CARS COMPANY; AUTO COMPANY, INC.; DOE 1, SEATBELT MANUFACTURER; DOE 2, SEATBELT COMPONENT MANUFACTURER; and DOES 3 through 100, inclusive, Defendants.	Case No. **DECLARATION OF DANIEL E. WILCOXEN IN SUPPORT OF PLAINTIFF'S MOTION TO REDUCE MEDI-CAL LIEN PURSUANT TO WELFARE & INSTITUTIONS CODE §14124.76** Complaint Filed: Trial Date: MSC:

I, Daniel E. Wilcoxen, declare as follows:

1. I am an attorney at law licensed to practice before all the courts of the State of California. I am the founding, managing and senior partner of the law firm of Wilcoxen Callaham, LLP in Sacramento, California. I received my juris doctor degree, cum laude, from the University of the Pacific McGeorge School of Law in 1972 and was admitted to the California State Bar in 1972. I was the 1989 President of the McGeorge School of Law Alumni Association. I am a founding member and diplomat of the American Board of Professional Liability Attorneys, a member of the American Association of Justice, and have been a Certified Specialist in Civil Trial Advocacy by the National Board of Trial Advocacy. I am a Board of Directors member and past President of the Capital City Trial Lawyers Association (CCTLA), where I was recognized as Advocate of the Year in 1996 and 2002. I am a member of the American Board of Trial Advocates (ABOTA), where I serve on the National Board of Directors with an Advocate Rank, requiring over 50 jury trials, and was the 2008 President of the Sacramento Valley Chapter and the Sacramento Valley Chapter 2010 Trial Lawyer of the Year. I have resolved over ninety (90) million to multi-million-dollar cases. In 2014, I received the Joe Ramsey Professionalism Award, which recognizes an attorney who has distinguished himself or herself for a commitment to professionalism, civility and "in recognition of his/her integrity, wisdom, helpfulness, legal skills, and experience." In 2023, I received the Mort Friedman Humanitarian Award, which recognizes an attorney for his or her demonstrated "heart, soul, and passion as a trial lawyer in service to the community." I am "AV" rated by Martindale-Hubbell and have been listed as a Super Lawyer of Northern California for over 18 years. I serve as an arbitrator and Judge Pro Tem in Sacramento, Placer and El Dorado Superior Courts.

2. I have personal knowledge of the matters set forth in the declaration, and if called upon to testify as to these matters, I could and would competently do so.

3. Attached hereto as **Exhibit 1** is the Life Care Plan Report for plaintiff JANE DOE prepared by Andrew Barrett, M.D.

4. Attached hereto as **Exhibit 2** are the Summary Life Care Plan and Life Care Plan Reports prepared by Christine Roland, M.A., M.S.

5. Attached hereto as **Exhibit 3** is the Summary of Economic Damages - Future Life Care Costs Report prepared by Ronald Burkett, CPA.

6. Attached hereto as **Exhibit4** is Summary of Economic Damages - Earnings Report prepared by Ronald Burkett, CPA.

7. Attached hereto as **Exhibit 5** is a true and correct copy of Department of Health Care Services' ("DHCS") March 1, 2018 itemization showing Medi-Cal paid $470,316.04 in accident-related charges on behalf of Ms. DOE.

8. Attached hereto as **Exhibit 6** is a true and correct copy of my May 2, 2018 letter requesting that DHCS' $470,316.04 lien on Ms. DOE's $1,500,000.00 recovery be reduced to $59,549.02 but that Ms. DOE was willing to compromise and pay $75,000.00 to satisfy DHCS' lien. This proposal was never responded to thus necessitating this motion pursuant to W&I 14124.76(a).

9. Attached hereto as **Exhibit 7** is DHCS' May 11, 2018 response to my letter stating that DHCS would not consider my proposal until all settlements have been reached on this case and the final lien has been issued.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated:

DANIEL E. WILCOXEN

Share your experiences, victories, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small).

Please include information about the author (legal affiliation and contact and other basic information) at the bottom of the article.

For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.

Special thanks to the CCTLA members and friends for helping us raise $14,200 for Mustard Seed School!

Ashley Amerio ($500) • CCTLA ($1,500) • Rick and Cynthia Crow ($250) • Cutter Law ($1,000) • Del Rio & Caraway ($1,000) • Kelsey DePaoli ($250) • Dreyer Babich Buccola Wood Campora ($2,000) • Debbie Frayne Keller ($100) • Shahid Manzoor ($500) • Virginia Martucci ($250) • Piering Law Firm ($1,000) • Offices of Noah S. Schwartz at Ringler ($500) • Craig Sheffer ($250) • Jacqueline Siemens ($250) • David Smith & Elisa Zitano ($250) • Telfer Law ($1,000) • Tiemann Law Firm ($1,000) • The Ward Law Firm ($100) • Wilcoxen Callaham ($2,500)

Spring Fling 2024!

President Daniel Glass
and the Officers and Board
of the Capitol City Trial Lawyers Association
& Sacramento Food Bank & Family Services

cordially invite you to attend

CCTLA's 20th Reception & Silent Auction

June 6, 2024
from 5 p.m. to 7:30 p.m.
at The Lady Bird House,
1224 44th Street, Sacramento 95819

RSVP
Deadline
Wednesday
May 29, 2024

Contact
Debbie Keller:

916 / 917-9744
debbie@cctla.com

For two decades, Allan Owen & Linda Whitney joined with CCTLA to support our Sacramento Food Bank & Family Services by hosting CCTLA's Auction & Reception that gives to those in need by raising funds for SFB&FS. This year, Chris and Amy Wood are again hosting the event in their home, the famous Lady Bird House!

Hosted beverages and appetizers will be provided, as well as valet parking

This reception is free to CCTLA members, honored guests, reception sponsors and those who donate to the auction, with all proceeds benefiting those in need in our community.

SACRAMENTO Food Bank & Family SERVICES

Silent Auction proceeds benefit Sacrmento Food Bank & Family Services, a local non-profit agency committed to serving individuals and families in need

CCTLA

Post Office Box 22403 Sacramento, CA 95822
Telephone: (916) 917-9744 Website: www.cctla.com

CCTLA'S 20th Reception & Silent Auction June 6, 2024

All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

Sacramento Food Bank & Family Services is a local, non-profit agency committed to serving individuals and families in need

Auction Donor Sign-Up Form

The committee is seeking donations of goods and services for the Silent Auction. Examples might include event tickets (sports, theater, etc.), golf at a private club, lessons (water or snow skiing, sailing, hunting, crafting, quilting, etc.), vacation home/timeshare, artwork, professional services, dining, wine, gift baskets, electronics.....just about anything you can think of!

