Plaintiff

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Plaintiff

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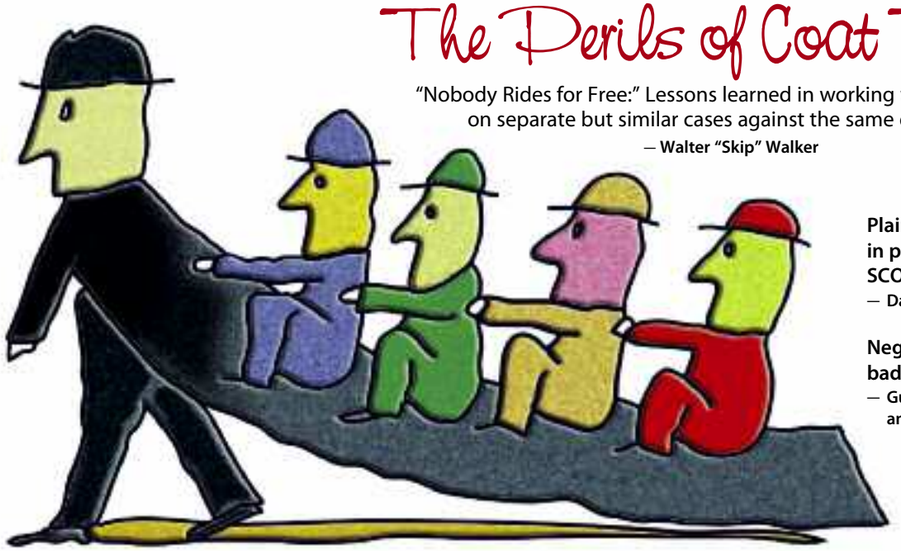

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Influenced by her strong faith and personal family struggles, she focuses on the client's best interest and keeps her ego out of it

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Negotiating the insurance bad-faith case

Preparing and posturing the insurance case for resolution

By Guy O. Kornblum and Charles D. Cochran

Insurance is unique in that the insured does not know whether the policy will cover a risk until a loss occurs. There is no assurance that a risk will be acknowledged by the carrier until it becomes a reality. Since insurance is not like a product which you can test beforehand, there is always a level of uncertainty even after there is a loss. When a risk occurs, it usually poses a potentially-harsh financial loss to the one protected, which can cause significant worry and stress until the claim is resolved. This translates to more than just contract damages if the claim is not timely and objectively handled in accordance with the insurer's contractual promises.

Insurance claims and lawsuits are unique

- They normally involve either an underlying prior lawsuit or claim that is documented by a "file," which is maintained by the insurer, tracks the claim's handling, and provides an early picture of what the company did and why;
- Special rules for good-faith claims handling apply and must be followed by the insurer in administering, managing, and resolving claims; as noted in this article, these principles result from statutes, regulations, and industry and internal insurance company standards;
- A "David" vs. "Goliath" scenario is present in cases when individuals or small businesses are the claimant or insured fighting the large insurance corporate giant; thus, there can be a greater emotional picture caused by financial loss and hardship.

Types of bad-faith claims

Bad-faith claims usually arise out of three general types of insurance claims:

The *failure-to-settle cases*, which involve an unreasonable refusal of the carrier to settle a claim against its insured within the limits of coverage, resulting in a judgment in excess of the policy's limits, and thus exposing the insured to a personal liability.[1]

The *failure-to-defend cases* in which the carrier refuses to accept a tender of defense which is unreasonable, and the insured suffers both the costs of defense and the costs of settlement or judgment.[2]

The *unreasonable refusal or delay* in adjusting and resolving a first party claim, such as a claim for an underinsured or uninsured motorist benefits, or any other type of first party claim requiring the insurer to directly pay the insured or, in the case of life insurance, a beneficiary of the coverage.[3]

Sometimes the insurance adjuster anticipates a bad-faith claim, such as if the jury awarded more than the policy limits in the underlying case and exposed their insured's personal assets. An insurance adjuster might also expect a bad-faith claim if an arbitrator awarded more than the policy limits in an Uninsured or Underinsured Motorist Arbitration, an appraisal on a property claim has resulted in an award well in excess of what the insurer offered, a long-term disability claimant has been denied benefits, or a claim in a payment mode is terminated with time left on the claim for monthly benefits for total or partial disability.[4]

Who is handling the claim?

Insurance coverage and bad-faith claims are not normally handled by adjusters who manage the more routine claims. This is because these claims normally involve coverage positions that set precedents for interpretation of policy provisions, as well as challenges to the insurer's claims practices.

In the more ordinary claim, e.g., auto, trip and fall, dog bite, the first adjuster who is responsible for the claim has very little authority or experience to evaluate it. However, that is not the case when the carrier is sued. When an insurer is sued, its financial assets are exposed because of an extra-contract claim, risking the insurer's assets beyond the underwriting and claims reserves. Instead of an ordinary adjuster, you are now dealing with a claims representative who is defending the insurer's claims practices and decision making, and who is also guarding the company coffers.

In addition, this claims representative will be reporting to the home office and is likely a more senior claims officer. This means that in the initial presentation of a claim against the insurer directly for bad-faith, the insured's attorney needs a thorough written presentation so that the high-level adjuster can inform the superiors of the seriousness of the claim.

Obtaining the insurance company file[5]

Before any evaluation of the case takes place, the plaintiff's counsel must obtain the complete claims file by a proper discovery request. No bad-faith case can be evaluated without a thorough review of the claims file by counsel, and perhaps also by an insurance claims expert who can spot the substandard claims practices.[6] If the insurance company is asserting an "advice of counsel"

affirmative defense, the defense counsel's file should also be obtained in discovery.[7]

The insurance file will include what are now electronic file notes entered by the adjusters which chronologically track the claims handling. The file notes document the information requested and received, the claims decision making, and the comments of those involved. They also track the notes regarding the evaluation and settlement efforts. A review of the claim file and these entries is the first step in the process of assessing whether the insurer met its good-faith duties regarding the investigation,[8] evaluation,[9] and payment obligations for the coverage at issue.[10] Next, the entries need to be put in chronological order so an outline of the claims actions by the insurer can be prepared. This will tell "what" the company did, but may not reveal "why" these actions were taken. To determine the "why," plaintiff's counsel may need to take depositions of key claims personnel before the contract and extra-contract exposure can be evaluated.

Computerized evaluation software

In the property and casualty area, computerized evaluation programs are often used to assess claim value. This program might be called Xactimate if it is evaluating the damage to a home,[11] or perhaps Colossus if it is used to value a liability claim.[12] Normally, claims handlers are restricted to the computerized programs' value determination for both payment and settlement options.

The Colossus system works by having adjusters in-put information regarding the claimed bodily injury. Insurance adjusters are told to take information about liability, injuries, and economic damage claims, such as wage loss, and put these "value drivers" into the parameters of the Colossus software. The adjuster then enters injury codes that define the injuries sustained. The software provides a range on what the claim is worth. Next, a supervisor reviews the file to affirm or reject the settlement range and give the authority to settle the case. However, there can be misuse of these programs.[13]

Misuse arises when the adjuster does not use the correct information, i.e., codes that accurately reflect the diagnosis and medical assessment of the injuries for assessing the claim. For example, if the adjuster puts in whiplash protocols instead of the objective injury (e.g., disk protrusion – an objective injury), the system will improperly evaluate the claim. Thus, in cases in which this "tool" is used by the insurer, it will be essential to conduct discovery on how this program was used, what information was considered, why information that was relevant to the evaluation was not considered, and to what extent the adjuster relied on the results in evaluating and making decisions about settlement efforts.

Posturing for evaluation and negotiation

Insurance bad-faith cases offer an early opportunity for resolution for several reasons.

First, these cases present a unique opportunity for an early evaluation. If there are coverage issues, they can be evaluated by reviewing the policy provisions and the applicable law. Because there is already a "paper trail" with the claims file, there is an excellent source for preparing a chronology of claims handling and an analysis of what was done and why. Thus, there is an early opportunity to learn about the claims handling, and the reasoning, or lack of such, behind it.

Other files are also available, such as an underwriting file, and claims manuals or written policies for the handling of the type of claim involved. These can provide guidelines on what procedures the insurer views as part of the good-faith claims process. The client and his insurance broker can also add information to the "claims story."

Second, bad-faith cases are costly to prepare and try. Capturing the case early, evaluating the damages, and looking at the down-the-line costs should motivate both sides to review the case to see if settlement at an early stage is prudent.

Thus, counsel can be aggressive in attempting resolution by inviting the defense to discuss the case or set a mediation date.

Evaluating the issues

Evaluating a case entails compartmentalizing it into the issues relating to the contract vs. the extra-contract (i.e., tort) claims. Since the measure of damages is different between contract and the extra-contract damages, there needs to be a breakdown of the potential liability and damages, both contract and tort.[14]

The purpose of the statutory and regulatory principles that outline the good-faith claims handling principles is to create a *proactive set of guidelines*, not a passive process. They establish that insurance companies, in responding to a claim of an insured, *have specific tasks that they must perform in order to reach a timely and efficient point for evaluation, payment and settlement efforts*, and cannot sit back and resist their payment obligations or insist that the file is not in a state for evaluation and payment because of the lack of information. The latter is totally contrary to the good-faith claims handling principles in most states.

In our view, there are ten basic areas of assessment:

- Was the claim promptly acknowledged?[15]
- Did the insurer "adopt and implement reasonable standards for the prompt investigation and processing of claims"?[16]
- Did an investigation of a claim begin within a reasonable period of time from notice of the claim?[17]
- Did the insurer "attempt to effectuate a prompt, fair and equitable settlement of a claim after liability [became] reasonably clear?"[18]
- Were the insured's financial interests treated equally with those of the insurer, or did the insurer subordinate the insured's interests to its own?[19]
- Did the insurer conduct a thorough, fair and objective investigation of a claim; that is did the insurer investigate all of the facts supporting payment of a

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claim as well as those that might support limiting or denying a claim?[20]
• Was the insurer objective in evaluating a claim?[21]
• Did the insurer timely respond to all communications?[22]
• Did the insurer provide a substantive response to communications that reasonably anticipate such?[23]

The claims handling can be measured against these basic principles, perhaps with the help of your insurance claims consultant/expert.[24]

The timing of negotiations

Getting the carrier to the table involves assessing the point at which the case is ripe for evaluation and negotiation. At this point, plaintiff's counsel should have a good idea of what was done and why. This then allows an evaluation of whether the good-faith claims principles have been satisfied. When the time is right, the invitation to negotiate or mediate should be communicated to defense counsel. This usually comes at the "plateau," where the parties have sufficient information to determine the potential liability of the insurer as to both the contract and extra-contract claims, and to assess the risks and costs of going forward.

Presenting the case to encourage settlement discussions

If mediation is scheduled, a written demand or a mediation statement is a must. Here, the burden is on the plaintiff. If a demand letter is chosen, the case must be carefully and fully outlined with exhibits to support the claims. If mediation is scheduled, the mediation statement must be provided to the opposing counsel and the carrier. This should be done even if the carrier does not provide plaintiff with its statement. There can be no holding back if the case is to be settled.

Beware, however, if the carrier is not willing to exchange a comprehensive mediation statement because then it is likely not coming to the mediation in good-faith, and will simply attend what it hopes is a "fire sale." Our suggestion is that you decline to mediate in that instance.

The presentation for the plaintiff should be organized in the same fashion as we have outlined, with the first attention to the contract claim if it has not been resolved.

In reviewing the claims handling, the focus should be on the basic principles outlined above and the facts that lead to the conclusion that the carrier did not comply with the recognized good-faith principles.

The demand letter or mediation statement might be supplemented by a confidential video with interviews of the client, family members, medical providers, other witnesses, and even experts[25] which are "mini" direct examinations. The video should be treated as confidential, using the settlement or mediation privileges.[26]

We also frequently supplement our submissions with a confidential letter to the mediator with additional information, which can be disclosed if it will help bring closure to the case later in the negotiations.

Preparing the client for mediation

A client deserves to understand and be prepared to make decisions about settlement. Insurance cases require some special handling. First, the client must understand how insurance policies and coverage work. Clients typically do not understand the limitations of coverage, both as to scope and financial limits. Often we find they are surprised to learn of these limits. "The agent never told us," they say. That may be true, but was the agent obligated to go over these limits under the circumstances, and how does this impact the liability of the insurer (or the agent/broker if also a defendant)?[27]

As to claims handling, this is usually an emotional situation for the client. Many are angry and frustrated at the insurer's behavior, so some intervention might be required to calm the emotions and bring rationality to the decision-making process.

The mediation materials, mediation statement, and any video should be sent to the defense well in advance of the mediation. One technique is to post them in the "cloud" and track who accesses the site that you provide for reviewing these materials before the mediation.

Mediation day: Authority matters

The key to the mediation day is communication, however that is best handled. Opening sessions are fine if they do not raise the temperature and are more matter-of-fact and focused on information gathering, rather than tension-building presentations.

