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Reflecting on a year of achievements as 2007 winds down

By: John N. Demas, CCTLA President

As my tenure as CCTLA president comes to an end, I would like to briefly reflect on this last year. I want to start by thanking all of the CCTLA board members. Not only are they some of the finest trial lawyers in Sacramento, but they give countless hours and effort to this organization and to the community.

Without their hard work, often behind the scenes, this organization would not be able to serve the needs of its members as well as it does now.

In addition, I would like to thank our executive director, Debbie Keller, who has done a fabulous job keeping the organization running and has been a tremendous resource for me.

At the beginning of the year, my goals included providing our members with high-quality, practical educational seminars, strengthening our connection with CAOC and continuing our community service efforts. I believe we made great progress toward achieving our goals.

Attendance at our seminars, luncheons and problem solving clinics was up significantly from last year. The Tahoe Seminar we co-hosted with CAOC drew record numbers. Our organization continued to strengthen its relationship and worked closely with CAOC on a number of different issues.

As for community service, we were involved in four projects, including fund-raising for KVIE; our annual bike helmet giveaway for disadvantaged children which this year took place at the Mustard Seed Spin event; our annual silent auction to benefit the Sacramento Food Bank; and our "Law Suits" Campaign that provided professional attire to the less privileged to assist them in their search for employment.

Our organization is strong and active. We added more members this year than in any of the past few years. We have a useful and practical list-serve. In addition, our website is set up to be a wonderful resource. However, there is still a lot of work that can be done.

For instance, I firmly believe that sharing information and resources such as deposition transcripts, pleadings, etc., makes us stronger and better advocates for our deserving clients. I will continue to assist this organization as it strives to provide essential tools and resources for its members.

Jill Telfer will be your president in 2008. I cannot think of a better person to run this organization than Jill. Her boundless energy and enthusiasm will take CCTLA to new levels. The organization is in extremely capable hands, and I look forward to great things to come.

Thank you for the honor of serving as your president. I look forward to seeing you all at our Annual Reception and Awards Ceremony on Dec. 13.

"I believe we made great progress toward achieving our goals."

— John Demas, 2007 CCTLA President

Allan's CORNER

By: Allan J. Owen

Here are some recent important cases culled from the *Daily Journal*. Remember, these summaries do not come from the Official Reports so before citing, be sure to check that they were published without change.

Premises Liability

In Castaneda v. Ulsher, w2007 DJDAR 11551, defendants owned the mobile home park where plaintiff resided. Plaintiff was shot and injured as a bystander to a gang confrontation involving a resident of the mobile home across the street from his. He contended that landlord breached a duty not to rent to known gang members or to evict them when they harass other tenants. Supreme Court holds that landlords ordinarily have no duty to reject prospective tenants they believe, or have reason to believe, are gang members. With regard to eviction, they agree that a residential tenant's behavior and known criminal associations may in some circumstances create such a high level of foreseeable danger to others that the landlord is obliged to take measures to eject the tenant from the premises; however, those facts were not present here.

Uninsured Motorist Coverage

In California Capital Insurance Company v. Nielsen, 2007 DJDAR 11735, plaintiff was a passenger in a vehicle driven by his friend. The vehicle itself was covered by an insurance policy. Friend drives off the road and into a pole and plaintiff becomes a quadriplegic. Friend's mother has an umbrella policy that covers both her and friend for driving the Acura even though was not separately covered by a liability policy. Plaintiff was paid $1 million.

Undaunted by the plain language of Insurance Code §11580.2 (there are a few parts of it that have plain language), plaintiff's attorney tries to collect the $100,000.00 uninsured motorist coverage on plaintiff's own policy. Trial court enters judgment for the company and the appellate court affirms finding that clearly this vehicle had a liability policy applicable to its ownership, maintenance and use and therefore was not an uninsured motor vehicle.

Plaintiff's attorney came up with four arguments that it was an uninsured motor vehicle all of which seemingly ignored the language of the statute and the policy.

ERISA Plan Reimbursement

In Totten v. Hill, 2007 DJDAR 12335, Laborers Health & Welfare Trust paid out over $165,000.00 in benefits for medical expense incurred by Hill who suffered a punctured bowel during surgery. Hill received $230,000.00 settlement in a med malpractice action against the doctor. Trustees attempted to obtain reimbursement and plaintiff refused. Trustees sued for breach of contract in state court, trial court granted summary judgment and trustees appeal.

Court first decided the issue as to whether or not an ERISA fiduciary may sue in either state or federal court for reimbursement of benefits paid to plan participant or beneficiary who recovers personal injury damages. Trial court decides that trustees had a federal ERISA claim and the federal courts have ex-

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2007: CAOC LEGISLATIVE REVIEW

By: Nancy Drabble, Nancy Peverini, and Lea-Ann Tratten

Consumer Attorneys of California is your first line of defense in Sacramento and at the ballot box. As your advocates in Sacramento, we want to thank you for your support and assistance.