If you are able to donate an item, please provide the necessary information:

Name: _____

Donated Item: _____

Item Description: _____

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Value: $ _____

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Donated items/certificates can be dropped off at 2114 K St, Sacramento CA, 95816 by Friday, May 24 2024

If you are unable to drop off your donation, please contact Debbie at CCTLA: 916 / 917-9744 or debbie@cctla.com.

THANK YOU!

CCTLA

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Telephone: (916) 917-9744 Website: www.cctla.com

CCTLA'S 20th Reception & Silent Auction June 6, 2024

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You will be helping the Sacramento community, and you will enjoy exposure to all CCTLA members, the judiciary and more. A wonderful opportunity!

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For a $1,000 donation to Sacramento Food Bank & Family Services (SFBFS)

- 2 quarter-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage
- Your name announced at the reception
- A sponsor ribbon attached to your name tag
- Your name listed as a sponsor by SFBFS on several social media sites

For a $2,500+ donation to SFBFS

- All of the above, with 1 full-page color ad in *The Litigator* instead of the 2 smaller ads
- 2 registrations for "Run to Feed the Hungry"

For a $5,000 donation to SFBFS

- 2 full-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage & announced at the reception
- A sponsor ribbon attached to your name tag
- 6 registrations for "Run to Feed the Hungry"
- Your name listed as a sponsor by SFBFS on several social media sites

For a $10,000 donation to SFBFS (1 available):

- Company logo/name on wine glasses used at the reception
- 2 full-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage & announced at the reception
- A sponsor ribbon attached to your name tag
- 8 registrations for "Run to Feed the Hungry"
- Your name listed as a sponsor by SFBFS on several social media sites

Your donation is tax-deductible, either by check made payable to Sacramento Food Bank & Family Services and mailed to CCTLA (address below) or to pay by credit card: Contact April Santos at SFBFS: 916-456-1980, Ext. 3420 / asantos@sacramentofoodbank.org or pay online: https://support.sacramentofoodbank.org/CCTLA2024

THANK YOU!

CCTLA

Post Office Box 22403 Sacramento, CA 95822
Telephone: (916) 917-9744 Website: www.cctla.com

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- Arbitrations
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- The Ins and Outs of Insurance Policies
- Government Liability
- Trial Skills Roundtable: Voir Dire, Openings, Direct and Cross Examinations, Experts and Closings
- Damages
- Depositions
- Welcome Reception (following MCLE Sessions)

SATURDAY, MARCH 9

9:00 AM TO 5:00 PM

- Navigating The Relationship with Your Client
- Children's Rights
- Sexual Abuse/Assault
- Federal Practice
- Keynote Lunch
- Trial Skills II: Evidence at Trial
- New Developments with the Law: From AI to New Discovery Obligations
- Closing Reception (following MCLE Sessions)

SESSION TOPICS SUBJECT TO CHANGE

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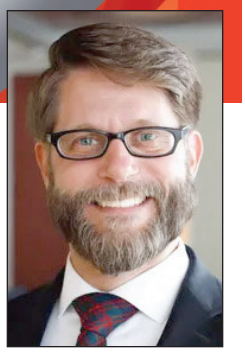
CONTINUING TO EVOLVE:

Labor Code Section 1197.5 and California's Hiring Above Minimum (HAM) Procedure

By: Justin M. Gingery



Justin M. Gingery, Gingery, Hammer & Schneiderman LLP, is a CCTLA Board Member

The California Equal Pay Act (hereinafter referred to as "EPA"), codified in Labor Code Section 1197.5, has evolved in recent years. For decades, the EPA has prohibited an employer from paying its employees less than employees of the opposite sex for equal work. Each year since 2016, further amendments to the EPA have signaled California's commitment to achieving real pay equity.

The most significant changes to the EPA in 2016 included requiring equal pay for employees who perform "substantially similar work," when viewed as a composite of skill, effort, and responsibility; eliminating the requirement that the employees being compared work at the "same establishment"; making it more difficult for employers to justify inequities in pay through the "bona fide factor other than sex" defense; ensuring that any legitimate factors relied on by the employer for pay inequities are applied reasonably and account for the entire pay difference; explicitly stating that retaliation against employees who seek to enforce the law is illegal, and making it illegal for employers to prohibit employees from discussing or inquiring about their co-workers' wages; and extending the number of years that employers must maintain wage and other employment related records from two years to three years.

In 2017, Governor Brown signed a bill that added race and ethnicity as protected categories and prohibited employers from using prior salary to justify a sex, race or ethnicity-based pay difference. Since then, California law prohibits an employer from paying its employees less than employees of the opposite sex, or another race or another ethnicity for substantially similar work. The provisions, protections, procedures and remedies relating to race or ethnicity-based claims are identical to the ones relating to sex.

Since 2018, the EPA covers public employers. Labor Code Section 432.3 was enacted which prohibits employers, with one exception, from seeking applicants' salary history information and requiring employers to supply pay scales upon the request of an applicant.

Currently, the amended EPA prohibits any employer from paying any of its employees' wage rates that are less than what it pays employees of the opposite sex, of another race or of another ethnicity for substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions.

In an effort to allow state agencies to compete with the private sector in recruiting and hiring personnel, the state allows for an applicant to make a Hire Above Minimum (hereinafter referred to as "HAM") request, which alows a state agency to pay an extraordinarily qualified applicant more than the minimum salary amount for the position applied.

California Government Code Section 19836 provides that a department may authorize payment at any step above the minimum salary limit to classes or positions to meet recruitment problems, to obtain a person who has extraordinary qualifications, to correct salary inequities resulting from actions by the department or State Personnel Board, or to give credit for prior state service in connection with appointments, promotions, reinstatements,

Continued on page 30

Continued from page 29
transfers, reallocations or demotions.

Generally, the HAM process happens as follows: If the state agency decides to hire a candidate for a position, the state agency decides the "class" the candidate is qualified for based on experience, training and education. It is the state's policy, to save on expenses, to offer the candidate the lowest, or minimum, salary amount available to the class to which the candidate is qualified. If the candidate expresses any issue or hesitancy with accepting the offered salary designation and if the state agency is very interested in hiring the candidate, the state agency will inform the candidate about the HAM request process. If the candidate is not already a state employee, does not know of the HAM request or does not express any issues or hesitancy with accepting the offered salary designation, the candidate is never informed of the HAM request.

A very important part of the HAM request is providing the hiring state agency with the candidate's recent pay history. The HAM request informs the state agency and CalHR that the candidate is unable to accept the offer of employment because the minimum pay rate for the class being offered is so much less than the candidate's recent pay rate that the candidate cannot afford to accept the position and pay rate as offered.