It is also very important to have someone from the carrier, with the authority to resolve the claim, present at the mediation. You should get that assurance from defense counsel or the mediator before attending the mediation. Any last-minute effort to avoid this appearance should result in the mediation being continued.

If the preparation has been thorough and the briefs have been exchanged, then the stage should be set for productive discussions. In many "bad-faith" cases the mediator may need to become more evaluative than facilitative. A mediator may need to evaluate the claims in order to contribute to the discussion of the issues and how they might be viewed by a judge or jury. This will help get the parties to be realistic about the value of the matter and the carrier's exposure both as to the contract and extra-contract claims.

We have already addressed some of the impediments to settlement, which include:
• The plaintiff has not obtained all the information necessary to present the case for settlement or mediation (e.g., not obtaining the claim file, not getting a review by a knowledgeable expert who can evaluate the claims handling);
• The carrier representative with the full authority to resolve the matter is not present at the mediation;
• The carrier's approach is to continue a "low ball" approach and not participate in settlement discussions in good-faith.[28]

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A final comment

Insurance bad-faith cases offer the opportunity to direct negotiations or mediation at a reasonably early stage in the litigation process, but it is up to plaintiff's counsel to make the process work. The claims files and documents must be reviewed and an expert must be consulted on the "wrongs" that were committed using the "good-faith" claims handling guidelines as reflected in the case law, statutes, applicable regulations, customs in the industry, and company guidelines (or absence of them). Once that is done a careful outline of the case, including the economic and non-economic losses of the client, must be communicated. Ultimately, a thoughtful presentation and analysis in a credible case should get the carrier to the table for discussions about settlement.


Kornblum

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Endnotes

This article, including extensive endnotes, can be downloaded at www.plaintiffmagazine.com.

The rent control revolution

Throughout much of the Bay Area, the tenants'-rights movement strengthens as landlords go on the defensive

By Josephine L. Alioto and Joshua C. Ezrin

California's Legislative Analyst's Office effectively stated the obvious when it recently announced, "California has a serious housing shortage."[1] It is well documented that California housing costs have outpaced inflation for decades. Particularly in the Bay Area, a confluence of factors has made it increasingly difficult, if not impossible, for even well-paid professionals to find housing that is both adequate and affordable. For far too many on the lower end of the economic spectrum, finding or maintaining *habitable and affordable* housing in California has become an insurmountable struggle.

According to the California Department of Housing and Community Development ("DHCD"), fewer than 80,000 new homes were built each year for the past decade, well below the projected annual demand of 180,000 additional residences.[2] Tension from the lack of supply is especially acute in and around San Francisco, resulting in growing housing inequality. According to the DHCD, over 1.5 million households in California pay in excess of 50 percent of their income toward rent. Absent the expansion of additional Rent Control Ordinances throughout the state, and the allocation of resources for enforcement mechanisms, little optimism can be projected to abate the widening housing crisis.[3]

The Costa-Hawkins Act 1966

Reflecting years of persistent activism by housing advocates throughout Northern California, the November 2016 elections resulted in the implementation of nascent Rent Control legislation in Mountain View and Richmond, and the strengthening of many existing ordinances, as discussed further below. At the same time, Rent Control measures were defeated in Burlingame, San Mateo, Pacifica, and Concord. Additionally, recently introduced legislation by Bloom (D-Santa Monica), Bonta (D-Oakland) and Chiu (D-San Francisco), (AB 1506) would repeal the controversial 1996 Costa-Hawkins Act, which set restrictive limitations to all Rent Control ordinances. In particular, Costa-Hawkins precludes limitations on rental rates at the establishment of a new tenancy and prohibits the establishment of any Rent Control ordinances over all

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residences built after 1995. Repeal of this regressive legislation would substantially benefit the further expansion of Rent Control protections.

A survey of rent ordinances

This article surveys recent and long-standing Northern California Rent Ordinances implemented in an effort to abate the growing inequities between rental rates and income. An important adjunct to these efforts is the concurrent need to implement low- to no-cost eviction defense services that ensure the means for tenants to utilize their newly minted protections from wrongful evictions. For example, San Francisco's government provides substantial economic support for eviction defense through the Eviction Defense Collaborative, a nonprofit mandated to provide assistance for tenants in nearly every eviction in San Francisco County.

Without affordable and pro bono eviction defense representation, rent control beneficiaries have no effective means to implement the legal protections afforded under their Rent Ordinances. Further, exemplar damages such as statutory trebling and attorneys' fees make it economically viable for contingency fee attorneys to take cases on behalf of tenants – but only in those few cities with Rent Ordinances that include such exemplar damages. As reflected below, not all Rent Ordinances are equal, though the trend appears to be moving in the right direction.

City-by-city rent ordinances

Voters and legislators enacted new and modified existing Rent Control ordinances to bolster the rights of renters in an area rife with abusive, opportunistic, and simply negligent landlords. Not all efforts are equally effective, but taken together, they demonstrate a concerted movement to mitigate the growing class disparity in the Bay Area, and Northern California in general, due in large part to excessive housing costs. Here, we address some of the most significant recent provisions in Northern California ordinances, with a particular focus on: (a) restrictions on rent increases (i.e., rent control); (b) restrictions for evictions (i.e., eviction control); and (c) damages for rent ordinance violations.

• ***Alameda*:** In March 2016, the Alameda City Council enacted the City of Alameda Rent Review, Rent Stabilization and Limitations on Evictions Ordinance

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No. 3148 ("ARO"). The ARO does not automatically regulate the extent to which landlords can increase rent in covered units. However, any increases above 5 percent are subject to review by a non-binding advisory committee. The ARO also allows evictions for any reason as long as landlords pay a nominal relocation fee to the tenants. However, a landlord cannot evict more than 25 percent of the tenants in the building without cause in any given year and cannot charge the new tenant more than 5 percent of the previous tenant's rent without a similar advisory review.

"For cause" evictions are excluded from these requirements, i.e., non-payment of rent, nuisance. For practical purposes, "For Cause," "Good Cause," or "Just Cause" evictions generally include failure to pay rent; breaching the lease agreement; causing a nuisance at the premises; and/or refusing a landlord's lawful access to the unit. Any attempt to recover possession of a unit in violation of the ARO subjects the landlord to liability for actual and punitive damages for wrongful eviction.

The prevailing party in an affirmative wrongful eviction action brought pursuant to the ARO is entitled to costs and attorneys' fees, not in an underlying eviction action. In November 2016, tenants' rights organizations such as Tenants Together and Alameda Renters Coalition fought to increase tenant protections by introducing Measure M1, which would have capped rent increases at 65 percent of inflation, much like surrounding rent-controlled cities. The Alameda City Council decided to put the already enacted Rent Review, Rent Stabilization and Limitations on Evictions Ordinance on the ballot (Measure L1) to duel with Measure M1. Measure L1 prevailed, implementing the more moderate of the two levels of tenant protections.[4]

• ***Berkeley*:** Berkeley's Rent Stabilization and Eviction for Good Cause Ordinance ("Berkeley Rent Ordinance") was enacted in 1980. It prohibits landlords from increasing rent more than a certain percentage each year (generally less than 5 percent) and from evicting tenants without "Good Cause."[5] However, effective December 19, 2016, 'owner-move-in' ("OMI") evictions[6] of families with children during the academic year are prohibited and relocation payments are increased for certain classes of no fault evictions (e.g., OMI evictions). This includes households with low-income tenants, minor children, elderly or disabled tenants, or tenants who moved in before January 1, 1999.

The Berkeley Rent Ordinance allows for treble damages and attorneys' fees in very limited circumstances, which has not been impacted by these recent changes. If a landlord evicts a tenant to demolish, repair or take possession in bad faith the tenant shall be entitled to regain possession and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to treble damages. Berkeley's rent ordinance provides for attorneys' fees only if a landlord evicts a tenant under the guise that he or his immediate relative is going to move in as ulterior motive.

• ***East Palo Alto*:** In 2010, the city of East Palo Alto enacted the Rent Stabilization and Just Cause for Eviction Ordinance ("EPA Ordinance"), which restricts similarly formulated rent and eviction controls as Berkeley (*supra*), Oakland (*infra*), and San Francisco. Section 17 of the EPA Ordinance also prohibits retaliatory and harassing acts by landlords.

In November 2016, East Palo Alto voters resoundingly approved Measure J, which created greater tenant protections under the 2010 EPA Ordinance, including: (1) yearly rent increases limited to 80 percent of the percentage increase in Consumer Price Index and set by Rent Board; (2) strengthened tenant notice provisions; and (3) authorizing the City Council to revise the ordinance if deemed in conflict with federal or state law.

Treble damages are available in a civil action if a landlord is found to willfully demand or retain excessive rent or where a landlord violates OMI restrictions. Attorneys' fees and costs are available to a *prevailing tenant* in a civil claim for damages or other remedies based on violations of §§ 16 (just cause required for eviction); 17 (landlord retaliation and harassment prohibited); 18A (landlord failure to properly register units); 18B (landlord demands or retains excessive rent); and/or 18C (landlord violates owner move in restrictions).

• ***Emeryville*:** On December 6, 2016, the City of Emeryville adopted the Residential Landlord and Tenants Relations Ordinance ("Emeryville Ordinance"), which became effective on April 1, 2017. The Emeryville Ordinance does not place any restrictions on rent increases, but does require Just Cause for evictions. Attorneys' fees are only available to a prevailing tenant in an underlying eviction action if the landlord is unable to demonstrate compliance with the preconditions to serve a Notice of Termination. Treble damages are not available.

• ***Mountain View*:** On November 8, 2016, Mountain View voters passed Measure V, the Community Stabilization and Fair Rent Act ("FRA"). The FRA prohibits rent increases above the prior year's Consumer Price Index (not to exceed 5 percent) and requires Just Cause for evictions. Attorneys' fees are available only for a *prevailing tenant* in civil action alleging a landlord's violation of the ordinance (i.e., a tenant cannot be assessed a fee for pursuing their rights). Additionally, treble damages are available if it is established that the landlord acted willfully, oppressively, fraudulently or maliciously.

In a brazen attempt to thwart the will of the voters, the California Apartment Association ("CAA"), filed a restraining order against the measure on December 21, 2016. However, on April 5, 2017, Santa Clara County Superior Court Judge William J. Elfving denied the preliminary injunction and lifted the restraining order thereby allowing for implementation of the measure.

• ***Oakland*:** Oakland enacted the Tenant Protection Ordinance ("TPO") in November of 2014, which essentially mirrors the robust protections found in

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San Francisco's 2008 tenant harassment ordinance. It prohibits landlords from a plethora of harassing behaviors, including failing to perform repairs or maintenance in bad faith. Treble damages and attorneys' fees are available if it is found that a landlord wrongfully endeavored to recover possession of an eviction-controlled unit in violation of the TPO and also available for a *prevailing Plaintiff* if a landlord violates the Tenant Protection Ordinance.

In November 2016, Oakland voters passed Measure JJ (Renters Upgrade Act), which was a major victory for tenants. Effective February 1, 2017: (1) Landlords must petition the Rent Board before instituting any rent increase that exceeds the annual allowable increase (previously, the *tenant* was burdened with instituting a rent board petition within 60 days *after* receiving an unlawful rent increase); (2) Just Cause eviction protection was extended to units built prior to December 31, 1995, (the "Costa-Hawkins" limit); (3) Tasked the city with instituting additional tenant-based benefits such as requiring the City to mail out an annual notice of the Rent Adjustment Program and legal maximum rent increase, creating an online searchable database, and guaranteeing access to translation services for hearings and appeals.

• ***Richmond*:** The city of Richmond now boasts having Contra Costa County's sole rent ordinance. On November 8, 2016, Richmond voters passed Measure L, The Richmond Fair Rent, Just Cause for Eviction, and Homeowner Protection Ordinance ("RFR"), which became effective December 30, 2016. Pursuant to RFR, a landlord is prohibited from increasing a tenant's rent by a greater percentage than the Consumer Price Index or from evicting a tenant without Just Cause. Attorneys' fees are available for a prevailing *tenant* who institutes a civil action for violation of the RFR. A prevailing tenant is also entitled to *three times the amount* by which such payment exceeded the maximum allowable rent if the tenant proves that the landlord acted willfully, oppressively, fraudulently or maliciously.

• ***Santa Rosa*:** In August 2016, Santa Rosa's City Council passed rent protections, including a 3 percent cap on rent increases and concurrent eviction

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protections. However, a CAA backed petition drive resulted in the calling of a referendum on codifying the protections through a June 6, 2017, special election.

• ***San Jose*:** In 1979, the city of San Jose enacted a rent stabilization ordinance known as the Apartment Rent Ordinance ("ARO"). (Chapter 17.23 of the San Jose Municipal Code.) The San Jose ARO covers properties with three or more units that were built prior to September 7, 1979, and prohibits landlords from raising rents above 5 percent, but did not require Just Cause for evictions. Consequently, landlords were able to evict a tenant without having to provide any specific reason then charge a dramatically higher rent to the new tenant.