In addition to the legislative efforts detailed below, the constant initiative attacks we have witnessed during the past three years continued in 2007 when the Civil Justice Association of California and the California Chamber of Commerce filed an initiative to severely restrict class action lawsuits.

We are pleased to report that, similar to 2006, the class action initiative was withdrawn and no anti-consumer bills passed the Legislature.

POSITIVE LEGISLATION

We faced a major hurdle in the Legislature in 2007 because of Governor Schwarzenegger's close ties to big business. However, despite that obstacle, CAOC was successful on several fronts.

First, because of the strong likelihood this governor would veto any major consumer legal protection legislation, the CAOC Legislative Committee instead focused its efforts on improving the daily practice of law for our members and their clients.

To that end, we are proud to say that AB 500 by Assembly Member Ted Lieu (D- Torrance) passed the Assembly and Senate and was signed by the governor. AB 500 requires uniform rules for telephonic appearances in general civil cases.

The legislation will permit a party in a general civil case who has provided notice to appear by telephone at conferences, hearings, and proceedings not requiring live testimony. The bill also requires the Judicial Council to adopt rules effectuating its provisions by the end of the year.

As part of our coalition efforts, the Sierra Club also voiced support for the bill, citing the environmental advantages of not requiring lawyers to drive long distances to courthouses.

We also were successful in passing AB 1264 by Assembly Member Mike Eng (D- Monterey Park) which prohibits a court from severing a DOE defendant before the conclusion of introduction of evidence at trial. CAOC worked closely with the California Defense Counsel and the Judicial Council in exploring common sense fixes to the civil discovery practice.

Those efforts resulted in a Judicial Council proposal to create a unique process for e-discovery in California. The agreed-upon rules are currently being circulated for public comment and we hope will provide a fair way to access information that is stored electronically. We are stepping up our efforts to improve the practice of law by continuing to meet with defense counsel and judiciary representatives on a number of other related issues.

Second, CAOC was successful in getting new amendments to the Welfare and Institutions Code to provide equitable guideposts for resolving Medi-Cal liens. The provisions make significant changes to the Medi-Cal lien statutes and create an equitable way to reach a determination as to what constitutes a reasonable reimbursement to the state Department of Health Services in instances where, because of limited coverage, issues of liability or comparative fault, your client does not receive full compensation for his or her injuries.

The full text of that bill can be viewed at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0201-0250/ab_203_bill_20070824_chaptered.html.

CAOC also followed up with legislation designed to overturn the Hanif decision. Hanif v. Housing Authority, 200 Cal. App 3d 635 (1988). CAOC was successful in passing SB 93 by Sen. Ellen Corbett (D-San Leandro) which was vetoed by the governor.

SB 93 would have prohibited the amount paid by Medi-Cal from being considered as evidence of past medical damages or for the purpose of reducing the third party's liability to the beneficiary in any third-party action. Unfortunately, the governor's administration broke two deals, the first after we negotiated with the Department of Health Services and the Department of Finance over the budget language that went into the budget, and then the governor's promise to sign a bill like SB 93 if it were taken out of the budget. We were not surprised, but disappointed.

Finally, we made substantial strides on CAOC's longest-lasting priority: changing the 1975 Medical Injury Compensation Reform Act cap. Under President Ray Boucher's leadership, the

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RECENT VERDICTS

Defense Verdict, submitted by Joe Marman

Plaintiff on motorcycle going east on four-lane roadway (two lanes each direction), separated by two-way center turn lane (suicide lane). Plaintiff sees vehicles slowing and stopping in front of him. Plaintiff sees that he can merge left in to the two-way left turn lane and then proceed a few cars ahead and then enter his left turn pocket to go left at the next intersection.

Vehicles in the slow lanes to Plaintiff's right, stop to allow Defendant's vehicle to enter from a side street on Plaintiff's right side. Defendant's vehicle crosses two lanes of traffic from the right side and toward the Plaintiff. Defendant admitted he did not look to his left, the direction of the Plaintiff, but only to his right, since he did not think a vehicle should be coming from the left in the two-way turn lane. Officer states Plaintiff in violation of law for traveling more than 200 feet in center turn lane, but officer does not cite, since no proof thereof.

Defendant's vehicle strikes Plaintiff on right side, breaking Plaintiff's foot off, which dangles merely by skin and muscle. Doctors successfully re-attach right foot for about $145,000. Lien from Plaintiff's health care insurance company. Defendant has policy of $100K with State Farm. CCP § 998 for $100K. No offer made.

Despite having five motorcyclists on jury, jury determines Plaintiff (at 20-25) was speeding, should not have been in the suicide lane, and that Defendant was not negligent.

Jury verdict of employment retaliation against the Folsom Cordova Unified School District

Plaintiff is a teacher who requested reasonable accommodation for her cancer-related impairments and thereafter complained of discrimination when her requests for assistance were ignored and she was subjected to harassment which she attributes to former diagnosis of cancer and her perceived sexual orientation. Subsequent to her complaints and requests for assistance, she was subjected to unwarranted investigations into alleged sexual harassment, discipline and denials of her requests for transfer.