The current state of the HAM process leaves the state and its agencies exposed to multiple opportunities that will result in violations of the Equal Pay Act. First, by only informing candidates of the HAM request that express concern or disinterest in the minimum pay offered, the state agency is likely to have a discrepancy in pay rate between those that know of the HAM request and those that accept the minimum pay offered. As the law allows for co-workers to openly discuss their respective pay rates, it is certain that those employees who were not made aware of the HAM request will learn of the pay discrepancy for those employees who were made aware of the HAM request. Should either of those employees coincidentally be of a different race or gender, the state agency is violating the Equal Pay Act and is subject to a lawsuit.

Secondly, by requiring those candidates who are informed of the HAM request and choose to utilize the HAM request to provide their prior salary rates, the state agency is arguably justifying the pay difference between employees of the opposite sex or employees of different race or ethnicity based on an employee's prior salary, which is also in violation of the Equal Pay Act.

If an employee can show that a co-worker of a different gender, race or ethnicity is paid more for substantially similar work, when viewed as a composite of skill, effort, responsibility, and performed under similar working condition, the employee has established a prima facie case for a violation of the Equal Pay Act. The burden then shifts to the employer to demonstrate that there is not a violation.

In order for the state agency to be able to legally pay employees of a different gender or employees of different race or ethnicity a lesser wage rate, the state agency must demonstrate the following:

(1) The wage differential is based upon one or more of the following factors:
- (A) A seniority system
- (B) A merit system
- (C) A system that measures earnings by quantity or quality of production
- (D) A bona fide factor other than sex, such as education, training or experience

(2) Each factor relied upon is applied reasonably

(3) The one or more factors relied upon account for the entire wage differential

(4) Prior salary shall not justify any disparity in compensation

Currently, the HAM request process's only justifications for paying employees of a different gender, race or ethnicity a different wage rate are the candidate's knowledge of the HAM process and that same candidate's prior salary rate. In fact, it can be argued that the only justification for the discrepancy in pay rate is the candidate's prior salary rate.

There are very simple solutions for state agencies to avoid the inevitable issues discussed in this article. The state could eliminate the HAM request process altogether and offer candidates for the same positions the appropriate and same salary amounts that the state agency is offering all the candidates with the same qualifications. Or, if the state is adamant about maintaining the HAM request process, the state agency should inform all the candidates of the HAM request process, whether or not the candidate expresses concerns about the minimum pay rate offered by the class designation.

The government's decision to apply the Equal Pay Act to public employers is a relatively new development finalized in early 2019. Shortly afterward, the world changed for completely different reasons. As such, the consequences of the decision to apply the EPA to public employers has yet to have the opportunity to come to fruition. That opportunity is rapidly approaching. State agencies must amend or change the HAM request process as soon as possible or it will run head on into the requirements and consequences of the EPA. This could be catastrophic for the state and it's budget, as well as incredibly daunting for a court system still trying to catch up from the pandemic.

CAOC releases statement on governor's proposed budget

Sacramento, CA – The Consumer Attorneys of California (CAOC) on Jan. 10 released the following statement from the organization's CEO Nancy Drabble, in response to Governor Gavin Newsom's proposed budget for 2024-2025:

"Despite potentially challenging economic headwinds facing California, CAOC is grateful to Governor Newsom for protecting access to justice in his budget proposal. By maintaining and protecting trial court funding, the judicial system will continue to have the resources necessary to reduce court backlogs and protect the right to trial by jury.

"Though the state's financial future may be uncertain, CAOC looks forward to partnering with the governor's office and the state's Judicial Council to protect and expand access to justice for all."

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MONDAY, MAY 13

Legislative Reception
5:30 to 7:00 PM
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TUESDAY, MAY 14

Justice Day Breakfast
7:45 to 9:00 AM - registration opens
1220 9th Street, Sacramento

Justice Day Legislative Meetings
10:00 AM
State Capitol and Capitol Annex Swing Space
1021 O Street, Sacramento

Justice Day Lunch
12:00 Noon
1220 9th Street, Sacramento

Justice Day Legislative Meetings
1:00 PM
State Capitol and Capitol Annex Swing Space
1021 O Street, Sacramento

Justice Day Closing Mixer
4:00 to 5:30 PM
Hyatt Centric's 7th Street Standard, Private Room
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Space is limited so register early. You must register by Wednesday, May 8, 2024 to be guaranteed legislative meetings.

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FREE to Attorney Members
Attorney non-member: If you've never been a CAOC member, register now for $99, and the registration fee includes free membership through 2024

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ABOUT

Consumer Attorneys of California is a professional organization that represents the interests of 39 million Californians. Our member-attorneys stand for plaintiffs seeking accountability from those who do wrong.

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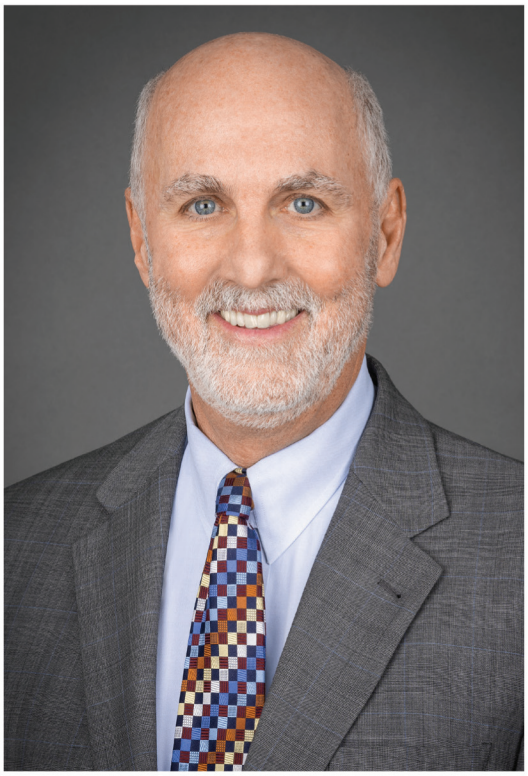

We congratulate Judge Newman on his retirement as Chief Magistrate Judge with the U.S. District Court, Eastern District of California, Sacramento Division.

Throughout his extensive legal career spanning more than four decades, Judge Newman garnered a reputation for his exceptional track record in achieving successful resolutions. He presided over 1,500 settlement conferences and has experience in a wide range of civil matters, including civil rights, employment law, personal injury and wrongful death, medical negligence, and general business litigation.

Prior to the bench, he served as Chief of the Eastern District of California's Civil Litigation Affirmative Section for the U.S. Attorney's Office. Highly praised by fellow judges, attorneys, and mediators, he will surely be an outstanding asset to the private sector.

A member of Judicate West's Federal Practice Group and based out of Sacramento, he is available throughout California for mediations, arbitrations, and private judging assignments.