On April 18, 2017, a divided San Jose City Council approved a Just Cause for eviction measure. Attorneys' fees and costs are available for a prevailing party in a civil action for wrongful eviction brought pursuant to the ARO. If a landlord demanded and/or accepted excessive rent, the prevailing tenant is entitled to the payment that was excessive, plus damages, not to exceed five hundred dollars or *three times the amount* by which such payment exceeded the maximum allowable rent, whichever is greater, plus attorneys' fees.

Looking forward: Considerations and improvements for tenants' rights

As attorneys representing tenants, we have unfortunately seen innumerable examples of landlords flagrantly ignoring their obligation to provide habitable housing, frequently as a means to regain possession of rent controlled units. The end result is often that their tenants are forced to abandon their homes and communities, permitting the landlord to set new rent at inflated rates that are unsustainable for long-term tenancies.

By adopting rent control ordinances, each of the above cities demonstrates a civic commitment to protect tenants by providing them the right to recover the difference between the market rate and the rent at the time of the tenants' constructive eviction for as long as they would have lived in the unit. See *Castillo v. Friedman*, 197 Cal.App.3d Supp. 6, 20-21 (1987) (under California law a plaintiff 's loss-of-use damages are "measured by the difference between market value and the rent-controlled rate of the subject Premises" for the period plaintiff would have continued living there). Particularly in the case of long-term tenancies, these future damages can be substantial – and provide both a disincentive for landlords to neglect to maintain the units of their long-term tenants and a mechanism to make whole those renters who have been constructively evicted from their rent-controlled homes so they have means to remain or return to their communities.

From the perspective of tenants' rights advocates, absent mechanisms and resources for enforcement, compliance with the existing laws governing habitability standards will continue to be systematically abused by opportunistic and negligent landlords, particularly in the Bay Area. San Francisco, which has arguably the most robust renters' rights in the nation, has several entities enforcing the existing laws.

For example, the Eviction Defense Collaborative ("EDC") is the principal organization in San Francisco helping low-income tenants respond to eviction lawsuits. They provided emergency legal services and rental assistance to over 6,000 tenants from San Francisco in 2016. Additionally, every renter in San Francisco going through eviction proceedings is provided a limited-scope volunteer attorney to represent them at their mandatory settlement conference. This program is operated by the Bar Association of San Francisco and could serve as a model for other communities seeking to ensure that each and every individual being evicted from their rent-controlled home is represented.

In contrast to San Francisco, most of the communities listed above have thus far failed to build the necessary enforcement infrastructure to ensure compliance with new and existing code. Although advocates of renters' rights should applaud the recent developments, we must continue to encourage further improvements (such as the further extension of treble damages currently available in East Palo Alto, Oakland, and San Francisco), and the allocation of sufficient resources to allow the rent ordinances that do exist to actually serve their intended purposes. Moreover, too many communities in California still lack any type of rent control whatsoever – and efforts to add such laws in Burlingame, Concord, Pacifica, and San Mateo were recently defeated. Accordingly, while the trend appears in favor of extending rights to renters in California, there is still much work to be done.

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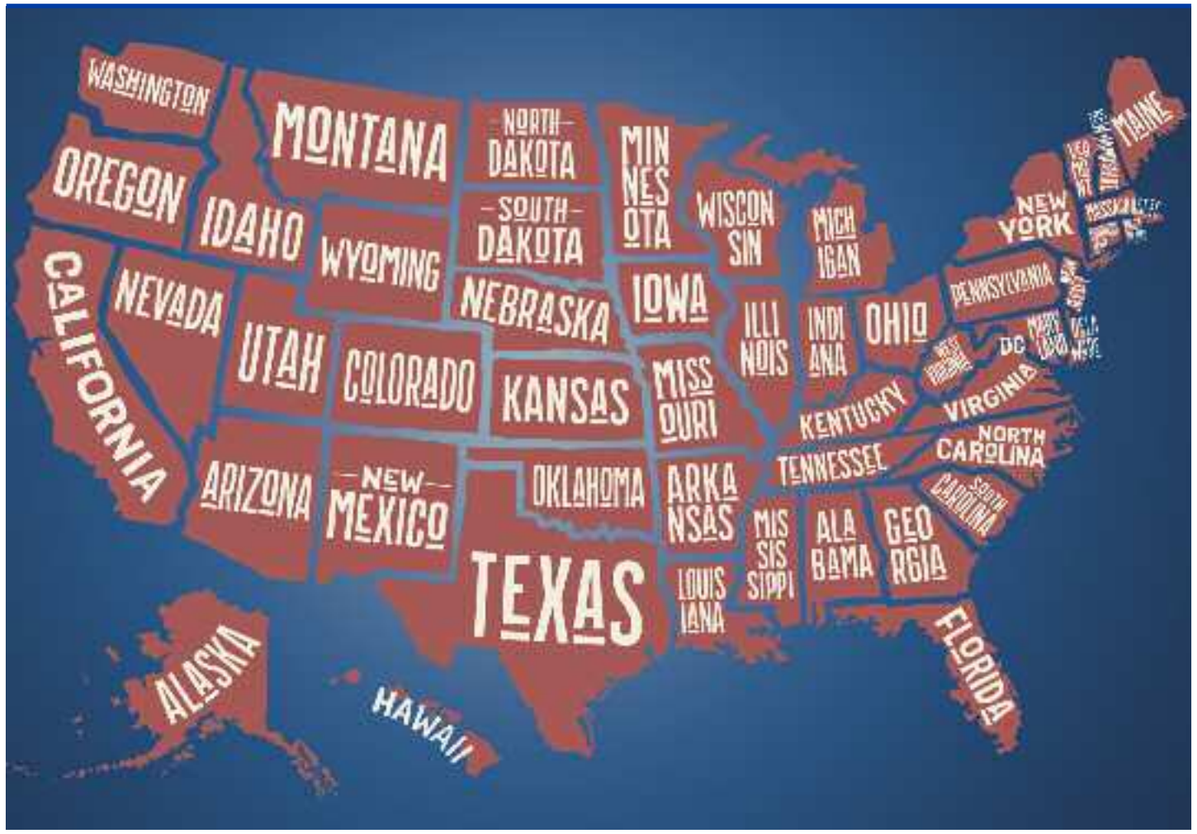
Endnotes

This article, including extensive endnotes, can be downloaded at www.plaintiffmagazine.com.



Plaintiff's jurisdiction and products liability

The U.S. Supreme Court has announced the "at home" rule of general or all-purpose jurisdiction

By Daniel Dell'Osso

What was once a fairly simple matter – suing an American auto maker or tire manufacturer in California for injuries suffered by a California plaintiff while using the defendant's product in California – is not so simple any longer. Recent decisions by both the United States Supreme Court and the California Supreme Court have inspired manufacturers to challenge jurisdiction in these cases, requiring that plaintiffs spend some time considering jurisdiction as part of routine case screening. More importantly, the tried and true "stream of commerce" allegation may not be enough to establish personal jurisdiction without a showing that the manufacturer intended its product to reach the forum state.

In January of 2014, the United States Supreme Court handed down its decision in *Daimler AG v. Bauman* (2014) 134 S.Ct. 746; the Court announced the "at home" rule of general or all-purpose jurisdiction. In an 8-1 decision authored by Justice Ruth Bader Ginsberg, the court held the exercise of general jurisdiction was only proper in a state where the defendant is "at home." And that "With respect to a corporation, the place of incorporation and principal place of business are "paradig[m]… bases for general jurisdiction." (*Bauman* at 760.) Which has come to mean as a practical matter that a court may only exercise general/all-purpose jurisdiction over a corporation in its state of incorporation, or that in the state which houses its principle place of business.

In the brief time since this decision was handed down, auto manufacturers and tire makers have seized upon it to routinely challenge a plaintiff's choice of venue. Taking advantage of the often blurred distinction between general and

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specific jurisdiction, the manufacturers have use *Daimler*, with some success, to argue that jurisdiction over them is proper only in their state of incorporation or in the state which houses their principal place of business.

The line between general and specific jurisdiction

And then, in August of 2016 the California Supreme Court issued its decision *Bristol-Myers Squibb v. The Superior Court of San Francisco County* 1 Cal.5th 783 (2016) *cert. granted sub nom. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County,* 137 S.Ct. 827 (2017). In *Bristol-Myers,* the California Supreme Court drew a distinction between general jurisdiction, and specific jurisdiction, in which jurisdiction is limited to specific litigation related to defendant's forum state contacts.

In highlighting this distinction, the California Supreme court held that non-California resident plaintiffs could sue Bristol Myers Squibb (BMS) in California because of the relationship between BMS, California and the litigation. In reaching its holding, the California Supreme Court relied on an analysis of three factors (1) whether the defendant has purposefully directed its activities at the forum; (2) whether plaintiff's claims arise out of or are related to these forum directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice.

Following the decision, BMS petitioned for certiori to the United States Supreme Court challenging the California court's finding as it relates to the second element of specific jurisdiction whether the plaintiff's claims arise out of BMS's forum related activities. BMS's challenge and the Supreme Court's grant of cert. raises the question of whether the rule articulated in *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286-297-298, that delivering a product into the stream of commerce with the expectation it will be purchased by consumers in the forum state is a sufficient basis for personal jurisdiction, is still viable.

In *Asahi Metal Industry Co. Ltd v. Superior Court of Cal.* (1987) 480 U.S. 102, four of the eight justices were of the opinion that if a corporation is aware

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that its final product is being marketed in the forum state, there is a possibility of a lawsuit in the state. The other four justices opined that there must be an "intent or purpose to serve the market in the forum state, when a product is placed into the stream of commerce in the forum state."

Stream of commerce: Two schools of thought

In light of this split between the justices recent jurisprudence on stream of commerce indicates that courts are coalescing around two discernible schools of thought as to how to apply the competing approaches in *Asahi*, particularly in light of the Court's more recent pronouncement in *J. McIntyre Machinery Ltd. v. Nicastro* (2011) 131 S.Ct. 2780.

Nicastro attempted to define the contours of the stream of commerce theory. According to one school of thought, *Nicastro* requires that a defendant must direct its activities with respect to its products toward the forum in order to be subject to personal jurisdiction for lawsuits relating to its products. The second school of thought, post-*Nicastro*, requires only it be foreseeable that a defendant's products would enter the forum in order for the defendant to be subject to personal jurisdiction there. As a result, courts are coming to opposite conclusions as to the meaning of *Nicastro*, apparently as a result of a disagreement as to how *Nicastro* should be viewed in light of prior Supreme Court authorities, particularly *Asahi*.

In *Nicastro*, a four-justice plurality held that under the stream of commerce theory, a defendant must target a forum with its products in order to be subject to personal jurisdiction for lawsuits relating to its products. And, that the mere fact that a defendant may have predicted that its products would wind up in the forum is not enough to subject the defendant to personal jurisdiction for such lawsuits. (*Nicastro*, 131 S.Ct. at 2789-90.) The plurality therefore concluded that the defendant in *Nicastro* was not subject to personal jurisdiction under a stream of commerce theory, as it had not targeted the forum with its products. (*Ibid.*) A two-justice concurrence agreed that the defendant in *Nicastro* was not subject to personal jurisdiction, but ruled that personal jurisdiction was lacking because the case at bar involved only one isolated sale of a product, which could not give rise to personal jurisdiction under any circumstances. (*Id.* at 2791-92.) Of note, the concurrence held that *Nicastro* could be resolved by the then-existing precedents. (*Ibid*.)

However, prior to *Nicastro*, the most recent Supreme Court case to consider the stream of commerce theory at length was *Asahi*. And, in *Asahi*, a four-justice plurality led by Justice O'Connor held that in order for defendant to be subject to jurisdiction in a forum for lawsuits relating to its products under the stream of commerce theory, it was not enough that a defendant might have predicted that its products would enter the forum, rather the defendant must have taken some act to purposefully direct its products toward the forum. (*Id.* at 112.) A second four-justice plurality led by Justice Brennan disagreed with the O'Connor plurality, holding that a defendant could be subject to personal jurisdiction in a forum under a stream of commerce theory merely where it was foreseeable that the defendant's products would enter the forum. According to the Brennan plurality, personal jurisdiction was proper even if there were no acts directed to the forum. (*Id.* at 117.)