Plaintiff missed six weeks of work because of excessive job-related stress, which violated her medical restrictions due to the cancer. After the lawsuit was filed, Defendant provided Plaintiff the accommodation she had requested for three years. **Experts:** Ernie Bodai, M.D.(treating cancer surgeon), Jo Danti, Ph.D (psychologist). **Technology:** PowerPoint and Sanction. **Highest offer from defendant:** $75,000. **Judgment:** $544,635.15; including $8,235 lost wages, $11,375 future medical expenses(counseling), $171,000 past and future emotional distress, $30,572.14 in costs, and $323,453 in attorney fees. **Plaintiff's counsel:** Jill P. Telfer. **Defense counsel:** Michael Pott, Nancy Sheehan, George Acero, and Kyra Clark of Porter, Scott **Judge:** Honorable Lloyd Phillips

Legislative Review

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organization took direct action this year and created a multi-faceted approach to educate legislators on the crucial need to change this 32-year-old law.

First, we hired consultant Shawnda Westly, who organized 24 district meetings with local legislators, both Assembly and Senate. The meetings not only involved local CAOC members and medical malpractice lawyers, but also victims of medical malpractice living in the legislators' districts. We would like to thank the CAOC membership for offering us so many stories of victims of medical malpractice over the past eight months.

Through an extensive vetting program, we are now armed with an organization of more than 40 victims of medical malpractice with highly compelling cases, which can be used for further public education and legislative contacts. Overall, CAOC organized over 50 local meetings with Assembly members and senators.

As your lobbyists, we led the effort at the Capitol, and met with dozens of legislators throughout the year, often joined by lobbyists at Rose & Kindel, a dynamic and well-respected contract lobbying firm.

Our team, rounded out by political consultant Sandi Polka, met frequently to share information and to look for opportunities. These efforts added to the foundation laid in electing pro-consumer legislators in the past three election cycles.

It is now clear that because of these combined efforts, legislators know firsthand the impact MICRA has on patients and have a better understanding of the insurance industry's role in opposing changes. These efforts have led to a direct understanding of the injustice that MICRA causes to patients. MICRA remains a top priority for this organization.

ANTI-CONSUMER LEGISLATION BLOCKED

In this tumultuous and unpredictable atmosphere, CAOC also fought to protect and defend the civil justice system in the Legislature. More than 2,800 pieces of legislation were introduced in the first half of the 2007-2008 Legislative Session and we read and assessed each one. Many bills were amended several times, and we reexamined each amendment for hidden harm. We sent dozens of bills out to the Legislative Committees for review, and we really appreciated the incisive comments we received back

Through an extensive vetting program, we are now armed with an organization of more than 40 victims of medical malpractice with highly compelling cases, which can be used for further public education and legislative contacts. Overall, CAOC organized over 50 local meetings with Assembly members and senators.

CAOC successfully defeated all anti-consumer proposals introduced in 2007, including, but not limited to:

✔ AB 1505 by Assembly Member Nicole Parra (D-Hanford) CLASS ACTIONS- Would have, among other provisions, required each individual class member to prove his or her claim and extent of damages and required trial evidence on both the plaintiff and defense side to be "substantially the same" for everyone, which if applied literally would have eliminated class actions as a tool to obtain justice.

✔ SB 875 by Senator Mark Ridley-Thomas (D- Los Angeles) **INSURANCE** - Would have set a dangerous precedent and permitted any corporate wrongdoer to come to the Legislature and change rules midstream when a lower court rules in favor of a consumer. In this instance, the bill would have

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changed the definition of "premium" and undermined pending litigation by four million consumers potentially denying them their day in court. Lawsuits against State Farm, Farmers Insurance, and the Auto Club are pending by policyholders who have been cheated by companies double charging them when they opted for installment plans.

✔ SB 432 by Senator Tom Harman (R-Huntington Beach) **PUNITIVE DAMAGES** - Would have limited punitive damages to three times compensatory damages.

✔ AB 1549 by Assembly Member Greg Aghazarian (R-Stockton) **PRODUCT LIABILITY** - Would have created a 10-year statute of repose in product liability cases.

✔ SB 117 also by Senator Harman **LOSER PAYS ATTORNEYS FEES** - Would have created a loser-pays-attorneys fees structure in California.

In addition to remaining vigilant to threats, we also lobby for positive legislation in addition to our sponsored bills in an effort to help consumers and our members in the practice of law.

For example, two important bills that passed in August and went to the governor were:

• Q AB 1043 by Assembly Member Sandre Swanson (D-Oakland) **EMPLOYMENT** - Voids employment contracts that require employees to use a forum other than California for employment disputes.

• Q SB 549 also by Senator Corbett **EMPLOYMENT** - Gives employees the right to take time off for bereavement leave.

Unfortunately, the governor vetoed both bills, but we will continue to work on pro-consumer pieces of legislation next year.

Finally, we spent a great deal of time this year on issues surrounding disabled access rights and remedies. CAOC has continued discussions with members of the disabled community, the California Restaurant Association, and the California Chamber of Commerce to seek a legislative solution that will enhance access for the disabled and address those suits that do not have compliance as a primary goal.