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 Continued from page 2

court determined that plaintiffs showed no reasonable diligence in prosecution of their action and granted motions for mandatory dismissal pursuant to Code of Civil Procedure section 583.310.

During the action, there were seven trial continuances, either requested or caused by plaintiffs. The final trial continuance placed the trial date well beyond the Dec. 28, 2021, deadline.

In January 2021, several defendants brought a motion pursuant to Code of Civil Procedure section 583.310 to dismiss the action. The trial court found that plaintiffs had failed to diligently prosecute the action and dismissed the case.

ISSUE: Did the unavailability of courtrooms during the COVID 19 pandemic support an automatic finding of impracticability or impossibility to extend the time to bring a case to trial.

RULING: Affirmed

REASONING: The court found that the unavailability of courtrooms did not automatically lead to a finding of an impossible or impractical circumstance. The court ruled that the trial court is tasked with determining the extent to which the unavailability of courtrooms for trial interfered with a plaintiff's ability to move the case.

The court concluded that the trial court acted within its discretion in determining that the courtroom closure and trial continuance at issue did not make it impossible or impractical for plaintiffs to commence trial in a timely fashion.

BARRON v. SANTA CLARA COUNTY VALLEY TRANSPORTATION AUTHORITY

2023 6DCACalifornia Court of Appeal, No. H050277 (December 14, 2023)

EMERGENCY RULE 10(a) EXTENDS THE FIVE-YEAR TIME FRAME TO BRING CASE TO TRIAL BY SIX MONTHS

FACTS: In 2017, plaintiff Marcelina Barron filed a civil suit for general negligence against defendants Santa Clara County Valley Transportation Authority and Bruce Arnold Gaillard (collectively Santa Clara VTA) concerning injuries Barron had sustained from a bus accident. After multiple continuances of the trial date, Santa Clara VTA filed a motion to dismiss the complaint on the basis that the case had not been brought to trial within the five-year statute of limitations provided in Code of Civil Procedure section 583.310.1. The trial court subsequently granted the motion to dismiss.

Barron appealed the dismissal on the ground that Emergency rule 10(a), which was passed by the Judicial Council of California during the COVID-19 pandemic, extended the five-year period in section 583.310 by six months such that Barron did bring the case to trial within the prescribed statute of limitations.

ISSUE: Does Emergency rule 10(a), which was passed by the Judicial Council of California during the COVID-19 pandemic, extend the five-year period in section 583.310 by six months?
RULING: Reversed and remanded.

REASONING: Section 583.310 requires an action to "be brought to trial within five years after the action is commenced against the defendant." If an action is not brought to trial within this time, the trial court must dismiss the action either on its own motion or on motion of the defendant. (§ 583.360, subd. (a).) Dismissal is mandatory and not subject to "extension, excuse, or exception except as expressly provided by statute." (§ 583.360, subd. (b).)

The Judicial Council issued 11 emergency rules on April 6, 2020. (*E.P. v. Superior Court* (2020) 59 Cal.App.5th 52, 55 (E.P.).) This included Emergency rule 10(a), which provides the following: "Notwithstanding any other law, including Code of Civil Procedure section 583.310, for all civil actions filed on or before April 6, 2020, the time in which to bring the action to trial is extended by six months for a total time of five years and six months." The rule remained in effect until Jun. 30, 2022.

On appeal, Santa Clara VTA argued that the holding in *Ables v. A. Ghazale Brothers, Inc.* (2022) 74 Cal.App.5th 823 (*Ables*) effectively invalidated Emergency rule 10(a) by finding that Judicial Council rules were not statutes and therefore could not amend existing statutory deadlines. The court found *Ables* legally and factually inapposite and that *Ables* did not make any determination on the validity of Emergency rule 10(a) and thus was inapplicable.

The five-year and six-month statute of limitations period under section 583.310 and Emergency rule 10(a) had not expired at the time the trial court granted the motion to dismiss. Therefore, the trial court erred in prematurely dismissing Barron's complaint.

JONES v. REGENTS OF THE UNIVERSITY OF CALIFORNIA

2023 4DCA/3 California Court of Appeal, No. G061787 (November 28, 2023)

WORKERS' COMP WAS SOLE REMEDY FOR UC EMPLOYEE INJURED RIDING BIKE HOME FROM WORK

FACTS: Rose Jones, an employee of the Regents of the University of California at the Irvine campus, was injured while riding her bike on university grounds on her way home from work. On the day of the incident, at the end of her workday, she exited her office suite at UCI's science library, walked her bike a short distance to the bike path on Outer Ring Road, mounted her bike, and began riding toward her home. After riding for about 10 seconds, Jones reached a trench, cordoned off with orange posts and caution tape. Upon noticing the obstacle, she swerved and at-

Continuedon page 38

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tempted to brake but fell off her bike and sustained injuries.

She and her husband filed an action against the University, and the latter moved for summary judgment. The university asserted, inter alia, that Jones was limited to workers' compensation under that system's "exclusivity" rule.

Although an employee's commute is generally outside the workers' compensation scheme, the university argued Jones's injuries were subject to the scheme under the "premises line" rule, which extends the course of employment until the employee leaves the employer's premises. The trial court agreed and granted summary judgment for the university.

Jones appealed.

ISSUE: Did the premises line rule apply when the university employee was still on campus?

RULING: Affirmed.

REASONING: Under the judicially created "'going and coming rule,'" an employee's injury while commuting to and from work is not compensable under the workers' compensation system absent "special or extraordinary circumstances." (*Hinojosa v. Workmen's Comp. Appeals Bd*. (1972) 8 Cal.3d 150, 153, 157.)

"In an effort to create a 'sharp line of demarcation' as to when the employee's commute terminates and the course of employment commences, courts adopted the premises line rule, which provides that the employment relationship generally commences once the employee enters the employer's premises." *Wright v. State of California* (2015) 233 Cal.App.4th 1218 "Prior to entry[,] the going and coming rule ordinarily precludes recovery [of workers' compensation benefits]; after entry, injury is generally presumed compensable as arising in the course of employment." The same rule applies to determine the end of the course of employment: generally, once employment has begun, it continues, and injury is presumed to be compensable until the employee leaves the employer's premises.

The court found that the worker's compensation exclusivity rule barred appellants' claims because Jones's injuries occurred in the course and scope of her employment as a matter of law. Her accident occurred on UCI's campus, undisputedly owned by the university, just after she left her workstation. Under these circumstances, the premises line rule brought Jones's injuries within the worker's compensation scheme.