Because *Asahi* produced two plurality opinions, some courts interpreting *Asahi* have applied the O'Connor plurality and others have applied the Brennan plurality. See *Boit v. Gar-Tec Products Inc*., 967 F.2d 671, 683 (1st Cir. 1992) (applying the O'Connor plurality from *Asahi*); see also *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (applying the Brennan plurality in *Asahi*); *Rustin Gas Turbines Inc. v. Donaldson Company*, 9 F.3d 415, 420 (5th Cir. 1993) (same); *Intercarrier Communications LLC v. Whatsapp Inc*., 3:12-CV-776 *5 fn. 3 (E.D. Va. Sept. 13, 2013); see also *Canntelo LLC v. Axis Communications AB*, Civil No. 13-1084 *5-6 (D.P.R. July 11, 2013) (same); *C&K Auto Imports Inc. v. Daimler AG*, N.J. Super. A.D. 2013 *4 (Super Ct. N.J. App. Div. June 21, 2013) (same); *Dejana v. Marine Technology Inc*., No. 10-CV-4029 *5-6 (E.D.N.Y. Sept. 26, 2011) (same). See also, *Smith v. Teledyne Continental Motors Inc.*, 840 F. Supp. 2d 927, 931 (D.S.C. 2012) (holding that the *Nicastro* plurality and concurrence "agree that at a minimum, the limitations of O'Connor's test [from *Asahi*] should be applied, although the plurality would apply an even stricter test, the parameters of which were not precisely defined ... therefore the "stream of commerce plus" test [the O'Connor plurality test from *Asahi*] now commands the majority of this court."); see also *Northern Ins. Co. of New York v. Construction Navale Bordeaux*, No. 11-60462-CV *5 (S.D. Fla. July 11, 2011) (same).

At the same time, some courts hold that after *Nicastro*, the Brennan test from *Asahi* is still controlling, because *Nicastro* left the law unchanged. Most recently, in *Service Solutions U.S. LLC v. Autel U.S. Inc*., No. 13-10534 *3 (E.D. Mich. Oct. 18, 2013), the court held that *Nicastro* left the law on the stream of commerce theory unchanged, and that *Asahi* still applies as it always had, the same way before and after *Nicastro*. Similarly, in *Ainsworth v. Moffett Engineering Ltd*., 716 F.3d 174 (5th Cir. 2013) the Fifth Circuit held that because *Nicastro* did not produce a majority opinion, the holding of *Nicastro* may be viewed as the position taken by the justices who concurred on the narrowest grounds, and that because the concurring opinion in *Nicastro* endorsed the Supreme Court's precedents, *Asahi* still controls this issue. (*Id.* at 178.)

However, and perhaps most importantly, when considering *Asahi*, the *Nicastro* plurality correctly noted that "stream of commerce" is simply a "metaphor" to describe the "purposeful availment" test when the sale of goods are involved. "[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that

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Clause ensures." *Nicastro* 131 S.Ct. at 2791 (Kennedy, J., for the plurality).

Nonetheless, caution is warranted here. While it is correct that the flow of products into the forum state "may bolster an affiliation" between the foreign defendant and the forum state that is germane to the jurisdictional analysis, (See e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 2855), there is simply no precedent for the conclusion of various lower courts that the exercise of specific personal jurisdiction is proper simply because a product entered the "stream of commerce" and ended up in the forum state; or that placing a product in the stream of commerce is a substitute for proof of purposeful availment by the defendant.

Hence, the mere possibility that a product might end up in a given state cannot constitute the specific intent necessary to support personal jurisdiction. "'[F]oreseeability'" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." (*World-Wide Volkswagen*, 444 U.S. at 295.) Were it otherwise, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." (*Id.* at 296.)

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. (*World-Wide Volkswagen*, 444 U.S. at 297.) The "stream of commerce" metaphor invites unwarranted reliance upon hypothetical expectations and "should have knowns," rather than admissible evidence that establishes conduct by the defendant designed to take advantage of the forum state.

Competing authorities notwithstanding, three things are now clear: (1) that product manufacturers now are more likely to challenge jurisdiction than they have in the past; (2) that if Plaintiff intends to assert general jurisdiction, the forum choices are limited to a defendant's state of incorporation, or its principal place of business; and (3) attempting to establish specific jurisdiction based solely on the fact that the defendant placed its product in the stream of commerce and it ended up in California is likely not enough – at least until the Supreme Court decides *Bristol-Myers Squibb*, which considering the make-up of the court, is not likely to make it easier on plaintiffs.


Dell'Osso

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Author's note: A special thanks to my friend and colleague, Tab Turner, for providing me with the invaluable and exhaustive summary of cases involving jurisdiction based upon stream of commerce.

The power press exception to Workers' Comp

Finding exceptions to the Workers' Compensation exclusive remedy doctrine in workplace injuries

By Andje Medina
The Veen Firm, PC

Power press injuries are most often serious and debilitating injuries. The Legislature carved out a special power press exception to the workers' compensation exclusivity rule recognizing that employers have an incentive to remove machine guards to increase production speed. This bad behavior unfairly exposes workers to significant risk. Recognizing this incentive, the California legislature enacted Labor Code section 4558 to shift the risk back to the employer for this bad conduct and provide a remedy to the injured worker outside of the no fault workers' compensation system.

If a client comes into your office missing a finger – or even a hand – due to an injury from a machine that lacked a point-of-operation guard, answer the eight-question checklist on page 34 (Figure 1) to see if the client has a civil remedy in addition to workers' compensation. (See Labor Code § 4558(b); *Burnelle v. Continental Can Co.,* (1987) 193 Cal.App.3d 315 – remedies are cumulative, but employer is entitled to an off-set or credit against civil judgment or settlement for monies paid in workers' compensation benefits.)

When running through the checklist you will see that many of the elements are straightforward and easy to establish. The ones that require a more thoughtful analysis are addressed below.

Power press

To be a power press, the machine must be a material-forming machine that utilizes a die in the manufacture of other products. (See Labor Code § 4558(a)(4).) Courts have held the following machines are not power presses – circular saw (See *Ceja v. J.R. Wood* (1987) 196 Cal.App.3d 1372, 1377); printing press (See *McCoy v. Zahniser Graphics* (1995) 39 Cal.App.4th 107, 111); notching lathe that cut, but did not impart image (See *Rosales v. Depuy Ace Med. Co.* (2000) 22 Cal.4th 279, 283); molding machine with cutting heads that did not determine the shape of the product formed (See *Graham v. Hopkins* (1993) 13 Cal.App.4th 1483, 1489).

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The Point of Operation Guard

The "point of operation" is the die space where the material is formed by striking, pressing, or punching the material, which poses a serious risk of crush injuries." (*LeFiell Manufacturing v. Sup. Ct.* (2014) 228 Cal.App.4th 883, 895.) It's the "strike zone." (*Gonzalez v. Seal Methods* (2014) 223 Cal.App.4th 405, 408.) Whether machine parts constitute a "die" is a question for the jury. (*Islas v. D & G Mfg. Co.* (2004) 120 Cal.App.4th 571, 579.)

Defendants frequently challenge whether a safety device is a *point of operation guard*. *Bingham v. CTS* (1991) 231 Cal.App.3d 56 does a thorough analysis of how to determine whether a safety feature is a point of operation guard.

In *Bingham*, plaintiff was injured after his supervisor had moved dual hand controls used to activate a power press away from the point of operation and installed a foot pedal so the machine could be activated by foot. (*Bingham, supra,* 231 Cal.App.3d at 60.) Plaintiff's wrist was crushed when he accidently pressed the foot pedal while his hands were in the point of operation. (*Id.*) The defendant employer argued that dual hand controls on the power press might be "point-of-operation devices," but they were not "guards." (*Id.* at 62.) Defendant also argued that even assuming the dual hand controls were guards, the employer had not *physically removed* them; it only "moved the palm buttons away from Bingham so that he could not use them." (*Id.* at 68.)

The Court of Appeal for the Second District did not accept either argument, noting that the employer was trying to make a "literal, narrow or hypertechnical" purported variance between a point-of-operation safety "device" and a "guard" which was contrary to the legislative intent behind section 4558. (*Bingham, supra,* 231 Cal.App.3d at 65.) The legislative intent was to "protect workers from employers who willfully remove or fail to install appropriate guards on large power tools [citation]." (*Id.* at 64-65.) The court unanimously held that dual hand controls were point of operation guards under Labor Code § 4558. (*Id.*)

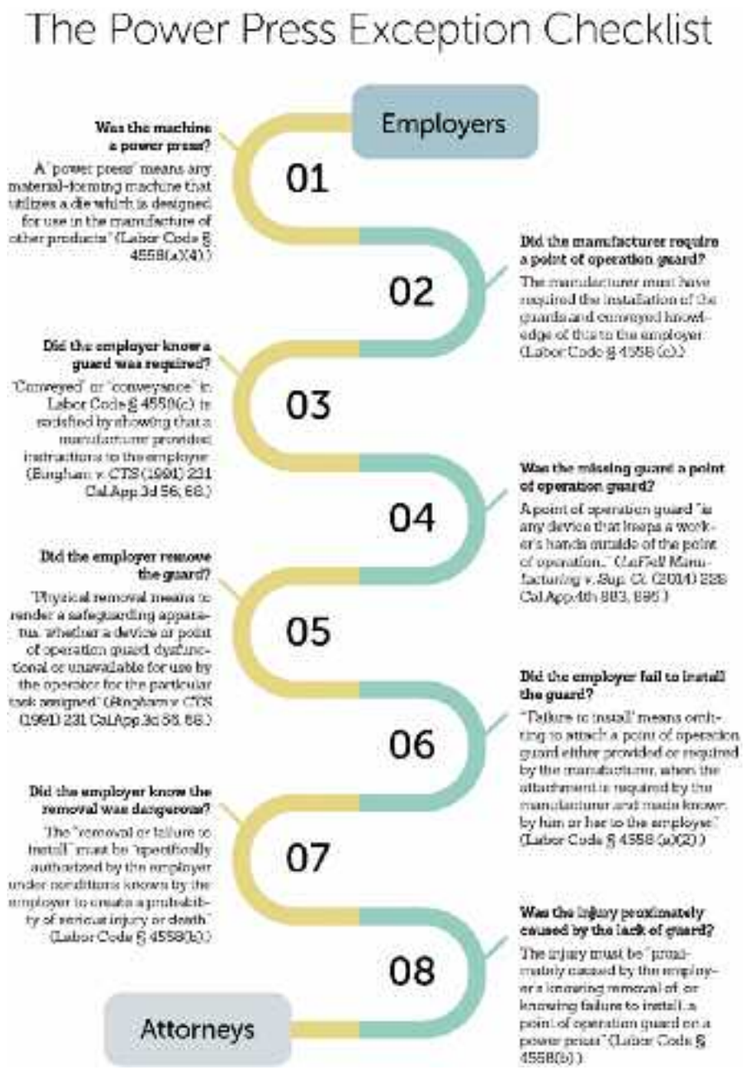

Figure 1

The power press in *Bingham* was also equipped with a light curtain that had fifteen light sensors so that the machine would not activate if the lights were disrupted. The defendant deactivated seven of the fifteen light sensors so that plaintiff could use his hands to change parts at the point of operation without deactivating the machine. The court found that the light curtain feature was intended to keep the operator's hands out of the point of operation and qualified as a point of operation guard as intended by Labor Code § 4558. (*Bingham, supra,* 231 Cal.App.3d at 65.)

Accordingly, the *Bingham* jury was properly instructed that a guard "as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending." (*Bingham, supra,* 231 Cal.App.3d at 65.)

The *Bingham* decision was heavily relied on in the recent case of *LeFiell, supra,* 228 Cal.App.4th at 883, where the court solidified that a point of operation guard "is any device that keeps a worker's hands outside of the point of operation…" (*Id.* at 895.)

Courts have held the following devices are not point of operation guards – removable blocks not capable of being permanently installed onto the power press (See *Gonzalez v. Seal Methods* (2014) 223 Cal.App.4th 405); die access door not intended to keep operator's hands out of the point of operation (*LeFiell, supra,* 228 Cal.App.4th at 895.)

Removal or failure to install

To be successful, you must show that the employer failed to install or removed the required guard. Liability turns on the (in)actions of the "employer," which includes "supervisor[s] having managerial authority to direct and control the acts of employees." (Lab.Code, § 4558 (a)(1).)

"'Failure to install' means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer." (Lab.Code, § 4558 (a)(2).)

"Removal" means "physical removal." (Lab. Code, § 4558(a)(5).) "Physical removal . . . means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra,* 231 Cal.App.3d at 68.)

As noted above, the defendant in *Bingham* claimed that it did not "remove" the dual hand controls; it simply "moved" them and made them inaccessible. (*Bingham, supra,* 231 Cal.App.3d at 68.) The court was unpersuaded by the

employer's hypertechnical explanation and found that moving the dual hand controls satisfied the "physical removal" requirement.

Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point-of-operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned. When the Regulations are read as a whole, we believe this is the most reasonable inference which can be derived from them in conjunction with section 4558. (*Bingham, supra,* 231 Cal.App.3d at 68.)

Manufacturer must require the guard

The manufacturer must have required the installation of the guards and conveyed knowledge of this to the employer. (Lab. Code §, 4558 (c).)