These efforts will continue in the second half of the session.

As the roller coaster of California politics continues to careen wildly, CAOC will forcefully and skillfully fight for your rights. Whether it is an initiative fight, anti-consumer legislation, or positive legislation, Consumer Attorneys will remains vigilant. As your advocates, we thank you for your invaluable support.

In addition to remaining vigilant to threats, CAOC also lobbies for positive legislation in addition to our sponsored bills in an effort to help consumers and our members in the practice of law.

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clusive subject matter jurisdiction. State courts not only lack concurrent jurisdiction over ERISA claims but moreover their jurisdiction over state law claims is displaced by ERISA and therefore the appellate court ordered the judgment vacated and the complaint dismissed.

Insurance Law - Bad Faith

In Archdale v. AIS Insurance Company, 2007 DJDAR 12775, insurance carrier turned down reasonable settlement offers within policy limits. Judgment entered May 3, 1999, suit by the insureds and the third parties based on an assignment filed September, 2003.

Court holds that (1) where the insurer provides a defense and pays out its policy limits after trial, it cannot be liable for any breach of an express policy provision but can be liable for breach of the implied covenant of good faith and fair dealing.

(2) Insurer's failure to accept a reasonable settlement offer to resolve a third party claim against the insured is a breach of the covenant of good faith and fair dealing. Such a breach, if it results in an excess judgment, will support a claim sounding in contract and tort. The amount of the excess judgment is a consequential damage of the breach and may be recovered as a matter of contract damages, the statute is four years, the claim accrues upon entry of the excess judgment in the underlying action but the running of the statute of limitations is tolled until the time for appeal has expired or if an appeal is taken until entry of the final judgment and the issuance of a remititur.

(3) Finally, Civil Code §2313 does not invalidate an insured's retroactive assignment of the claim against his or her insurer if the assignment is made before the statute runs. Note that here, the insured's own action for emotional distress was too late as the two year statute of limitations had run. After judgment was entered on August 30, 1999, trial court ordered judgment vacated, denied new trial motions, granted a motion for judgment notwithstanding the verdict as to one defendant, denied similar motions by other defendants and made orders taxing costs.

The amended judgment was actually entered on October 15, 1999 and expressly stated that the amended judgment superceded the original judgment entered. Appeal was taken and it was affirmed in an unpublished opinion on September 14, 2001 and remititur issued November 27, 2001.

998 Offers

In Peterson v. John Crane, Inc., 2007 DJDAR 12889, by the time of the 998 offers, plaintiff was acting in her individual capacity on a loss of consortium claim, in a representative capacity on the survival action and as the heir in a wrongful death action. 998 was made to her in all three capacities, a single 998 for a waiver of costs. She lost at trial, expert fees and costs were about $98,000.00. She moved to tax costs, denied.

Appealed on the grounds that first of all, the 998 was made to multiple plaintiffs and not apportioned and was therefore invalid and also on the theory expressed in Seaver v. Copply Press, 2006 141 Cal App 4th 1550 that the court should have done a relative assessment of the economic standing of the plaintiff and the defendant to decide whether to tax costs. Court of Appeal held the 998 was proper as really and truly she is just one person/party. It ducked the major issue as it was not raised at the trial court level.

Of importance is footnote 7 which at least indicates that were it properly before them, the court would feel that where the offer is unclear, the burden is on the offeree to clear up any ambiguities. I do not believe this is the law but it is a dangerous little footnote.

Non-economic Damages

In Dodson v. J. Pacific, Inc., 2007 DJDAR 13199, jury in a special verdict found defendant was negligent and caused injury to plaintiff, awarded economic damages including the cost of surgery for a herniated disc but awarded no non-economic losses.

Second District holds that as a matter of law, where a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted and the jury has expressly found that the defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in an inadequate damage award as a matter of law.

Summary Adjudication

In Gonzalez v. Autoliv ASP, Inc., the Second District holds that summary adjudication in a strict product liability claim based on the risk/benefit theory of design defect cannot be granted where the defendant fails to provide evidence negating the theory that the product was defective.

Here, the defendant was the manufacturer of an air bag module. The air bag deployed full force in a low speed collision and one undisputed fact was that the front air bag module fully deployed the air bag as it was designed and manufactured to do.

wUnder the risk/benefit theory, once the plaintiff proves that the design caused the injuries, the burden shifts to the defendant to prove the benefits of the design outweigh its inherent risk. Here, the risk was an eye injury and there was no evidence on the risk/benefit theory presented by the manufacturer.

Uninsured Motorist Coverage - Proration vs. Excess

In Allstate Insurance Company v. Mercury Insurance Company, 2007 DJDAR 13789, the court holds that Mercury's proration clause (where you have two different potential uninsured motorist coverage coverages available in an accident) prevails over Allstate's (and anyone else's) excess insurance clause pursuant to the term of Insurance Code §11580.2.