GUTIERREZ v. TOSTADO

2023 6DCA California Court of Appeal, No. H049983 (December 1, 2023)

ONE-YEAR STATUTE OF LIMITATIONS UNDER MICRA APPLIED IN AMBULANCE CRASH EVEN WHERE PLAINTIFF WAS NOT PERSON RECEIVING MEDICAL CARE

FACTS: Francisco Gutierrez was driving on Interstate 280 when he was forced to stop. Shortly after Gutierrez stopped, Uriel Tostado, who was driving an ambulance, rear-ended him.

At the time of the accident, Tostado was an emergency medical technician, (EMT) employed by ProTransport-1, LLC, and was transporting a patient from one medical facility to another. While Tostado drove, his partner attended to the patient in the rear of the ambulance. Gutierrez was injured in the collision and visited a chiropractor for treatment within 10 days of the incident.

Almost two years later, Gutierrez filed a complaint against Tostado and ProTransport-1, alleging various personal injury claims. The respondents filed a motion for summary judgment on the sole ground that Gutierrez's claims were time-barred under MICRA's one-year statute of limitations. The trial court agreed that MICRA applied, and granted the motion. The trial court concluded that because Tostado was transporting a patient at the time of the accident, he was rendering professional services. The trial court held that Gutierrez's claims against the defendants were time-barred under the statute.

Gutierrez timely appealed from the judgment.

ISSUE: Does MICRA apply in a motor vehicle accident with a health care provider engaged in providing medical care?

RULING: Affirmed.

REASONING: In this case, Tostado was transporting a patient who was receiving medical care at the time of the accident. He drove while his partner attended to the patient. The court found there was no question that transporting a patient in an ambulance qualified as the provision of medical care, and that the act of driving the ambulance was an integral part of that care.

The court noted the case of *Lopez v. American Medical Response West* (2023) 89 Cal.App.5th 336 that considered this issue of a passenger riding with patients being treated who sustained injuries in a crash. The *Lopez* court held that nonpatients injured while an EMT was rendering professional services were subject to MICRA.

The court held that even though Tostado may have owed a duty to the public to drive the ambulance safely when not in use for medical care, the injury to Gutierrez occurred while Tostado, a medical provider, was performing the integral function of transporting a patient by ambulance. The court found that the trial court correctly concluded that MICRA's one-year statute of limitations applied to Gutierrez's negligence claims.

Member Verdicts & Settlements

CCTLA members are invited to share their verdicts and settlements: Contact Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com, for preferred sample format. The next issue of *The Litigator* will be the Summer issue, and submissions need to be sent to Jill before April 5, 2024.

Settlement/Mediation: $740 Million

CalPERS Long-Term Care Class Action

Holly Wedding et al. v. California Public Employees Retirement System, et al, Case No. BC517444

Total Settlement: $740 Million
Claimants: $660 million; Attorney's Fees: $72.14 million; Settlement Administration Expenses: $5.5 million; Reimbursement of Costs: $2.27 million

Plaintiff's Counsel:
Kershaw Talley Barlow PC, Nelson & Fraenkel LLP, Shernoff Bidart Echeverria LLP, Bentley & More LLP
Defendant's counsel: Morrison Foerster
Mediator: Layn Phillips of Phillips ADR Enterprises

Case Summary

The case was a statewide class action filed against CalPERS that settled for a total amount of $740 million with more than $660 million in payments to approximately 80,000 Class members. The lawsuit involved CalPERS' sale of long-term care insurance ("LTC insurance") to thousands of CalPERS members and their families beginning in 1995. LTC insurance is used to cover the costs of nursing home care and other needs related to a long-term disability.

The settlement includes Class members who purchased policies with "Automatic Inflation Protection" and who were subject to an 85% rate increase, which was announced by CalPERS in February of 2013 and implemented in 2015 and 2016. Stuart Talley and his co-counsel filed this case in Los Angeles Superior Court shortly after the rate increase was announced, alleging that the rate increase breached the insurance contract between the parties.

This case was heavily litigated for over a decade. The parties engaged in extensive discovery, including 42 days of depositions, hundreds of special interrogatories, requests for admission and requests for production. In total, more than 90,000 pages of documents were produced, and there were more than 1,000 separate pleadings and 100 orders issued across dozens of court appearances.

The litigation Class was certified by the court on Jan. 28, 2016. After several more years of litigation—including multiple motions for summary judgment, a partial Settlement with one of the original Class defendants, and a motion to decertify the Class—Stuart was part of the trial team that conducted a "phase one" trial that focused on construction of the insurance contract and whether the plaintiff's claims were barred by the statute of limitations.

The trial led to a favorable Statement of Decision in July 2020, and a "phase two" jury trial was scheduled on the questions of breach and damages. However, before the phase two trial commenced, CalPERS agreed to a class-wide settlement that was approved by the court in July 2023 and became final on Sept. 28, 2023. The settlement provides cash payments to Class members totaling more than $660 million, with some Class members receiving individual payments of up to $173,000. Attorneys' fees and other costs were separately paid by CalPERS and totaled $80 million.

Verdict: $11,183 Million

Whistleblower Retaliation after Reporting Neglect of an Elder

Armstrong v. Lifecare Centers of America, Inc.

Total Verdict: $11,183,000
- Verdict 1: Wrongful Termination: $161,000 wage loss, $500,000 non-economic harm.
- Verdict 2: Defamation: $500,000
- Verdict 3: Unpaid Overtime: $22,000
- Verdict 4: Punitive Damages: $10,000,0000

An additional $100,000 will be added to the verdict due to prejudgment interest. Plaintiff's counsel will also seek an award of approximately $1,500,000 to $2,000,000 in attorney's fees and costs.

Plaintiff's Counsel:
Lawrance Bohm, Kelsey Ciarimboli, Jack Brouwer, Michael Noah Cowart of Bohm Law Group, Inc.; Mark Wagner - Wagner Legal Group, P.C.
Defendant's counsel:
Jahmal Davis, Dorothy Lui, Samantha Botros of Hanson Bridgett, LLP
Court:
Riverside County Historic Courthouse, Department 1
Honorable Harold Hopp presiding.
Riverside, California
Trial Dates:
Nov. 8, 2023 to Nov. 17, 2023; Nov. 29, 2023 to Dec. 15, 2023

Case Summary

Plaintiff Kathleen Armstrong, age 58, began working at a skilled nursing facility in Menifee, CA, in March 1997. The skilled nursing facility was owned and operated by Lifecare Centers of America, Inc., ("LCCA"). LCCA operates more than 200 skilled nursing facilities throughout 28 states, which included California. Each skilled nursing facility houses an average of 70 beds for patients.

Armstrong worked for LCCA for 21 years at the time of her termination on July 11, 2018. She was an admissions director of the Menifee facility and regarded as an outstanding employee who represented "the gold standard." Her direct supervi-

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sor was Rodger Groves, the executive director of the facility.