Proof of the manufacturer's "conveyance" of this information to the employer may come from any source. (Lab. Code, § 4558(c).) Authorities that have addressed the definition of "conveyed" or "conveyance" in Labor Code section 4558(c), have noted that a manufacturer conveyed information by providing instructions to the employer. (See *Bingham v. CTS* (1991) 231 Cal.App.3d 56, 68 – "the manufacturer conveyed the requirement for use of these safeguarding measures to [employer] CTS through its literature.") *Bingham* also noted that reference to a dictionary definition is proper when explaining the meaning of a word that is not a specific legal term of art. (*Id.* at 65.) Merriam-Webster states that to "convey" means "to make (something) known to someone. (http://www.merriam-webster.com/dictionary/convey.)

To satisfy this element, you must show that the employer had actual knowledge. You cannot argue that the employer should have known a guard was required. (See *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505.) Although it is reasonable to believe that the existence of a hole in the machine implies that a safety device is missing, that is not enough to prove actual knowledge. (See *Bryer v. Santa Cruz Pasta Factory* (1995) 38 Cal.App.4th 1711.) Additionally, mere knowledge of the OSHA regulations that require guards is insufficient to show specific knowledge that a manufacturer required a guard on a specific machine. (See *Swanson v. Matthews Products Inc.* (1985) 175 Cal.App.3d 901, 907.)

Loss of consortium/wrongful death

The power press exception to workers' compensation exclusivity is only available for the injured worker where the worker's injuries are not fatal. (Lab. Code, § 4558(b).) The spouse of an injured worker does not have a derivative claim for loss of consortium pursuant to Labor Code section 4558(b). (See *LeFiell, supra,* 228 Cal.App.4th at 282.) However, if the worker's injuries are fatal, the statute has carved out a valid claim for dependents. (*Id.* at 289.)

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Medina

the Best Lawyers in America list the last two years. She has been recognized as a Rising Star by Northern California Super Lawyers every year since 2012 and is rated AV Preeminent by Martindale Hubbell. She is also included on the Top 100 Trial Lawyers and Top 40 Under 40 lists by The National Trial Lawyers. In 2012, she received the Distinguished LRIS Panel Member Award, for the largest recovery in the history of the Bar Association San Francisco's Lawyer Referral Service Program. In 2011, she obtained a verdict that was included in "California Top Verdicts of 2011."

Profile: Rene Turner Sample

Influenced by her strong faith and personal family struggles, lifelong Fresno resident keeps her focus on the client's best interest and keeps her ego out of it

By Stephen Ellison

Caring about the client is a crucial characteristic of any lawyer, no matter which side they represent. But the biggest difference Rene Turner Sample has seen since transitioning from civil defense attorney to plaintiffs' trial lawyer is how much she truly cares about her clients.

Sample, a founding partner of Fresno-based Cornwell & Sample, loves being a trial lawyer, especially figuring out the issues and the competition, the part "where you get out of it what you put into it," she said. And while there's only a fine line between the two sides when it comes to work ethic, there are significant disparities in approaching and preparing a case, she said.

Feeling the justice

"From the plaintiffs' side, you're building a case; from the defense side, you're batting it down," Sample explained. "I don't want to minimize that role; it's not like it's easy work. But it's just a different approach and a different reward. With the defense, you feel the *win*. With the plaintiffs' side, it's more you feel the *justice*."

That very sentiment likely was the motive behind Sample starting her own plaintiffs' firm after working several years in defense and private counsel for insurance companies. As a defense lawyer, she certainly didn't mind the competition, solving problems and going for the win, not to mention getting plenty of trial experience. Ultimately, though, plaintiffs' work contained an element that cut much deeper.

"My Christianity and faith are very important to me. As plaintiffs' lawyers, we have a fiduciary obligation to our clients, to put our clients' needs before our own; that is Christian ministry," Sample said.

Sample

"But I didn't know that's how it was going to impact me. I went into it because it's a very similar type of law to what I was doing, I love trial work, and it just seemed like a good type of work to start my own practice.

Now it's about people

"Before, everything about law was competition and the win, and switching to it being about the people has been unbelievably rewarding," she continued. "I'm feeling like I'm living on a purpose. I feel like God gave me a skill set and life experience, and I'm really able to put it to its correct use."

Indeed, since she became a plaintiffs' trial lawyer, Sample has shown there's almost nothing she isn't capable of accomplishing. She has tried more than 50 jury trials to verdict in the San Joaquin Valley and is one of the valley's few plaintiffs' lawyers to have two personal-injury verdicts in excess of $1 million.

Sample was the first female member of the San Joaquin Valley Chapter of the American Board of Trial Advocates and remains the only female member of the chapter who specializes in plaintiff's personal injury. She also is past president of the Central California Trial Lawyers Association and an active board member of Consumer Attorneys of California.

Sample is a frequent lecturer on civil litigation, having taught many of the Central Valley's litigators as an adjunct faculty member at her alma mater, San Joaquin College of Law.

Some of her recent trial results include: a slip and fall case resulting in shoulder replacement surgery for which she obtained a $1.2 million jury verdict; a vehicle accident resulting in mild traumatic brain injury for which her client received a $2 million jury verdict; a metal object in a restaurant meal resulting in dental injuries for which a jury awarded her client $300,000; and an insurance bad-faith case involving an insurance company's failure to pay a severely injured plaintiff the $15,000 policy limit in a timely manner, for which she obtained a $900,000 jury verdict.

From childhood poverty to the law

Born and raised in Fresno, Sample grew up in poverty, she said, as her parents were very young when they married. She recalled the very moment when she fell in love with the idea of a career in law; it was when she was in the sixth grade, and her father introduced her to a female judge.

"That was a long time ago, and we didn't have a lot of exposure to professional women," she said. "But as soon as I met her, I was just focused on wanting to be a judge when I grow up. … It's funny because part of that story was I was in the sixth grade, and back then [the TV show] 'Laugh-In' was a big deal. So I was going to be a lawyer and a go-go dancer. I settled and became a trial lawyer."

The young Sample never wavered from her aspirations. She never had any other interests and always loved school, so it was pretty much a foregone conclusion that she would attend law school. She stayed close to home for all her higher education, attending Fresno State as an undergrad. And she put herself on the fast track.

"I met my husband when I was 16. … He had told me he wouldn't marry me until I graduated from college," Sample recalled. "So I graduated in five semesters."

For law school, Sample went on to San Joaquin College, which was a four-year night program at the time, she said. She and her husband married during her first year of law school and had their first child during the summer between her third and fourth years at San Joaquin. Her plan at the time was to work part time and stay at home to raise children. But during her final year of law school, she took a trial-practice class taught by the hiring partner from the largest law firm in Fresno, and after the class he invited her to interview at the firm.

"Initially, I said no," Sample recalled. "But when I went to the interview and met all the lawyers, I could tell my personality was so much like theirs. I just decided to give it a try, and I ended up taking a full-time position. Later on, I cut back my hours when my kids got a little older. But that's how I started out, and I just never looked back. I still love being a trial lawyer."

From Allstate to practicing with Steve Cornwell

When the time came to cut back her workload, Sample took a job as in-house counsel with Allstate Insurance, staying there about five years before she got the bug to start her own practice. She met up with her former colleague, Steve Cornwell, whom she considered a mentor, and told him she had decided to go be a plaintiffs' lawyer.

"He said, 'OK, let's do it.' I wasn't even thinking he would come out," Sample said. "It was awesome because he's like 20 years my senior and has this unbelievable reputation. So the two of us started this practice, and what was great was we took all of those insurance defense files (from the firm) with us and finished them up. Obviously, we weren't going to be in competition with them; we were going into plaintiffs' law. So we finished them up as our own firm. It gave us a cushion where we were getting an hourly wage while we were building up our plaintiffs' practice. … It was an easy transition the whole way."

Personal struggle influences perception of cases

In terms of recent memorable cases, Sample recalled a client of hers, a woman, who had a history of homelessness and addiction and had been severely injured. Because of her personal experience with having a loved one in recovery, her son, Sample believed she had a unique ability to see past a person's perceived baggage, and the entire ordeal made her a better lawyer.

"I think I've always been fairly non-judgmental. Any kind of judgment I had in me I lost a decade ago going through what we went through with our son," she explained. "I was able to get full value for her case.

"That's one of the things that was part lawyering and part really caring and not being afraid of the risk that a jury may not warm up to her. I had full confidence that a jury would be able to see her for the woman she really was and not for her past. I've always said, 'You know how to have a great verdict? Have a great case.' The great verdicts come from just being there and not giving up too soon."

When she's at trial, Sample's goal is to simply get the jury to drop their barriers and actually hear and listen to her case. Jurors, she said, are taken out of their world and put into a courtroom to hear someone else's problems, and they go in with the thought that the only answer is money. Going in with that mindset makes most jurors uncomfortable about the entire process, she said.

"If they sense the trial is all about money, they have a hard time listening," Sample said. "So you end up spending a lot of time with clients to get them to speak without an agenda. When someone is just being real, you can listen. So if they feel like you're just trying to increase the value of the case, they tune you out. In a trial setting, you just have to get them to break down those barriers so they can hear your case.

"I'm pretty animated in court, so they'll usually listen to me," she continued. "But that doesn't necessarily mean they'll feel the case. They can't feel the case for what it is unless all the witnesses have that same sincerity. And it takes a lot of time to get witnesses to let their guard down and say what's real."

Working in the recovery community

When she's not in the courtroom or the office, Sample stays active in the recovery community, particularly with a local nonprofit rehabilitation center where her son found recovery several years ago. She helps raise money for the center and, along with her son, co-hosts Sunday night dinners for young men he is helping at the center. She's said she does it for her son, for the people who need the support and for the families who are going through the same difficult ordeal she endured.

"There was a time when I was really tired, and I'm not tired right now," Sample explained. "I'm at that restored part of my life now. Life isn't always easy, but I'm at that easy part right now, and I have the energy to help these kids because I know their parents are tired."

Sample also spends time with her nine-month-old granddaughter, who lives in Virginia. And she has another grandchild on the way.

For those with aspirations of a career in law, Sample said they should read cases while in law school so they can actually learn to think like a lawyer. When they actually begin practicing, it's all about work ethic, she said, and trusting their instincts. Most of all, they should truly believe in the client-comes-first approach.

"Take it seriously that you're putting your client's interest before your own," she said. "If you keep that as your focus, it will guide you to do the right thing in how much work to put into a file, the decisions you make about your case and, most of all, how to keep your ego out of it."

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The perils of coat tailing

When you hitch a ride on someone else's trial, remember – "Nobody Rides for Free"

By Walter "Skip" Walker

Perhaps this has happened to you. A friend approaches, a colleague, a referral source. There is a fine case underway. A good attorney has it. Discovery is being conducted and all is going superbly. Experts have been retained; maybe even videos or other exhibits created. And here's the great news for you: there is a second victim, a lesser victim, who needs representation, and all you have to do is file suit and tag along.

Sounds simple enough, doesn't it? Not only will you get the benefits of another attorney's efforts, but the value of your own case will be enhanced either in settlement or at trial. After all, what defendant would want to settle with the Big Plaintiff and go to trial against the little one? And if the case does not settle and Big Plaintiff asks for millions from the jury, wouldn't a mere percentage of Big Plaintiff's demand be reasonable for your client?

The situation had never come up in my own 35-plus years as a plaintiff's lawyer, and then all of a sudden there it was in back-to-back cases. In the first, a well-known attorney (we will call him WKA) was suing a major public entity on behalf of a seriously injured client. WKA was already invested, had already lined up experts, was already on the attack. Sure, he would welcome us aboard with our lesser-injured client. We would not even need to get our own experts. After all, we are fellow warriors of common interest.

And on the heels of that opportunity came another. A big plaintiff's firm (we will call it "BPF") had a very good product liability case against a construction vehicle, the driver of which had inadvertently backed over a co-worker, resulting in serious physical injury. For BPF, almost any investment of time and money was worthwhile because the only uncertainty was the number of millions to be obtained. But there was a second victim, an unlikely one, but a victim nonetheless.

The driver of the offending vehicle had suffered what would turn out to be indisputable psychological injury, beginning the moment he felt the impact and discovered he had run over his friend. *Whoa*, you might say: You mean the person who drove the vehicle over his buddy wanted to file a lawsuit for what he, himself, had done? To which my response is: No. The driver wished to file suit for his own foreseeable damages resulting from the expected use of a defective product. The case of *Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 579-580, allows that very thing:

"[W]e conclude that where, as here, the complainants are using a defective product for the purpose and in the manner intended and the product causes injury to another because of the defect, the users may state a cause of action for emotional trauma they sustain through sensory perception of the injury thus inflicted."

You've got your psychological injury, you've got your legally authorized cause of action, you've got your hardworking, free-spending BPF counsel what; could go wrong?