"Pillah" Talk©

with J. William Yeates

An ongoing series of interview with pillars in the legal community
By: Joe Marman

J. WILLIAM YEATES

Bill Yeates' practice focuses on environmental and land use consultation and litigation involving CEQA (California Environmental Quality Act), NEPA (National Environmental Policy act, and other land use and environmental laws. He advises state and local governments and environmental organization on environmental law and policy. He is the author of the Community Guide to the California Environmental Quality act.

Q. Can you briefly describe what you have been doing in your practice in the last decade?

A. Well, I began my career as a California Coastal Commission lobbyist when I came out of law school in 1978. The California's coastal land use program was approved in 1972 by the voters mainly in response to the big Santa Barbara oil spill, Sonoma County's approval of the Sea Ranch development plan, which prevented public access to 11 miles of California coast, and another big development project in Dana Point. The California Legislature approved the 1976 Coastal Act. The Coastal Act is unusual because it is one of the few laws where state law takes precedence over the local land use laws.

In 1984 I went on my own as a lobbyist for environmental and sport and commercial fishing organizations.

Q. Considering your current occupation as a protector of wildlife, that may seem inconsistent to promote commercial fishing.

A. Well, my clients were salmon trollers who used trolling lines, which are very "selective" and have little waste product as far as fishing goes. These fishermen also taxed themselves through salmon stamp fees, which provides funds to the Department of Fish and Game for salmon restoration. The ocean salmon fishery is regulated by a regional federal management council under the Magnuson-Stevens Fishery Conservation and Management Act. When I was at the Coastal Commission, I had worked with the salmon trollers in opposing off-shore oil drilling along California's near shore waters.

In 1987, I hired Mike Remy with Remy & Thomas to represent a coalition of organizations opposed to the trophy hunting of mountain lions. Years before, Governor Reagan had signed into law a moratorium that prevented the hunting of mountain lions Unfortunately, in 1985 Governor Deukmejian vetoed an extension of this hunting moratorium. In 1987, the Fish and Game Commission proposed a hunting season, and my group, known as the Mountain Lion Coalition filed a lawsuit challenging the Fish and Game Commission decision for failing to comply with the California Environmental Quality Act, (CEQA). We were successful and stopped the proposed hunting season.

Later I helped draft Proposition 117, which was called the California Wildlife Protection Act. Volunteers gathered signatures for this initiative measure and it was put on the ballot and passed in 1990. The law prohibits the trophy hunting of mountain lions and provides for $900 million over 30 years to preserve wildlife habitat.

Q. Do you have any life's heroes?

A. Well, I learned a lot from Mike Remy, who passed away three to four years ago, when I joined Remy & Thomas in 1990. He converted me from being a lobbyist to a litigator. Also, my former boss, Peter Douglas, when I was at the Coastal Commission was an important mentor and role model.

Q. How long have you been in your current practice?

A. Since 1994, I have been a sole practitioner, but expanding to include my associates Keith Wagner and Jason Flanders. In November, I will be forming a new partnership with Charity Kenyon. Charity is a well-recognized appellate and 1st Amendment lawyer. Her clients include the Sac Bee, McClatchy, and other newspapers and TV stations. She is looking forward to expanding her practice to include environmental issues, and I am looking forward to working with someone with her wealth of appellate experience.

Q. Do you have any recent cases that were interesting?

A. We just won a case against the City of Rancho Cordova, on behalf of our client, the California Native Plant Society, because the city did not adequately mitigate the loss of habitat and allowed city growth in improper locations.

We are also representing the Sierra Club and Sierra Foothills Audubon Society in a lawsuit challenging Placer County's approval of the Placer Vineyards project in western Placer County for failing to protect irreplaceable grassland and vernal pool habitat. We are also challenging the City of Rocklin's approval of residential development with Clover

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Valley on behalf of the Clover Valley Foundation and Sierra Club.

In the Placer Vineyard case, the County of Sutter also filed a separate action against Placer County. The Town of Loomis filed a separate action against the City of Rocklin in the Clover Valley case. Both cases involve the adverse consequences of growth loss of open space and valuable native plant and wildlife habitat and traffic congestion.

We just had a recent victory on appeal in Tuolumne County Citizens for Responsible Growth v. the City of Sonora. In this case the City of Sonora attempted to piecemeal or segment a Lowe's Home Improvement store. Rather than look at the entire project the city tried to chop it up into smaller pieces to avoid environmental review.

Another interesting case has been the Protect The Historic Amador Waterways v. Amador Water Agency case. This case involves a 140 year-old water canal that dates back to the California's hallowed gold rush period. The water agency wanted to change its water delivery route from the leaking canal to a pipeline.

My client wanted to preserve the historic canal and the Jackson Creek watershed that had come to depend upon the leaks from the canal. We prevailed on appeal, and then my clients settled with the water agency. All parties are now working with the new Sierra Nevada Conservancy and other partners to look at ways to enhance and restore the Jackson Creek watershed while preserving the canal to deliver water that serves the natural resources in the watershed. Hopefully, one of those win-win cases in the end.