In May 2018, Armstrong's father required care in her facility after a fall in his home. Armstrong was approved to admit her father into the facility for rehabilitation and general care. During the course of his stay in the Menifee LCCA facility, she discovered and reported to Groves that her father was left in a soiled diaper because there was not sufficient staff to assist him. She also discovered and reported that her father's dietary requirements were not met for several days, leaving him malnourished.

Days later, Armstrong reported that she had not been informed of a fall her father experienced in the facility even though she suspected a fall had occurred, she directly asked the care team if a fall had occurred, which the team initially denied. After demanding "fall precautions" for her father, the facility provided some, but not all, safety precautions for a fall risk. Armstrong complained that her father had experienced another fall while a care team member was assigned to watch him.

On June 3, 2018, less than a month after her father's admission, he became septic after aspirating chunks of hamburger meat into his lungs due to the facility's failure to provide puréed food as required by his dietary orders. He was taken by ambulance to a nearby hospital where he died hours later. The hospital doctor advised Armstrong and her two sisters that the facility's neglect caused the death of their father and that the matter would be reported to the California Department of Health.

The day her father died, the facility asked Armstrong to help complete required census reports. She returned to the facility at 8 p.m. that night and worked until midnight. While on bereavement leave, the company again asked her to come in to complete required census reports. She was also required to keep a cell phone with her during this time to answer any after-hours call to the Admissions Department. Armstrong performed all this work without complaint.

Historically, Armstrong was told that any after-hours work on the phone was "part of the job" and that she would not be paid for that time. She worked approximately 10 hours each week on her after-hours phone.

On Jun. 25, 2018, she returned to work at the facility. By this time, Armstrong and her siblings had decided to sue the facility for their father's negligent death. While at work, she asked the director of Medical Records what steps she needed to take to obtain her father's care-related records for her attorney. Armstrong was informed that her attorney needed to send a subpoena.

The next day, Jun. 26, 2018, she was in her office when Groves, her boss, stopped by to check on her and said he would be resigning in the near future. Armstrong responded, "Well, I probably won't be around much longer, when the company learns that my family and me are suing the facility." When Groves learned why, Groves told her, "I'm the only person who would fire you here, and I'm not going to fire you."

Groves contacted the regional director, defaming Armstrong, including by falsely claiming she stated she could not do her job, did not feel comfortable giving tours and that she could not recommend the facility. The regional director republished the false information to Divisional Vice President Matthew Ham., who at the time was in charge of all facilities in California, Nevada, Arizona and New Mexico.

The false information also was published to Corporate Senior Vice President of Human Resources Kelly Falcon. Based on this information, LCCA claimed that it became concerned Armstrong had a conflict of interest that "could" prevent her from performing her job. No warning, conversation, or action was taken to advise Armstrong of the company's concern about her presumed potential conflict of interest.

On June 27, 2018, Armstrong's assistant, Marissa Martinez, falsely reported to Groves that she had observed Armstrong stealing confidential logs containing information about the care of her father and other residents who were in the facility at the same time. Martinez falsely claimed Armstrong folded up the logs and put them in her purse. At the time, Martinez was regarded as a dishonest employee with chronic poor performance, whom Armstrong was in the process of replacing.

Rather than asking Armstrong about the allegation, LCCA managers and the Legal Department suspended Armstrong. At the time, Armstrong was meeting with a wrongful death attorney about her father's case. Upon her suspension, rumors immediately burned through the facility that Armstrong stole patient records and had violated medical privacy laws. Armstrong only worked two-and-a-half days between the time she returned from bereavement to the time of her suspension.

While on suspension, Armstrong was approached by a member of the housekeeping staff who told Armstrong that the rumor in the facility was that she had been fired. As of this time, Armstrong had been suspended for several days without any word regarding the specifics of why she was suspended or what next steps would entail.

Approximately one week after her suspension, on July 6, 2018, Armstrong was called into an investigatory meeting where she was asked to turn in her after hours phone and building keys. During this meeting, Armstrong denied taking the forms.

On July 9, 2018, the company decided the allegations of stealing records could not be substantiated because multiple records unrelated to her father were also missing from the facility. Further, other witnesses present denied any wrongdoing by Armstrong. After the company determined the theft allegations could not be substantiated, it decided to fire Armstrong anyway because of her alleged comments about refusing to do her job, as well as the comments she made criticizing the facility for the neglect of her father. That same day, Armstrong was asked to come to a meeting on July 11, 2018.

On July 11, 2018, Armstrong was waiting in the lobby for her meeting with Groves. While waiting, a nurse assistant approached her to say she was sorry Armstrong had been fired. Apparently, everyone in the facility knew Armstrong was being

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fired except for Armstrong. Armstrong was shown a termination form repeating the defamatory remarks initially communicated by her superiors. The termination form also noted "other associates" heard Armstrong make similar statements. Armstrong refused to sign the form, remarking, "That's not what I said.

The company indicated that although she was fired, Armstrong could choose to accept a severance. When she asked if the severance would require her to dismiss her claims regarding her father's death, she was told it would. Armstrong responded, "Then I guess you will have to fire me." Immediately, in response, Armstrong was told she was fired. Her supervisor then walked her through the facility, past her co-workers, to clean out her desk and load up her car.

After her termination, Armstrong did not obtain new employment until 2020, when she began working for a different skilled nursing facility. By 2023, Armstrong's new employer provided compensation in excess of the earnings she would have received from LCCA. As such, Armstrong had no claim for future lost earnings. After her termination,

Armstrong experienced non-economic harm including stress, anxiety, depression, sleep disturbance, stress, worry, humiliation and damage to her reputation. She received no health treatment for these problems.

Defendant LCCA claimed that all statements reported by the managers and Martinez were true. The company further claimed Armstrong actually did take the medical records, although it could not be substantiated. In addition, the company claimed she never made any complaints about the care that led to her father's death. The company further asserted Armstrong's lawsuit regarding her father had "nothing to do" with her termination and that the statements published by Groves were "substantially true."

Lastly, as to punitive damages, the company argued that none of the leaders involved in the termination, including the Legal Department, were managing agents. Moreover, the company could not afford punitive damages because it was unable to make a profit from the $600,000,000 it collected in 2022 from patients.

The jury unanimously rejected the defense assertions, finding Armstrong's protected activities contributed to her termination. The jury also determined 15 false statements were made about Armstrong, causing harm to her reputation. The jury unanimously found a basis for punitive damages for whistleblower retaliation and defamation due to conduct by managing agents and ratification of same by the company.

Plaintiff's final pre-trial demand = $2,900,0000 (CCP998), inclusive of fees and costs

Defendant's final pre-trial offer = $500,000 (CCP 998), inclusive of fees and costs

Experts - None.