So we coat-tailing counsel signed up both clients and sallied forth in the footsteps of our brethren. And for a while, all went well. In the case of the defective vehicle's operator, we defeated summary judgment. In the case against the public entity, we traipsed dutifully along with WKA, filling in where needed, consulting when asked, bringing our own considerable experience to the table, and readily accepting assurances that we were in this together.

It was not until the two trials approached that there was a change in the wind. Word got out in one case that the major public entity defendant had a set amount of money allocated to settle. Not to worry, WKA told us. His client wanted considerably more than what the public entity had available and we were definitely going to trial. Moreover, because we were definitely going to trial, it was now time that we, the State of Rhode Island in this Union, paid our share of the experts. We agreed it was. We were, after all, going to trial together.

Meanwhile, as we closed in on trial in the second case, BPF informed us that it was not going to share its experts because of what it had determined was a conflict of interest where, at the very least, BPF wanted to be able to blame our client when it came time to litigate the worker's comp lien.

To be fair, and this is one of the points of this epistolary warning, neither WKA nor BPF owed anything to me or my clients. WKA and BPF were friends and colleagues, but their legal and fiduciary obligations were to their own clients, who were depending on them to get maximum recovery.

And so unfolds the saga. Suddenly, with less than two weeks to go before trial, we were informed by defendant governmental entity that through an extended series of negotiations about which we were unaware, WKA had secured a settlement for *all the money* defendant had available. WKA and his client were now out of the case and defendant would proceed to trial against us alone.

Well, okay. We may hunt as a pack, but we are not necessarily going to share the kill. And at least we had the experts that WKA had retained. Perhaps in these last few days before trial we could meet them. Take over their billings. Learn all the things that WKA had told us were under control.

Meanwhile, in the product-liability case, we had made the strategic decision not to hire our own experts because the value of the case did not warrant the expense and because we were going to be able to take advantage of BPF's experts since, for the most part, we had a commonality of interest. All we had to do was make sure BPF's experts got deposed so that we could claim their testimony as permitted by Code of Civ.Proc. § 2034.310(a). Except the experts' depositions kept being delayed, postponed, canceled until BPF informed us that none of its experts would be deposed because, it too, had settled and no, BPF was not going to release those experts to us.

All the reasons for coat tailing – *It's easy! It's cheap! It will be fun to try the case together!* – disappeared in a cloud of smoke.

Fortunately for my firm, we are blessed with the resources to proceed on our own. In the case against the public entity, we have been able to re-invent the wheel with the inherited experts; and in the case of the defective product we are proceeding without experts on the consumer expectation theory (*Who could one get for an expert on consumer expectations – Elizabeth Warren?*). But of course we are paying deeply on matters that we might not have undertaken if we had known that we would be proceeding on our own.

The lessons for us, and perhaps for you, are clear. Do not rely on others. Assume the worst case scenario. Do your own work, even if it is duplicative. Get your own experts, even if they are overlapping. And remember, as the song told us in the 1991 movie *Point Break*, "Nobody Rides for Free."


Walker

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Vocational rehab examination by the defense

Don't agree to any sham demand for a vocational exam of your client by a defense expert

By Eustace de St. Phalle and Andy Clay

They often come in waves – defense demands to do a vocational-rehabilitation expert examination of your client. This often happens after a defense attorney tells a war story at a lecture about how he tricked a plaintiff's attorney into giving him something he was not entitled to in discovery. Following the lecture, we begin receiving a flurry of requests for defense vocational examinations of our clients. Sometimes these are couched as medical exams, although they are not. The defense follows the adage, "Run it up the flag pole, and see if anyone salutes."

For many years, the defense has often made these requests, and from time to time they have succeeded in obtaining vocational examinations of an injured plaintiff. Then, the charlatan defense expert will have a foundation for making wildly inaccurate claims about your client's ability to work. Many of us have repeatedly resisted such requests by pointing out that they are not authorized under California law and no California code permits such an exam. The recent case *Haniff v. Sup. Ct. of Santa Clara Cty.* (*Holman*) (2017) 9 Cal.App.5th 191 reaffirmed what we in the plaintiffs' bar have said all along: that defendants cannot demand a vocational examination, bolstering the defense against this unauthorized discovery demand.

Plaintiff's vocational-rehabilitation expert

In a personal injury case, the plaintiff may claim future loss of income (CACI 3903C) or future loss of earning capacity (CACI 3903D). Generally, the plaintiff may claim an amount equal to what the plaintiff's expected income or earning capacity would have been if the incident hadn't happened, minus any mitigating income, i.e., what the injured plaintiff is likely to earn with their current physical limitations.

The plaintiff will often present opinion testimony about plaintiff's future income loss and mitigating income through a vocational-rehabilitation expert. Typically, a vocational-rehabilitation expert will interview the injured plaintiff, evaluate the plaintiff's skills and ability to work, and match these with the demands of potential jobs. The vocational-rehabilitation expert's opinions are usually central to the plaintiff's claims regarding mitigating income, i.e., that the plaintiff can't work, must change careers, or will not make as much money as they did prior to the incident.

Vocational-rehabilitation experts are not medical doctors. To assess the plaintiff's physical limitations affecting their potential work tasks, the vocational evaluation must rely on foundational materials and opinions of other experts. The vocational expert may obtain information from medical experts or may utilize a Functional Capacity Evaluation (FCE) to establish a person's injuries and limitations. An FCE inventories the plaintiff's ability to perform various functions (such as reaching, lifting, carrying, sitting, standing, mentally concentrating, etc.). The FCE may be done by the vocational expert, or by another professional assisting or advising the vocational expert.

While a vocational-rehabilitation expert's work often involves medical issues, this expert is primarily concerned with the potential future jobs and/or career of the injured person. The vocational-rehabilitation expert's central task is to assess how the plaintiff's physical and mental abilities and limitations allow them to fulfill (or prevent them from fulfilling) the demands of particular jobs in the labor market at particular salary rates.

Objections to defense vocational rehabilitation exams

The defendant may also retain a vocational-rehabilitation expert to evaluate the plaintiff's ability to work and potential mitigating income. However, a defense vocational-rehabilitation expert *does not have a right to examine or interview the plaintiff.*

There is no provision in the Discovery Act for a defendant to demand a "vocational examination" of the plaintiff by a non-physician. Code of Civil Procedure section 2019.010 sets forth six methods of civil discovery: "(a) Oral and written depositions; (b) Interrogatories to a party; (c) Inspections of documents, things, and places; (d) Physical and mental examinations; (e) Requests for admissions; (f) Simultaneous exchanges of expert trial witness information." Courts examining arguments for defense vocational examinations have noted that a "vocational exam" is not an authorized method of discovery under section 2019.010 or any other statutes. (See, *Browne v. Superior Court* (1979) 98 Cal.App.3d 610; *Haniff, supra,* 9 Cal.App.5th 191; discussed *infra.*)

Generally, the defense may demand a physical examination of the plaintiff under Code of Civil Procedure sections 2032.210-2032.260, or a mental examination (or further physical examinations) under sections 2033.310-2032.320. Section 2032.220 references "the *physician* who will conduct the examination." Case law holds that only a *licensed physician* may conduct an examination under sections 2032.210 *et seq*. (*Browne, supra,* 98 Cal.App.3d 610, 615)

The plaintiff's recognized privacy considerations are yet another reason the courts should not add yet another invasive examination method to the defendant's repertoire of discovery devices. Privacy and intrusiveness are a general concern with defense examinations. Physical examinations are inherently invasive. A doctor, whose job it is to disprove the plaintiff's claims, gets to examine plaintiff, touch the plaintiff's person, and measure their body parts or physical responses. California courts have recognized that physical examinations may invade the plaintiff's privacy as to their health conditions or rights as a litigant. Both statutory and case law uphold limitations into defense physical examinations. The statute limits the exam to portions of plaintiff's body or conditions that are "in controversy" in the action (Code of Civ.Proc., § 2032.220(c); examination related to other parts of the body would be invasive of the plaintiff's privacy. (See, *Britt v. Superior Court* (1978) 20 Cal.3d 844) Also, the statute prohibits any demand for painful, protracted, or intrusive tests or procedures. (Code of Civ.Proc., § 2032.220(a)(1))

Further, a defense vocational exam is almost certainly duplicative of other discovery. With respect to defense medical examinations, case law holds that taking a history from the examinee is not authorized, and is likely to be duplicative of other discovery, such as the history given in the plaintiff's deposition. (*Golfland Entertainment Ctrs., Inc. v. Super. Ct*. (2003) 108 Cal.App.4th 739, 745-746.) For vocational examinations, again, the defense has other sources for the information sought in these exams. Defense counsel usually asks the plaintiff at deposition about their work history and work limitations, and obtains documents and written discovery related to these issues. The defendant's medical experts will offer opinions on plaintiff's medical limitations that relate to employability. It would be unnecessary and duplicative for the defendant to obtain yet another interview with the plaintiff through the defense vocational expert, on issues covered elsewhere in discovery.

Case authority prohibiting examinations

The leading case on defense requests for vocational examinations is *Browne v. Superior Court* (1979) 98 Cal.App.3d 610. In *Browne*, the plaintiff was injured in an automobile-motorcycle accident and claimed future wage loss. The defendant requested a vocational examination, arguing that the statute did not expressly prohibit vocational examinations, and the court should permit the exam based on the liberal policy permitting discovery.

The Court granted defendant's request.

The Court of Appeal reversed, holding that since the statute provided for an examination by a physician, it would subvert the intent of the statute to include vocational exams by non-physicians: "To read into the governing statute authority to conduct a physical examination by a non-physician would *subvert the express legislative policy that such physical examinations be conducted only by a physician*, by definition a person holding a valid certificate to practice medicine issued by a competent medical authority." (*Browne, supra,* 98 Cal.App.3d 610, 615, emphasis added.)

The Court also noted that the defendants were not disadvantaged by an inability to conduct a separate vocational examination, as the defendants already had enough information. Defendant had been "afforded access to all of the notes and records of the examination of petitioner conducted by the state vocational rehabilitation counselor, augmented by the latter's deposition. . . ." (*Browne, supra,* 98 Cal.App.3d 610, 616 n. 4.)

Based on the authority and reasoning of *Browne*, and the lack of a statute authorizing a vocational exam, plaintiffs have resisted defendants' demands for vocational examinations. However, defendants may sometimes demand an examination despite the negative case authority in civil law. (In Workers' Compensation cases, there is authority for demanding a vocational rehabilitation evaluation, since Labor Code section 5708 exempts workers' compensation judges from the statutory rules of evidence or procedure; see, *Holz v. Workers' Comp. Appeals Bd*. (2013) 78 Cal. Comp. Cases 484, 2013 WL 1915679.)

Haniff

This issue was recently discussed in the Sixth District case, *Haniff v. Sup. Ct. of Santa Clara Cty* (*Holman*) (2017) 9 Cal.App.5th 191, which reaffirmed the *Browne* decision against vocational exams. [The *Haniff* case should not be confused with *Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, a medical malpractice case often cited regarding the proper measure of medical damages.] *Haniff* was a personal-injury auto accident case in which the plaintiff sustained a fractured pelvis, and claimed he could not return to work. The defense sought to have the plaintiff examined by a vocational-rehabilitation expert. The defendant successfully moved the trial court to compel this examination, based on the broad authority of Code of Civ.Proc., § 2017.010 and the need for the exam to avoid injustice, as well as out of state authority supporting defense vocational exams.

On a writ of mandate, the *Haniff* Court reversed the trial court's decision. The Court noted that generally, civil discovery "cannot be expanded beyond the statutory limits." (*Haniff, supra,* 9 Cal.App.5th at 199.) The Court cited *Browne* with approval, noting that *Browne* did not find any legal rationale for authorizing vocational exams. (*Id*. at 200.) The Court also noted that C.C.P. § 2019.010 listed six authorized methods of discovery, which did not include vocational exams. (*Id*. at 200-201.) The history indicates that the Legislature intended these six methods to be the complete list. (*Id*. at 202-203.) C.C.P. § 2017.010 could not authorize new methods of discovery as it only discussed the scope of discovery. (*Id.* at 205-206.) Finally, neither Workers' Compensation Appeals Board cases, criminal cases, nor out-of-state cases, were persuasive on this issue, as California statutes were specific about permissible civil discovery methods and excluded vocational exams. (*Id.* at 206-208.)

The Court of Appeal concluded by holding as follows:

> Since a *vocational rehabilitation examination is not one of the civil discovery methods* authorized by section 2019.010, we conclude under the applicable legal principles that *the trial court acted outside the scope of the court's discretion when it ordered Haniff to undergo a vocational rehabilitation examination*.
> (*Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 208-209, emphasis added)

How to object to vocational examinations

Given the recent case authority, it should be straightforward to object to a request for an examination by a non-physician vocational-rehabilitation expert. The objection can be in a form such as the following:

> Objection. Defendant's request for an examination of plaintiff by defendant's vocational-rehabilitation expert is outside the methods of permissible discovery under Code of Civil Procedure section 2019.010. The proposed examiner is not a physician and is not authorized to conduct an examination of plaintiff pursuant to sections 2032.210 *et seq*. There is no statutory authority for this examination. (*Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 208-209) Plaintiff will not submit to this examination and will not appear on the date demanded.