A few years ago we represented the Sierra Club, Sierra Foothills Audubon Society, and California Oak Foundation challenging Placer County's approval of a large residential development at what was Bickford Ranch. In this case the Town of Loomis filed a separate action, too.

We prevailed at trial, but the County and developer appealed. It looked like we were headed toward years of protracted litigation, but fortunately my clients and the developer reached an accommodation regarding the protection of oak woodland habitat. The developer agreed to provide a fund of $6 million dollars for local land trusts to acquire oak woodland habitat to offset the losses at Bickford Ranch.

We got a very unusual settlement in a recent case, where we represented environmental groups against the City of Roseville over the city's approval of the West Roseville Specific Plan, which authorized the development of over 5,000 homes on native grassland and vernal pool habitat. In this case the developer was very motivated to settle and urged us to go into mediation. So we did. My clients were able to get several million dollars for the acquisition of grassland and vernal pool habitat, but, in addition, all future sales of the homes within the West Roseville Specific Plan Area will have a percentage of the selling price go to local land trusts for additional acquisition or the maintenance and operation of existing habitat areas.

Q. Do you think there should be changes made to the laws that impact the areas of law practice that you would like to comment on?

A. Yes. I think our land use laws need to encourage development that reduces vehicle miles traveled, so we can reduce the generation of greenhouse gases. Over 40% of California's greenhouses gases are generated by the transportation sector of our economy. AB 32, authored by Assembly Speaker Fabian Nunez and Assembly Member Fran Pavley and signed into law by Governor Schwarzenegger requires the California Air Resources Board to regulate greenhouse gasses in order to reduce our generation of greenhouse gases to 1990 levels. Every Californian and especially future generations has a stake in the implementation of this law. One way to reduce greenhouse gases and our dependence on oil is to promote land use development plans that discourage sprawl and encourage infill. If Californians have more efficient and safe transportation options that get us out of our cars, we can substantially reduce greenhouse gas emissions.

The Sacramento Area Council of Governments (SACOG) prepared a "Blueprint" whereby the counties of Placer, Sutter, Sacramento and Yolo agreed on the plan to recommend a more dense growth plan, which would reduce unnecessary traffic and preserve habitat. Senator Darrel Steinberg is currently authoring SB 375, which encourages cities and counties to implement these "blueprint plans" for better transportation, more compact development plans, and protection of our agricultural and natural lands.

Q. Do you generally have juries decide your cases?

A. We generally bring our cases by seeking a Writ of Mandate in either an administrative mandamus or traditional mandamus proceeding. On behalf of our clients we challenge a governmental agency's decision or for failure to act. There is a confined administrative record that includes all the information and evidence that was before the public agency, so there is no discovery. Cases are generally decided on the briefs.

Q. Do you have any opinion on how Bush has been changing the environmental laws over the time he has been in office?

A. I think Bush Administration's polices on environmental policy show that the federal government is just out of touch with the rest of American society. The lack of leadership on global warming is typical.

Here in California and many other states, the elected leaders, like Governor Schwarzenegger, have simply taken the lead and filled the leadership void created by the Bush Administration.

Calculating Lost Profits:
Determining economic damages for the self–employed business owner

By: Craig M. Enos, CPA/ABV, CFE

Lost profits are often claimed by a self-employed business owner when he or she has experienced a personal injury or other business interruption. Often, it is difficult to determine the economic damages suffered by a business owner after a claimed incident. Accounting records are not always available or are in poor condition, tax returns are not always produced, it is not always clear if the books are kept on the cash or accrual method of accounting, and the real life ups and downs of a self-employed business make it difficult to evaluate if a loss is related to the incident or the nature of the business itself.

For example, depending on the type of business, it might not be unusual in the ordinary course of a business to generate a profit of $150,000 in 2004, $200,000 in 2005, and then $175,000 in 2006. The difficult question is, did the decrease in 2006 of $25,000 relate to a claimed incident or was it part of the ordinary course of business. Did the business have a one time contract in 2005? Did a competitor enter the area or the market change in 2006? On the other hand, was the business on track for 25% revenue growth over the next two years?

In order for financial information to be useful to the reader, the reader needs to know if the financial information is kept on the cash or accrual method of accounting.

Under the cash method of accounting, revenues are reported when cash is received without regard to when the revenue was earned; expenses are reported when cash is paid.

Under the accrual method of accounting, revenues are recognized and reported when they are earned and when the amount and timing of the revenue can be reasonably estimated without regard to when the cash is received. Expenses are recognized when they occur.

It is essential to gain as much information about the business as possible. For discussion purposes, assume the following (See box):

Plaintiff claims he was injured in an automobile accident in mid-2006 and claims he is unable to work at the same capacity he did prior to the accident. The plaintiff is a self-employed sub-contractor performing various tasks for a general contractor building homes in California. The plaintiff's tax returns (Schedule C – accrual basis) report the following:

	2004	2005	2006
Gross revenue	$250,000	$300,000	$275,000
Cost of goods sold	50,000	60,000	25,000
Gross profit	200,000	240,000	250,000
Other expenses	50,000	40,000	75,000
Net profit	***$150,000***	***$200,000***	***$175,000***

Upon initial review, it appears that gross revenue and net profit both increased from 2004 to 2005, and then decreased in 2006. This may be a direct relationship to the fact the plaintiff was injured in 2006 and was unable to work at the same capacity he did prior to the accident. The decrease may also be a result of a down turn in the market and work is not as plentiful as it was in prior years.

