

FORD, WALKER, HAGGERTY & BEHAR



Law Review
April 2000

These decisions are of particular interest. Should you wish a copy of any of the decisions below, please contact Maxine Lebowitz at 562/983-2513 with the name of the case and the number.¹

Updating the Law Review

Recent Cases

APPEAL

VOLUNTARY DISMISSAL OF APPEAL PROMPTS ORDER THAT PARTIES WILL BEAR THEIR OWN COSTS ON APPEAL: After pointing out that dismissing an appeal voluntarily after ascertaining that the appeal would serve no purpose is to be commended, the Second Appellate District held that both parties to this appeal would bear their own costs. (Small v. Hall's Furniture Defined Benefit Pension Plan '00 Daily Journal D.A.R. 3520.) [File #148.]

ARBITRATION

IN A BINDING CONTRACTUAL ARBITRATION, THE ARBITRATOR NEED NOT AWARD ATTORNEYS FEES TO THE PREVAILING PARTY DESPITE A CONTRACTUAL PROVISION AUTHORIZING SUCH AN AWARD: Our Supreme Court has held that "where the entitlement of a party to attorney fees under Civil Code section 1717 is within the scope of the issues submitted for binding arbitration, the arbitrators do not 'exceed[] their powers'" (secs. 1286.2, subd. (d), 1286.6, subd. (b)), as we have understood that narrow limitation on arbitral finality, by denying the party's request for fees, even where such a denial order would be reversible legal error if made by a court in civil litigation." (Moore v. First Bank of San Luis Obispo '00 Daily Journal D.A.R. 3867.) [File #180.]

¹ The information contained in this Law Review is meant to be a tool to keep abreast of recent developments in the law in the State of California. It is not intended to give legal advice. It is one interpretation of the cases outlined and is not meant to substitute for a thorough reading of the cases before citing them as precedent. It is also important that the subsequent history of the cases be checked before they are cited.

AVIATION

A DEFENSE BASED UPON THE WARSAW CONVENTION'S SEVEN DAY "NOTICE" PROVISION FOR PROPERTY DAMAGE REQUIRES PROOF OF THE DATE NOTICE WAS "DISPATCHED," NOT RECEIVED, BY THE AIRLINE

DEFENDANT: The Ninth Circuit has affirmed a summary judgment in favor of one defendant, but reversed the judgment as to another. Both defendants introduced evidence to establish that the plaintiff had failed to notify them of the alleged property damage within seven days as required by the Warsaw Convention. But, the Convention's actual language states that no claim may be sustained against the shipper unless "dispatched" within seven days. The party whose summary judgment was reversed had submitted evidence which established only the date the claim was received. The evidence was silent as to when the claim was sent by the plaintiff. The evidence submitted by the other defendant was sufficient to establish when the plaintiff's claim was "dispatched" to it and, therefore, summary judgment was affirmed as to that defendant only. (Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc. '00 Daily Journal D.A.R. 4265.) [File #308.]

BAD FAITH

1. CO-INSURER WHICH WAS NOT AFFORDED AN OPPORTUNITY TO DEFEND OWES NO DUTY TO CONTRIBUTE TO INSURER WHO DID DEFEND:

The Second Appellate District has concluded that an insurer which undertook the defense of its insured with knowledge of the existence of a co-insurer should have notified the co-insurer of the possibility of contribution. Its failure to do so barred its right of indemnification from the co-insurer because the co-insurer's policy included a "notice" provision requiring the insured to "promptly" notify it of any suits. (Truck Ins. Exchange v. Unigard Ins. Co. '00 Daily Journal D.A.R. 3707.) [File #105.]

2. INSURER MUST DISCLOSE SETTLEMENT DISCUSSIONS WITH INSURED WHENEVER LIABILITY MAY EXCEED POLICY LIMITS:

Applying California law, the Ninth Circuit has reversed a summary judgment on the grounds that an insurer's failure to advise its insured of a settlement offer which potentially could have exceeded policy limits may have subjected the insurer to the duty to pay extracontractual damages in the event of a verdict in excess of policy limits. (Anguiano v. Allstate Ins. Co. '00 Daily Journal D.A.R. 4023.) [File #14.]

CIVIL PROCEDURE – STATE

1. A TRIAL COURT MAY STAY CIVIL PROCEEDINGS DUE TO THE PENDENCY OF A CRIMINAL PROSECUTION AGAINST THE DEFENDANT:

Although the defendant in this particular case was not entitled to a stay of the concurrently pending criminal litigation, the Sixth Appellate District held that a trial court is entitled to stay a civil proceeding on the grounds that a criminal proceeding is pending against a defendant in both actions if the interests of justice seem to require such action. The factors to be considered are the extent to which the defendant's Fifth Amendment Rights are implicated, the interests of the plaintiff in the civil action in having that case move along expeditiously, the burden on the defendant, the court's convenience in managing its calendar, the interests of persons who are not parties, and the interest of the public in both the civil and criminal proceedings. Because the defendant in this case was a corporation, the defendant had no right against self-incrimination. As a result, the Court concluded that the trial court did not abuse its discretion in refusing to stay the civil action. (Avant! Corporation v. Superior Court '00 Daily Journal D.A.R. 3653.) [File #292.]