If the defendant tries to compel a vocational examination over your objection, you are likely to defeat this motion based on the *Browne* and *Haniff* cases, and the lack of authority for this type of discovery. Check the code and restrict at least one of the defense tactics of misinformation and distortion.

de St. Phalle

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If you love them, let them go

Withdraw as counsel and advise your client to proceed pro se. The carrier may low-ball them and open up the policy

By Patrick Gunning

There is no conversation more frustrating than explaining to a victim of a catastrophic collision that their case holds little value due to the other party's inadequate insurance-policy limits. Although the client's damages may be worth millions, no full and fair justice can be obtained unless the insurance carrier declines to settle the case within the inadequate policy limits and thereby "opens" the policy.

Recently, our firm and referring co-counsel have embraced a novel approach in a catastrophic-injury case involving an underinsured driver where liability was disputed. Before a lawsuit was filed but after the defendant's policy limits were disclosed, co-counsel withdrew as the attorney of record and advised the client to pursue "opening" the policy via a settlement demand as an unrepresented pro se claimant. As a result of large insurers' well known institutional prejudices against unrepresented litigants, the defendant's insurer denied the plaintiff's claim in bad faith, the policy was opened, and ultimately a multi-million dollar settlement was obtained. I am sharing the method we used to accomplish this result in the hopes that you may find it useful in your practice.

Facts of the example case

The case at issue involved an elderly man who was crossing the street near his home when he was struck by a negligent driver and sustained severe injuries, including hip and leg fractures requiring surgery, a significant traumatic brain injury, necessitating past medical treatment and also injury requiring a spinal-fusion surgery. Medical costs were in excess of six figures.

Liability, however, was seriously in dispute, as multiple eyewitnesses presented contradictory testimony, with the defendant and one other independent witness claiming the plaintiff "darted out" from between parked cars and was not within the nearby crosswalk at the time of the incident. The defendant driver had a woefully inadequate insurance policy through a major auto insurer, was not in the course and scope of any employment, and had no assets or excess coverage.

Initial steps

Co-counsel began working up the case by conducting the appropriate workup of a serious personal injury case – gathering witness statements, medical treatment and billing records, the police report, and formally requesting the disclosure of the defendant driver's applicable insurance policies and their policy limits. When the defendant driver's insurer revealed their inadequate policy limits for the catastrophic injuries at issue, counsel for the plaintiff had a choice.

In most situations, the attorney of record would then prepare a settlement demand package and demand the insurance policy limits. However, in this case, counsel correctly deduced that if the plaintiff was formally represented, the likelihood that the insurer would pay a policy limits demand was exceedingly high. After attorneys' fees, costs, and medical liens were taken into account, such a settlement would have left the client with essentially no recovery.

To maximize the client's potential likelihood of a full and fair recovery, counsel planned to voluntarily withdraw as attorney of record in the settlement correspondence and to allow the plaintiff and his family to pursue the matter pro se. This decision ultimately allowed the plaintiff to use the insurer's own bad-faith tactics against it, and to achieve full and fair justice.

Taking advantage of unrepresented clients

It is no secret that the insurance industry wants claimants to be unrepresented in order to take advantage of them with lowball settlement offers and unfair denials of liability. After the widespread adoption of the "Colossus" computer program and other similar systems in the insurance industry in the 1990's and early 2000's, courageous whistleblowers came forward and disclosed many unethical practices of insurance companies and nationwide lawsuits by consumer attorneys further exposed their conduct.

For example, in nationwide class-action litigation, former Allstate employees testified that they were "trained to build rapport with customers and discourage them from hiring lawyers." (Bartelme, Tony. *STORM OF MONEY: Insider tells how some insurance companies rig the system*. South Carolina Post Courier. December 1, 2012.) This practice was and still is prevalent in the insurance industry. According to noted insurance whistleblower Robert Dietz, adjusters at Farmers Insurance were "taught how to dissuade people from hiring a lawyer in the first place, "were evaluated annually for this talent," and "whenever adjusters allowed claimants to retain an attorney, they had to fill out a form to explain to supervisors how they let it happen." (Heckman, Candace; *Low-ball offers nothing new in insurance industry*. Seattle Post-Intelligencer. May 14, 2003.)

While insurance companies treat an unrepresented pro se litigant differently in practice, the law holds pro se litigants to have equal rights under the law, and an equal right for their settlement demands to trigger an insurer's duty of good faith and fair dealing to settle within the policy limits.

Representation is irrelevant to the insurer's good faith duty to settle

To prove insurance bad faith under California law for an insurer's refusal to accept reasonable settlement within the applicable liability policy, a plaintiff must prove: (1) the plaintiff in the underlying case brought a lawsuit against the insured for a claim that was covered by their insurance policy; (2) the insurer failed to accept a reasonable settlement demand for an amount within policy limits; and (3) that a monetary judgment was entered against the insured for a sum greater than the policy limits. (CACI Civil Jury Instruction 2334.) "A settlement demand for an amount within policy limits is reasonable if the insurer knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on the underlying plaintiff's injuries or loss and the insured's probable liability." (*Ibid.*) Because the implied covenant entails a duty to investigate properly submitted claims, "the insurer is charged with constructive notice of facts that it might have learned if it had pursued the requisite investigation." (*KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 973.)

The reasonableness of an insurer's actions towards a claimant's demand is thus based on actual or constructive notice of the "injuries or loss" and the "insured's probable liability," not whether the claimant is represented by an attorney. Under the California Insurance Code and the California Code of Regulations sections pertaining to third party claims against auto insurance policyholders, no distinction is made in the duties owed by an insurer to a third party claimant based upon whether they are represented by an attorney or not. (See, e.g., Cal. Ins.Code § 790.03; Cal. Cal.Code Regs., § 2695.1 *et seq*.) Nor is there any such distinction made in the published case law on bad-faith claims. Thus, while as a matter of practice insurance companies frequently undervalue and ignore claims made by unrepresented claimants, as a matter of law their settlement demands have equal force and effect in opening a policy.

Counsel withdraws with client's consent

With client consent, referring counsel withdrew and the client pursued a policy limits demand as a pro se claimant. Fully aware of these factors and the normally hopeless situation facing their client, co-counsel pursued an unconventional and intelligent strategy. The client and his family were advised of the potential outcomes and obtained their consent to withdraw as counsel from the pre-litigation settlement discussions.

Prior to his withdrawal, counsel provided the clients with advice as to the form, content, and materials to provide in support of a policy limits demand. A new attorney/client agreement was formed, strictly limiting counsel's role to ongoing, as-needed advice and guidance in drafting documents and responses necessary to pursue their pro se policy limits demand, and waiving counsel's right to fees in the event the policy limits were paid. After this new agreement was formalized, counsel wrote to the defendant's insurance carrier and formally withdrew as counsel of record, advising that in light of the limited insurance proceeds the clients had elected to conduct settlement negotiations pro se and to contact the claimants directly on all further issues relating to the case.

This action did not violate attorney ethics rules

The question many attorneys have when presented with this scenario is whether it creates ethical issues under the Rules of Professional Conduct or the Business and Professions Code. According to published case law and bar disciplinary opinions in California, the answer is no. Such an arrangement does not violate a California attorney's professional ethical obligations.

First, "[t]here is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited scope of the representation." (L.A. Co. Bar Assn. Form. Op. 483 (1995); see also *Joseph E. DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 158.) Any limitations on the scope of work to be performed by the attorney in this role should be stated explicitly and completely. (*Id.*; see also L.A. Co. Bar Assn. Form. Op. 502 (1999).)

Second, "there is no specific statute or rule which prohibits an attorney from assisting a client in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney's role." (*Ricotta v. State of California* (S.D. Cal. 1998) 4 F. Supp.2d 961, 987-988; L.A. County Bar Assn. Form. Op. 483, March 20, 1995.) Nor are there published court decisions in California state or federal courts which have required an attorney's disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a litigant appearing pro se. (*Id.*; see also L.A. Co. Bar Assn. Form. Op. 502 (1999).) There are also no published California state case or ethics opinions holding that an attorney's preparation of a pleading or document for the signature of a party appearing pro se without disclosure to the court of the authorship of the pleading or document inherently involves deception or misleading of a court within

the meaning of Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct. (L.A. Co. Bar Assn. Form. Op. 502 (1999).)

Finally, the ethical standards referenced above refer to the filing of documents by the pro se litigant with the court, which imposes additional duties to the attorney under the Business and Professions Code. Under California's ethics rules and Business and Professions Code, neither a pro se litigant nor a lawyer retained by one are required to disclose such assistance, particularly as it would relate to pre-litigation communications or settlement demands. As a result, nothing in referring counsel's conduct created an ethical conflict, particularly since the limits of the new representation were expressly disclosed and full consent was given by the client.

The policy limits demand is rejected

The pro se claimant sent a valid policy limits demand, which was ultimately rejected. In advice to the soon-to-be pro se claimant, referring counsel directed them to include the necessary components of any policy limits demand, (1) evidence to establish a likelihood of liability; (2) evidence to establish damages in excess of the policy limit; (3) a statement that settlement for the policy limits would release all claims, including loss of consortium claims; (4) a statement that all liens would be paid by the claimant, and (5) a time limit to accept. The claimant's family and claimant provided the police report, a written under-oath statement by the claimant, his medical records, and medical billing documentation showing paid *Howell*-number special damages in the six figures.

The insurer responded in the usual fashion, demanding authorizations for medical records, Medicare, and additional time to investigate – all of which were granted. After multiple extensions were granted, the defendant driver's insurer reached a decision. Despite conflicting testimony and evidence over whether the claimant was or was not in the crosswalk, and damages valued in the seven figures, defendant's insurer completely denied liability and refused to pay the policy limits. Based upon past experience, this was a clear, unambiguous case where a client represented by counsel imminently threatening suit would have received a tender of the policy limits from the insurance carrier. Defendant's insurer, however, got greedy and refused to pay, opening the policy.

Counsel steps back in

With an open policy in hand, the claimant and his family returned to their attorney, entered into a new attorney/client agreement, and filed a lawsuit. At this point, any attempt by the defendant's insurer to belatedly tender the policy limits was futile. "[R]ejection of an initial settlement offer is frequently regarded as a preliminary bargaining tactic, not as a break off of negotiations … The injured party, however … may take an initial rejection at face value and choose thereafter to submit his claim to the uncertainties of litigation … Even if the insurer attempts to resume negotiations by a belated offer of the policy limit, that action does not necessarily relieve it of the onus of an earlier bad faith rejection." (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 797-8 (disapproved on other grounds); see also *Martin v. Hartford Acc. & Indem. Co.* (1964) 228 Cal.App.2d 178, 185.)

Ultimately, our firm associated in this case as trial counsel, and resolved the matter for a confidential seven-figure settlement at mediation, despite very tough liability evidence and the client's advanced age. The settlement allowed the client to afford the substantial medical care and in-home assistance he will need for the remainder of his life, and to provide new opportunities for his family. In a situation where all too often full and fair compensation is impossible to obtain, creative lawyering (or in this case, creatively knowing when *not* to lawyer) allowed this client to receive justice and forced a major insurer to face the consequences for its bad-faith conduct towards pro se injury claimants.

When should you try this approach?

Ultimately, there were several necessary factors in the example case that made this course of action a successful strategy. This technique for opening an insurance policy would potentially work well in future cases with (1) catastrophic injuries or wrongful death damages; (2) limited insurance proceeds; (3) disputed liability evidence, and (4) a good working relationship with the clients. However, too often cases that meet these criteria must be rejected or immediately settled for the inadequate policy limits, with the client denied any meaningful recovery. Any attorney willing to "let go" of some client control and attempt this method on an appropriate case could reap substantial rewards for their client.

Counsel in this example case took a real risk of not receiving their share of the limited insurance proceeds in attorney fees by allowing the clients to proceed with the pro se policy limits demand and, unsurprisingly, the large insurance carrier acted with callous disregard that the potential judgment against their insured was likely to exceed the amount of the demand based on the underlying plaintiff's injuries or loss, even if the defendant were ultimately only found a small percentage at fault. Success with techniques like this can only help deter large insurance companies' ongoing efforts to take advantage of those who are unable to or purposefully discouraged from obtaining the competent representation they need.


Gunning

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Appellate Reports

McGill v. Citibank, NA — Allows an individual plaintiff to seek a public injunction under the UCL and FAL – relief whose primary purpose is to benefit the public generally – without the need to pursue the claim as a class action

McGill v. Citibank, NA

(2017) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this decision: (1) lawyers handling cases involving requests for injunctive relief; and (2) lawyers handling UCL claims seeking injunctive relief.