Calculating Lost Revenue

The first step in calculating lost profits is to calculate lost revenue. There are several methods to calculate lost revenue. The most common methods used to calculate lost revenue, based on the above facts, would be: the "Before and After" method, the "Yardstick" method, and an approach based on the terms of a contract.

Using the "Before and After" method, one would compare the revenue before the incident to the revenue after the incident. The theory here is that "but for" the accident, the plaintiff would have continued to earn the same or similar revenue after the accident as he did before the accident.

The "Yardstick" method can be used to estimate what the revenues of the business would have been if not for the accident. The "Yardstick" method is whereby one measures their business results against a "Yardstick" such as comparing actual results to budgeted results, comparing actual results to a similar business in the area, or comparing actual results to industry averages.

If a contract was in place, the lost profits can be calculated by comparing the actual results after the incident to those that would have been realized had the contract been completed.

Calculating Avoided Costs

After lost revenues have been calculated, the next step is to calculate related

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Calculating lost profits

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costs. Generally, the costs that should be deducted from the lost revenues in order to calculate lost profits are referred to as avoided costs.

One will need to gain an understanding of the companies cost structure in order to calculate the avoided costs. Avoided cost for a contractor would include the following: cost of goods sold (building materials), direct costs (specific labor costs or equipment rental), overhead costs (non-specific costs such as advertising or administration costs), and indirect costs (costs not specifically related to activity).

Avoided costs can be calculated various ways. The method to calculate avoided costs will depend on the quality of the accounting records maintained by the plaintiff. The analysis for a plaintiff with organized accounting records and detailed cost analysis will be much different than for the plaintiff with poor or missing accounting records. One may use methods such as review of detailed accounts, ratio analysis, review of industry data, or estimates from the plaintiff to calculate avoided costs.

What if it is not this straight forward?

What if (1) the plaintiff had a large one time contract in 2005 that was to last two years, (2) a job in 2005 required more expensive materials (inflating revenue), (3) a new competitor entered the market, (4) the plaintiff had been working for one general contractor and his projects were completed in 2006, (5) the plaintiff recently performed poorly and was having trouble gaining work, or (6) due to market conditions people stopped buying or improving homes? The calculation of lost profits can become very complex.

Counsel may consider hiring an expert to evaluate the claim. It is valuable if the expert can meet with the business owner and gain an understanding of the business. The expert will want to know if the business owner has revenue and profit projections as well as gain and understanding the business owners industry and competitors.

The expert will also want to understand the type of work the business owner performs and what is included in revenue, cost of goods sold, and other expenses. The expert will want to review financial statements and obtain the following types of information: the number of customers (does the company do work for various customers or is the work concentrated with a few), information related to competitors, number of employees, work season (summer and winter), how does the business bill for services (by the hour or by the job), and did the business owner try to hire someone to perform the tasks he or she is unable to perform.

In addition to meeting with the business owner, the expert should be provided the following documents to perform an initial analysis: a copy of the Complaint, relevant financial information prior to the incident and after the incident, copies of any depositions containing information related to damages, and any other related documents.

It is often valuable to use the services of a forensic accountant as an expert to evaluate and calculate lost profits. A forensic accountant has expertise and training in the application of accounting, finance, quantitative methods, and investigative skills to assist in the valuation of the lost profits claim.

A forensic accountant can assist counsel and the plaintiff in evaluating and calculating the economic damages related to an incident by evaluating the "but for earnings" (earnings had the incident not happened) to the "impaired earnings" (actual earnings since the incident plus projected future earnings taking into account a reduction for the inability of the plaintiff to work at the same capacity he did prior to the incident).

Experts are often engaged late in the litigation process. The value of engaging a forensic accountant in the early stages of litigation can be extremely beneficial. A forensic accountant can perform preliminary analysis early on to assist counsel in evaluating the strengths and weaknesses of a case as well as facilitating in the settlement process.

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

You are cordially invited to the CCTLA Annual Meeting & Holiday Reception at Sofia Restaurant, 815 11th Street, Sacramento Thursday, December 13 — 5:30. to 7:30 p.m.

This event is free
to honored guests, CCTLA members,
and one guest per invitee

Reservations must be made no later than Friday, Dec. 7, by contacting
Debbie Keller at the CCTLA office, (916) 451-2366

Consumer advocates help defeat Allstate's efforts to hide its post-Katrina pay-out procedures

By: Public Justice Correspondent Sarah Dean

Allstate Insurance Company will not be allowed to hide trial exhibits that include the company's pay-out procedures for Hurricane Katrina claims thanks, in part, to efforts by Public Justice, the national public interest law firm headquartered in Washington DC, and the Foundation for Taxpayer and Consumer Rights (FTCR), based in California.