Settlement/Mediation: $10.75 Million

Shippen, et al. v. Paul Franco Trucking, et al.
Motor Vehicle Trucking Accident Wrongful Death/Personal Injury

Total Settlement: $10,750,000
$8,000,000 to Shippen plaintiffs
$2,750,000 to plaintiffs in separate vehicle

Plaintiff's Counsel for the Shippen Plaintiffs:
Daniel W. Wilcoxen and Drew M. Widders, of Wilcoxen Callaham, LLP
Defendant's counsel: Mary K. Talmachoff; Richard Jacobsen and Joseph Urbanic; John Cotter; and Michael Kronlund
Mediator: Hon Richard Gilbert (ret.)

Case Summary:

This case arises out of a dump truck vs. passenger vehicle accident. Thomas Fairhurst, a driver for Paul Franco Trucking, rear-ended the Shippen vehicle, resulting in the deaths of Kalen and Madeleine Shippen's parents and personal injuries to Kalen. The impacting vehicle had a $1,000,000 policy. The supplier of the independent contractor's truck had $5,000,000. The defense of the cases was tendered by prime contractor, Defendant SPSG Partners, to the subcontracting operators and suppliers of the truck. Defendant Thomas Fairhurst contended that Kalen Shippen, while driving his parents' vehicle, slammed on his brakes. That, however, was in contrast with the statement that Fairhurst gave to CHP at the scene of the accident: "I must have fallen asleep."

SPSG Partners created a series of liability complications by hiring independent contractors, who hired independent contractors, who hired independent contractors. Thus, Fairhurst, driver of the vehicle, was four independent contractors away from SPSG Partners. Each layer of contractors had indemnity agreements with the subcontractors below. Questions arose during motions for summary judgment concerning the independent contractors' independent status. Plaintiffs moved for a summary judgment on the issue of non-delegable duty. That motion was denied. Defendants Dan Palmer Trucking and Dan Palmer Brokering moved for a summary judgment on the independent contractor issues. That motion was denied. The case then went to mediation and settled.

Verdict: $7.38 Million

O'Keefe v. Target -Case No: SCV-265337
Bench Trial
Plaintiff's Counsel: Roger A. Dreyer and Natalie M. Dreyer of Dreyer Babich Buccola Wood Campora LLP
Defendants' Counsel: Martin D. Holly, Esq. & Erika Brenner, Esq. of Resnick & Louis, P.C.

Total Verdict: $7,381,336.66
Case Summary:

The matter proceeded as a court trial on May 23, 2023 in

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Department 19 in Sonoma County before the Hon. Oscar A. Pardo, judge presiding, and continued for 20 court days for a bench trial. Closing arguments were delivered on Jun. 30, 202, and the matter was deemed submitted for a decision by the court on this date. In total, 32 witnesses were called and testified.

Plaintiff Alison O'Keefe alleged and proved that that Defendants Target Corproation and Tiago Bettencourt were negligent and that their negligence resulted in her harms and losses. The evidence at trial was that Plaintiff's injuries were directly and causally due to the impact of the Target "U-Boat" device, a large and heavy metal cart used to move merchandise, pushed by Defendant Bettencourt, when it struck Plaintiff on her right side on Aug. 2, 2019.

During the trial, Defendants admitted that this incident was solely the result of the negligent conduct of Bettencourt and that he was in the course and scope of his employment at Target at the time of the incident. Plaintiff provided significant evidence that she sustained a mild traumatic brain injury, a neck injury and an injury to her right arm diagnosed as a brachial plexus nerve injury that developed into Complex Regional Pain Syndrome (CRPS).

During trial, Plaintiff O'Keefe established that she was in good health prior to this incident. Following the incident, she presented evidence from numerous Petaluma and Santa Rosa-based Kaiser physicians. These physicians spanned multiple disciplines and established continuous and consistent care and treatment provided to the Plaintiff. Due to the COVID shutdown, Plaintiff elected to treat outside of Kaiser and received treatment from Dr. Vinay Reddy with the Spine and Nerve Diagnostic Center. Once Kaiser re-opened, Plaintiff continued to treat with her Kaiser physicians and eventually was referred to the Chronic Pain Clinic. During the course of this treatment, Plaintiff was diagnosed with a brachial plexus injury and complex regional pain syndrome (CRPS).

Plaintiff also was treated for her brain injury. She received weekly treatment from Dr. Richard Olcese, a neuropsychologist in the Santa Rosa area. She also sought treatment for her head injury within Kaiser and her other providers.

Plaintiff presented evidence by way of family members that proved the nature and extent of her losses. Her sister, husband and daughter testified as to her physical and mental state prior to the date of this incident. Their testimony was compelling as to the losses suffered, and the employment and everyday limitations she suffered. Experts were also retained.

In July 2020, prior to the trial, Plaintiff made a CCP section 998 demand for $6,840,000. On the eve of trial, Defendants made two separate 998 offers, one for $240,300 and another for $267,000. Plaintiff responded with a $3.9-million demand prior to trial.

The court's verdict determined that Defendants' conduct on Aug. 2, 2019, was a substantial factor in causing Plaintiff's injuries and awarded damages in the amount of $7,381,336.66.

Settlement/Mediation: $5 Million to Plaintiffs

Jones, et al. v. Jones, et al.

Motor vehicle collision wrongful death

Plaintiff's Counsel: Daniel E. Wilcoxen of Wilcoxen Callaham LLP, Richard Molin and Gina Gestri of Stewart, Humpherys & Molin.
Defendant's counsel: Tom Prountzos and Mike Miller, Phillip Bonotto, Mary Talmachoff
Mediator: Hon. Benjamin Davidian (ret.)

Case Summary:

The decedent was a nine-year old boy sitting in the passenger seat of his grandfather's vehicle. His grandfather was a contractor who installed guardrails. In the rear seat were two employees of the contractor. While driving his Prius and looking out of the window at a potential job site, the decedent's grandfather crossed over the centerline of a two-lane roadway in Butte County. The impact killed the nine-year old boy, and one of the employees in the rear seat. The employees in the rear seat had worker's comp cases that were settled by the comp carrier.

The parents who wish to remain anonymous, each had a separate case and each of them received $2,500,000. Complications with the case involved conflict of interest in that the plaintiff mother was suing her own father (grandfather of the decedent), which caused significant insurance issues.

Settlement/Mediation: $2.25 Million

Miranda, et al. v. Eduardo Marquez, et al.