Why it's important: (1) Holds that arbitration provisions that purport to waive the right to seek the remedy of public injunctive relief in any forum are unenforceable in California, even after the U.S. Supreme Court's decision in *Concepcion*. (2) Makes clear that a plaintiff may seek public injunctive relief under the UCL without having to bring the case as a class action.

Synopsis: The California Supreme Court adopted a rule in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 and *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077, which held that agreements to arbitrate claims for public injunctive relief under the CLRA, the UCL, or the false advertising law are not enforceable in California (the "*Broughton-Cruz* rule.") Several California and federal decisions have held that the *Broughton-Cruz* rule was abrogated by the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*), which substantially increased the preemptive force of the Federal Arbitration Act ("FAA").

In *McGill*, the California Supreme Court granted review to decide whether the *Broughton-Cruz* rule survived *Concepcion*. But it ultimately decided that the case did not present that issue, as explained below.

McGill opened a credit card account with Citibank and purchased a "credit protector" plan (Plan). Under the Plan, Citibank agreed to defer or to credit certain amounts on McGill's credit card account when a qualifying event occurred, such as long-term disability, unemployment, divorce, military service, or hospitalization. Citibank charged a monthly

premium for the Plan based on the amount of McGill's credit card balance. As originally issued the Plan had no arbitration provision, but Citibank amended the original agreement to include one. The arbitration clause applied to "all claims" between McGill and Citibank, including all claims "relating to your account or a prior related account, or our relationship, including claims regarding the application, enforceability, or interpretation of the agreement and the arbitration provision. The provision applied to "all claims, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek."

The arbitration clause specifically limited the relief that the arbitrator could provide: "Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis." It further provided that "Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court."

In 2011, McGill filed this class action based on Citibank's marketing of the Plan and the handling of a claim she made under it when she lost her job in 2008. The operative complaint alleges claims under the UCL, the CLRA, and the false advertising law, as well as the Insurance Code. For relief, it requests, among other things, an injunction prohibiting Citibank from continuing to engage in its allegedly illegal and deceptive practices.

Citibank petitioned to compel McGill to arbitrate her claims on an individual basis. The trial court ordered McGill to arbitrate all claims other than those for injunctive relief under the UCL, the false advertising law, and the CLRA. The Court of Appeal reversed and remanded for the trial court to order all of McGill's claims to arbitration, concluding that under *Concepcion* the FAA preempts the *Broughton-Cruz* rule. The Supreme Court granted review and reversed.

(1.) *Public vs. private injunctive relief. Broughton* and *Cruz* distinguished between public and private injunctive relief. The latter primarily resolves a private dispute between the parties and rectifies individual wrongs. It benefits the public, if at all, only incidentally. By contrast, public injunctive relief by and large benefits the general public, and benefits the plaintiff, if at all, only incidentally and/or as a member of the general public. For example, an injunction under the CLRA against a defendant's deceptive methods, acts, and practices generally benefits the public directly by the elimination of deceptive practices and will not benefit the plaintiff directly because the plaintiff has already been injured, allegedly, by such practices and is aware of them.

McGill's claims are framed as claims for public injunctive relief. She sought, inter alia, an order requiring Citibank "to immediately cease such acts of unfair competition and enjoining Citibank from continuing to conduct business via the unlawful, fraudulent or unfair business acts and practices complained of herein and from failing to fully disclose the true nature of its misrepresentations."

(2.) *The* Broughton-Cruz *rule is not implicated by McGill's claims.* The provisions in Citibank's arbitration clause did not simply require that McGill's claims for public injunctive relief be heard in an arbitral forum, they precluded her from asserting claims for public injunctive relief in *any* form. Accordingly, the issue in the case was whether such a provision was valid under California law; not the continuing vitality of the *Broughton-Cruz* rule, which the Court did not address.

(3.) *An arbitration provision that precludes a plaintiff from seeking a public injunction in any forum is unenforceable under California law*. Civil Code section 3513 provides: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Consistent with this provision, the Court has explained that "a party may waive a statutory provision if a statute does not prohibit doing so, the statute's public benefit . . . is merely incidental to [its] primary purpose," and "waiver does not seriously compromise any public purpose that [the statute was] intended to serve." By definition, the public injunctive relief available under the UCL, the CLRA, and the false advertising law, as discussed in *Broughton* and *Cruz*, is primarily for the benefit of the general public. Its evident purpose is "to remedy a public wrong," "not to resolve a private dispute," and any benefit to the plaintiff requesting such relief "likely . . . would be incidental to the general public benefit of enjoining such a practice."

Accordingly, the waiver in a predispute arbitration agreement of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as the arbitration provision here purports to waive McGill's right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.

(4.) *The FAA does not preempt California law forbidding a waiver of the right to seek a public injunction.*

Congress's purpose in enacting the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*." Thus, arbitration agreements, "like other contracts," "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." They may not, however, be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

The contract defense at issue here – "a law established for a public reason cannot be contravened by a private agreement" (Civ. Code, § 3513) – is a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract. It is not a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue.

(5.) *Proposition 64 allows an individual plaintiff to seek public injunctive relief without the need to certify the case as a class action.* When *Broughton* and *Cruz* were decided the UCL and the false advertising law allowed "any person" to seek relief on their own behalf or acting on behalf of the general public. But Proposition 64 amended these statutes in 2004, to provide that private individuals may (1) file an action for relief only if they have "suffered injury in fact and [have] lost money or property as a result of" a violation (Bus. & Prof. Code, §§ 17204, 17535), and (2) "pursue representative claims or relief on behalf of others only if they meet those standing requirements *and* comply with Section 382 of the Code of Civil Procedure," which relates to representative suits.

The Court held that these provisions do not preclude a private individual who has "suffered injury in fact and has lost money or property as a result of" a violation of the UCL or the false advertising law (Bus. & Prof. Code, §§ 17204, 17535) – and who therefore has standing to file a private action – from requesting public injunctive relief in connection with that action. A request for such relief does not constitute the "pursu[it]" of "representative claims or relief on behalf of others" within the meaning of Business and Professions Code sections 17203 or 17535, such that "compliance with Section 382 of the Code of Civil Procedure" is required.

This latter holding has broad implications, because it allows an individual plaintiff to seek a public injunction under the UCL and FAL – relief whose primary purpose is to benefit the public generally – without the need to pursue the claim as a class action.

Short(er) takes:

Attorney's fees; Civ. Code § 1717; dismissal based on forum-selection clause. *DisputeSuite.com, LLC v. Scoreinc.com*. (2017) __ Cal.4th __ (Cal. Supreme.)

DisputeSuite markets software to credit-repair organizations. Scoreinc.com ("Score") performs services for credit-repair organizations. The parties entered into an exclusive marketing arrangement, which provided that the Florida courts had sole jurisdiction to resolve any disputes.

DisputeSuite sued Score in California. The trial court stayed the action, giving DisputeSuite time to re-file in Florida, which it did. The court then dismissed the California action. Score then moved for an award of attorney's fees under Civ. Code § 1717 as the prevailing party.

The trial court denied the motion, finding that Score had not prevailed in the dispute, which was pending in Florida. The Court of Appeal affirmed, and the Supreme Court granted review. Affirmed. "We hold that Score's victory in moving the litigation to Florida did not make it the prevailing party as a matter of law under Civil Code section 1717, and the trial court therefore acted within its discretion in denying Score's motion for attorneys' fees."

Appellate procedure; notices of appeal; sufficiency: *West v. United States* (2017) __ F.3d __ (Ninth Cir.)

West was convicted of robbery and received a 25-year sentence. When it was discovered that former FBI agent Joe Gordwin had coerced witnesses at West's trial, West was released and the charges against him were dismissed. He sued the U.S. and Gordwin. The U.S. representing itself alone, filed a motion to dismiss. The district court granted the motion, and dismissed the entire action, including the claims against Gordwin. West filed a notice of appeal that included both the U.S. and Gordwin in the caption, and which identified the dismissal order and judgment but which did not otherwise separately identify Gordwin. He did address his claims against both the U.S. and Gordwin in his opening brief.

The Ninth Circuit reversed. Rule 3 of the Federal Rules of Appellate Procedure requires a notice of appeal to identify each appellant and to designate the judgment, order, or part thereof being appealed. These requirements are jurisdictional. In *Torres v. Oakland Scavenger Co*. (1988) 487 U.S. 312, 317, the appellant's appeal was dismissed because he omitted his name from the notice of appeal. But neither *Torres* nor the text of Rule 3 mentions appellees. Consistent with other circuits and the text of the rule, the Court held that failing to name an appellee in the notice of appeal is not a jurisdictional defect. Since the notice identified certain counts against the U.S., and twice specifically named the order being appealed, the notice was sufficient to indicate West's intent to appeal from the entire order and judgment dismissing the entire lawsuit. The Court reversed the dismissal of the claims against Gordwin, who had not even been served with the complaint when the district court dismissed the case.


Ehrlich

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Selection criteria

The mechanics of jury selection


Cooper

By Miles B. Cooper

The defense lawyer looked down at a field of post-its. "Your honor, the defense would like to thank and excuse Ms. Smith, juror number 17." The judge's head swiveled, lips pursed. "Number 17? Counsel, please approach."

Ask "dumb" questions

During trial, no-one wants to look inexperienced. This is particularly true with jury selection. Scanning through C.C.P. §§ 200-237 (codes governing jury selection) helps but is not enough. Many of the mechanics themselves are discretionary. Will initial questioning include 12, 18, 24 or some other number of potential jurors? When a juror in the first 12 seats is struck, is the seat filled from seats 13-18 (typical) or someone completely new (rare but happens)? Does the method change between cause challenges and peremptories? Will there be a time limit, and if so, is there *any* flexibility?

Most departments have specific (unwritten) rules. They've used their own rules so long that they forget not everyone knows them. Ask. One can't effectively play the jury selection game without knowing the specifics.

Questionnaires

Questionnaires deserve their own column. For now, know that copying and reviewing (turning jury selection into two days at a minimum) means judges disfavor questionnaires. Having a jointly-agreed questionnaire with a specific copy and review plan helps overcome judicial displeasure.

Random

Request the random list before the panel files in. It lists jurors in order of how they'll be seated in the jury box. As roll is taken, identify and cross out anyone who got lost between the jury commissioner's office and the department.

Moo

The clerk advises that the jury panel is heading up. Exciting, right? Yes and no. The cattle call – 60 or so people filing in, roll call – lacks pizazz. But as the jurors file in and roll is taken, kick your senses into overdrive. They don't have their guard up yet. Look for ideological buttons on jackets and packs, scan for reading material, and listen for strong personalities in responding to roll call. That copy of Trump's *The Art of the Deal* will disappear before the potential juror sits down in the box.

Hard times

Typically, the judge initially "hardships" the jury. Some departments request jurors fill out a form or line up to make a hardship case. Others take them as they go. Gather hardship data. The hardships might be denied but the information given can be useful for decision making. Those who want hardship relief but don't get it tend to be bad for the plaintiff.

Organization

After trying different methods – post-its on a board, software programs, notepads, I've decided simple is best. I use a standard clerk's 18-pack chart on 8.5" x 14" paper. The only items listed are the jurors' names, a score, leadership capability, and challenges. Fives are great, ones are bad. L's are leaders, S's are followers (S for sheep – not my creation but it works.) P-C is a plaintiff cause challenge, D-C is one we suspect will be a defense cause challenge. Same with P-P (plaintiff peremptory) and D-P.

As people move out of the box, the name and score is lined out and replaced with the next person. This method gives a global view of the current jury and the upcoming potential jurors.

I also use a Word document for the jurors' answers. It has an auto-numbered table with columns for juror number, name, and answers to questions. All answers – to judicial questions, our questions, defense questions, go in this section. I type 65 words per minute. I scribble at roughly 30. I can also highlight or italicize items mentioned that I want to follow up on.

Challenge

Cause challenges are handled first, with the defense typically challenging first. Detailed notes – precise quotes (that Word document) – help. The quotes can be used to knock or argue to keep a juror. Cause challenges are made to the judge, not in front of the jury panel.

Next come peremptories. Each side gets six challenges. The game theory here is riveting and fast-paced. Keep track of the challenges used. Try to avoid using the last challenge or two. Using all challenges means someone truly awful can slide in at the last minute.

Alternates

Alternate selection rules tend to vary greatly. One usually gets one peremptory per alternate. This means if there are three alternates, one gets three peremptories. Lawyers sometimes get tired by the time alternates get picked. The day has been stressful, folks want to be done, and it is frequently 4:30. Stay focused, as alternates tend to make it onto the jury.

Outro

Back to our defense lawyer and the peremptory challenge to juror 17. The judge conducted a brief sidebar, gently reminding the lawyer that peremptory challenges were restricted to the first 12 potential jurors. The defense lawyer went back out, made an appropriate challenge, and the game continued.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).

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