On August 16, United States District Judge Sarah Vance in New Orleans refused to seal the trial exhibits in Weiss v. Allstate, the case of a New Orleans couple who earlier this year won a $2.8 million verdict against Allstate for illegally refusing a hurricane-related claim. In so ruling, the Court noted that "[p]ublic access serves to enhance the transparency and trustworthiness of the judicial process, to curb judicial abuses, and to allow the public to understand the judicial system better."

"We are thrilled that the Court has rejected Allstate's request to seal these exhibits," said Public Justice Attorney Michael Lucas, lead counsel for FTCR. "This ruling vindicates the public's right to know and it prevents Allstate from hiding its behavior in the wake of Hurricane Katrina."

Several months after the jury verdict in Weiss, the insurance company had asked the court to either return or seal the trial exhibits, which include Allstate's manual for handling claims and an operational guide for subcontractors engaged to work on Katrina-related damage. Representing FTCR, Public Justice opposed Allstate's request on the ground that the trial exhibits provide insight into Allstate's decision-making process" and that denying public access to them "would directly impede FTCR's mission of educating the public about insurance practices and abuses." The motion to seal was also opposed by plaintiffs' counsel in the case.

In refusing Allstate's request for secrecy, the Court specifically rejected Allstate's argument that public access to the trial exhibits would cause it prejudice in other litigation involving hurricane-Katrina claims, holding that "[w]hen, as here, the documents are in the possession of the court as trial exhibits, the case is even stronger for permitting other litigants to have access to them." The Court further ruled that Allstate had failed to identify any specific reason why disclosure of the materials "might be harmful to Allstate's competitive position."

"Allstate clearly did not want to disclose the internal procedures by which it handled the claims of Katrina survivors, but the public and policymakers have a right to know why and how insurance companies make decisions to pay or not to pay in the wake of disasters," said FTCR's Executive Director Doug Heller. "This ruling will prevent Allstate from using the court system as a cloak of secrecy."

Public Justice Staff Attorney Leslie Brueckner and cooperating counsel Brian D. Katz, Stephen J. Herman, Joseph E. Cain, and Soren E. Gisleson of Herman Herman Katz & Cotlar, LLP in New Orleans are also representing FTCR.

A reception honoring 9th District Assembly member Dave Jones was held this fall, hosted by Allan Owen, David Lee and Jill P. Telfer. Jones chairs the Assembly Judiciary Committee. His bills demonstrate his commitment to children, affordable housing, environmental protection, health care, privacy rights, and improving access to the courts. For example, he secured $10 million in the state budget for self-help law centers and made funds available for grants to non-profit legal-aid organizations to help meet the legal needs of low-income, elderly and disabled people. Several CCTLA members attended the fund-raising event.

(Editor's note: This event was not a CCTLA-sanctioned event)

Assembly Member Dave Jones, in left photo with Jill Telfer, was honored at a reception recently. Among those attending were, above photo, from left: Christopher L. Kreeger, David Lee, Margaret Doyle and Brooks Cutter.

Inside This Issue

CCTLA COMPREHENSIVE MENTORING PROGRAM

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

Jack Vetter: jvetter@vetterlawoffice.com
Chris Whelan: chwdefamation@aol.com
Cliff Carter: cliff@ccalawcorp.com

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

CCTLA Calendar of Events

December

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

Thursday, December 13
CCTLA Annual Meeting & Holiday Reception
Time: 5:30 to 7:30 p.m.
Location: Sofia Restaurant
(815 11th Street)
CCTLA Members and one guest per invitee

January

Wednesday, January 16
CCTLA Seminar
Topic: What's New in Tort & Trial: 2007 in Review
Speakers: Patrick Becherer, Esq. & Craig Needham, Esq.
Location: Capitol Plaza Holiday Inn
Time: TBA
Cost: TBA

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

CAOC presents annual awards

Consumer Attorneys of California (CAOC) President Ray Boucher has been selected as the Consumer Attorney of the Year for his work on more than 500 Catholic priest molestation cases, all resulting in settlement. He was selected for the award by CAOC's executive committee, which also presented a new award, the Street Fighter of the Year Award, to Lisa Maki, for her work on a Southern California disability discrmination case. This new award recognizes efforts, through the practice of law, to create a more just society, regardless of profit or personal benefit. Both recipients were announced at CAOC's annual convention, held in San Francisco.

CCTLA member Stephen F. Davids was nominated for his appellate work in Greer v. Buzgheia, which paved the way for other practioners dealing with medical liens. As a result of Greer and other precendent court decisons, a reduction in medical damages under Hanif is inappropriate when the plaintiffs' medical providers sold their liens to a financial services company at reduced rates, but the plaintiffs remained fully liable for the amount of the medical provider's charges for care and treatment.

CCTLA members Wendy York and William Kershaw were nominated for their September 2006 class-action settlement representing UPS drivers who were often required to skip meal and rest breaks.