Motor Vehicle Trucking Accident, Wrongful Death

Total Settlement: $2,250,000 global to the two plaintiffs

Plaintiff's Counsel: Daniel E. Wilcoxen and Blair H. Widders, Wilcoxen Callaham, LLP
Defendant's counsel: Matthew C. Jaime, Kimberly Oberrecht and Cheyenne Page, R. James Miller and Katherine Marlink
Mediator: Hon. Richard Gilbert (ret.)

Case Summary:
The accident causing the injury occurred on Sept. 16, 2016. The plaintiffs alleged Guzman was driving at unsafe speed on the Yolo causeway, resulting in a rear-end collision causing the vehicle, owned by Sprint, his employer, to be disabled in the roadway. Plaintiff's father, David Miranda, was a passenger in this vehicle. David Miranda and Guzman exited the Sprint vehicle and thenn the Sprint vehicle was struck by a loaded tomato truck that also struck Miranda and Guzman, causing Miranda's death and personal injuries to Guzman. A third accident then caused personal injuries to another plaintiff. There were more than 20 depositions taken in the case, three motions for summary judgment, including one regarding coverage for Guzman as driver of the Sprint vehicle, and three mediations. Plaintiffs' wrongful death claims against Guzman and the employer of the tomato truck driver settled at the third mediation.

Coalition Applauds Congressional Efforts to Restore Consumer Rights

Letter Supports CFPB Rulemaking Reining in Big Banks' Abuse of Forced Arbitration

WASHINGTON — On Dec. 14, 2023, a coalition of consumer advocacy organizations applauded Congressional efforts to restore consumer rights in financial products, following a letter led by Senator Elizabeth Warren, Representative Hank Johnson and nearly 100 Members of Congress.

The letter expressed support for the creation of a Consumer Financial Protection Bureau (CFPB) rule to rein in the use of forced arbitration clauses by big banks and other financial services corporations. Hidden in the fine print of everyday click-through agreements, terms and conditions, and other contracts, forced arbitration clauses trap consumers by mandating that their cases against banks can only be filed in a secretive process with a private arbitrator, chosen by the bank.

"Every day, big banks rob consumers of their Constitutionally protected rights through the use of forced arbition. But thanks to leaders like Senator Warren, Representative Johnson and nearly 100 Members of Congress, the voices of American consumers have a chance to be heard," said Linda Lipsen, CEO of the American Association for Justice. "When big banks defraud consumers, they should not be allowed to hide behind these fine print traps, and I applaud these members' support for a new CFPB rule."

"We are grateful to all the members of Congress who are standing up for the right of everyday American consumers to be able to make critical choices in their dealings with powerful financial institutions," said Christine Hines, legislative director at the National Association of Consumer Advocates. "We hope that the CFPB will take the next step to restore consumer choice, by simply reining in forced arbitration clauses in financial services and products."

"Forced arbitration is a rigged game, one that corporate players in the financial industry nearly always win," said Martha Perez-Pedemonti, civil justice and consumer rights counsel at Public Citizen. "We applaud Sen. Warren and her colleagues for joining the call urging the CFPB to level the playing field so that customers who are wronged by a financial services company are once again able to have their day in court."

"Members of Congress are taking important steps to shine a light on these hidden fine print traps that rob consumers of their Constitutional right to access the courts," said Shennan Kavanagh, senior attorney and incoming director of litigation at the National Consumer Law Center. "We are thrilled that Senator Elizabeth Warren and Representative Hank Johnson offered their support to the CFPB's efforts to stop predatory lenders, fraudsters, unscrupulous banks, and other repeat offenders from escaping accountability when they wrong consumers."

"For far too long, banks and predatory lenders have been able to use the fine print to take away their customers' right to fight back against unfair practices and hold them accountable in court," said Paul Bland, executive director of Public Justice. "Now these corporations are going even further and rewriting contracts to try to give themselves the power to change the rules at any time, creating more hurdles for each new group of consumers they harm. The CFPB should exercise its authority and put an end to this with one simple change."

"What's more fair, having a dispute resolved before a jury of your peers, as established in the US Constitution, or before someone selected by a corporate defendant, under the terms of a mandatory agreement buried in a loan disclosure? Arbitration prioritizes the interest of corporations at the expense of consumers," said Erin Witte, director of consumer protections for the Consumer Federation of America. "The CFPB should initiate a rulemaking process to rein in the use of forced arbitration in financial services."

We are thankful to all the leaders in Congress and their efforts to restore consumer rights otherwise stripped by forced arbitration fine print traps. The American public deserves better than the rigged, private, non-transparent system of forced arbitration when they are hurt or defrauded by financial institutions," said Amanda Jackson, director of Consumer Campaigns for Americans for Financial Reform. In the past few weeks, we've heard from consumer groups, law professors, military groups, and members of Congress: the CFPB must act to reign in forced arbitration fine print traps."

Since the initial petition was submitted to the CFPB, support has rapidly grown for a rule (as of Dec. 14):

- Nearly 170 professors penned a letter supporting a rulemaking, submitted to the CFPB docket.
- A coalition of more than 100 consumer protection, civil rights and organized labor organizations expressed support for the rule and submitted comments to the CFPB docket.
- More than 17,000 people signed on to a grassroots petition submitted to the CFPB.
- Nearly 20 military and veterans' groups submitted a letter to the CFPB in support of a rulemaking.

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Contact: Megan Varvais,
mvarvais@publicjustice.net

A New Discovery Tool /Obligation?

See Page 3

Capitol City Trial Lawyers Association
Post Office Box 22403
Sacramento, CA 95822-0403

CCTLA Calendar of Events

CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at gguenard@gblegal.com, Chris Whelan at Chris@WhelanLawOffices.com or Alla Vorobets at allavorobets00@gmail.com

Wednesday, February 21
CCTLA Luncheon – Noon to 1 p.m.
Topic: The State of the Sacramento Court: 2024 and Beyond
Speakers: Judge Bumni Awoniyi and Judge Steven Gevercer
58 Degrees and Holding
$35 Members / $45 Non-members

Friday/Saturday, March 8 - 9
CAOC/CCTLA Sonoma Travel Seminar
Fairmont Sonoma Mission Inn & Spa
See page 28 for more information

Tuesday, March 12
Q & A Problem Solving Lunch - Noon
CCTLA Members Only - Zoom

Tuesday, April 9
Q & A Problem Solving Lunch - Noon
CCTLA Members Only - Zoom

Tuesday, May 14
Q & A Problem Solving Lunch - Noon
CCTLA Members Only - Zoom

Tuesday, May 14
CAOC Justice Day
See page 34 for more information

Thursday, June 6
Spring Reception benefiting the Sacramento Food Bank and Family Services
5 to 7:30 p.m. – The Lady Bird House
See pages 25-27 for more information

Tuesday, June 11
Q & A Problem Solving Lunch - Noon
CCTLA Members Only - Zoom