2. CONTENTS OF POLICE INVESTIGATORY FILES IN ON-GOING CRIMINAL INVESTIGATION ARE NOT DISCOVERABLE IN CONCURRENT CIVIL LITIGATION UNLESS THE BENEFIT OF DISCLOSURE OUTWEIGHS THE NEED FOR CONFIDENTIALITY: The Fourth Appellate District has concluded "that the contents of police investigative files sought in civil discovery must remain confidential so long as the need for confidentiality outweighs the benefits of disclosure in any particular case." Consequently, the trial court erred in ordering the production of the criminal investigatory file without first conducting an examination of its contents to determine whether the public's need for confidentiality outweighed the benefits of disclosure in the civil action. The Court also noted that the issue could be revisited by the trial court even if it first determined that contents of such files were not discoverable. The passage of time could diminish the public's need for confidentiality such that the file and/or a portion thereof could eventually become discoverable in the civil action. (County of Orange v. Superior Court '00 Daily Journal D.A.R. 3395.) [File #201.]

3. FAILURE TO PAY INITIAL SANCTION AWARD MAY SUPPORT SECOND AWARD OF SANCTIONS: When an attorney failed to pay a \$200 sanction imposed upon him personally for failure to file a mandatory settlement conference statement in a timely manner, the trial court issued another sanction, this time for \$250. The Second Appellate District held, first, that the attorney's employer had standing to contest the sanction even though it was assessed against the attorney personally. Since the Labor Code requires an employer to reimburse an employee for "all that the employee necessarily expends or loses in direct consequence of the discharge of his duties," the employer was the real party in interest. As to the second sanction, the Court held it was appropriately assessed "to penalize" the attorney for "ignoring lawful orders of the court. The court had every right to impose a monetary sanction to compel obedience to its lawful orders, or to punish disobedience and disrespect of the court's processes." (Twentieth Century Ins. Co. v. Choong '00 Daily Journal D.A.R. 3993.) [File #81.]

4. LOCAL RULE ALLOWING COURT TO GRANT SUMMARY JUDGMENT WHEN NO OPPOSITION IS FILED IS INVALID: The Fourth Appellate District has invalidated a local rule which allowed the trial courts to enter summary judgment in favor of the moving party simply because no opposition had been filed. The local rule

conflicted with Code of Civil Procedure, section 437c which requires the moving party to meet an initial burden. Local rule cannot absolve the moving party of that burden. Section 437c empowers the trial court to grant summary judgment on the grounds that no separate statement has been submitted in opposition to the motion, but the section does not authorize granting summary judgment simply because no opposition has been filed. Local rules cannot conflict with state law. (Thatcher v. Luck Stores, Inc. '00 Daily Journal D.A.R. 4155.) [File #85.]

5. COMPARATIVE EQUITABLE INDEMNITY APPLIES TO ECONOMIC DAMAGES ONLY: Since the passage of Proposition 51, joint liability applies to economic damages only. Liability for non-economic damages is several. In this case, the First Appellate District considered the impact of Proposition 51 on “settling tortfeasors’ right to seek comparative equitable indemnity from a nonsettling concurrent tortfeasor.” The Court concluded that “comparative equitable indemnity is available only for that portion of a settlement attributable to economic damages, because that is the extent of the underlying joint obligation. A defendant has no right to settle the plaintiff’s claim against another party for non-economic damages. Each defendant is entitled to severally negotiate or litigate its own several liability.” (Union Pacific Corp. v. Wengert '00 Daily Journal D.A.R. 4195.) [File #288.]

6. IF SUCCESSFUL AND UNSUCCESSFUL CLAIMS ARE INTEGRALLY RELATED, THE COURT NEED NOT APPORTION ATTORNEYS FEES: According to the First Appellate District, “When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney’s fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award. [Citation omitted.] When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required.” (Akins v. Enterprise Rent-A-Car Co. '00 Daily Journal D.A.R. 3871.) [File 360.]

7. CERTIFICATION AS CLASS ACTION NOT PROPER FOR MEDICAL MONITORING PLAINTIFFS IN TOXIC TORT ACTION: The Fourth Appellate District has held that a trial court erred in certifying a class brought by individuals who sought monitoring for potential medical problems which they suspected would be caused by their exposure to dangerous chemicals discharged into a city’s water supply by various corporations. The Court held there was an insufficient community of interest between the plaintiffs even though the same facts involved as many as 100,000 potential class participants. The Court noted that “these common issues would be overwhelmed by the numerous inquiries necessary to establish each individual’s claim to medical monitoring” and that “[m]any courts, both California and federal, have found that mass tort actions for personal injuries are not appropriate for class treatment due to the plethora of individual factual issues regarding liability, causation, and damages.” (Lockheed Martin Corp. v. Superior Court '00 Daily Journal D.A.R. 3763.) [File #320.]

8. DOE AMENDMENT STANDARD IS INAPPLICABLE WHERE STATUTE OF LIMITATIONS HAS NOT EXPIRED: Plaintiff sued the manufacturer of a muscle stimulator machine, but did not name the chiropractor who treated her. Later, she named the chiropractor in place of a Doe defendant prior to the expiration of the one-year statute of limitations. The Second Appellate District rejected the doctor's argument that the Doe amendment was improper inasmuch as plaintiff knew his name at the time the complaint was drafted. The argument was rejected because Code of Civil Procedure, section 474, the "Doe" amendment "relation back doctrine," applies only where the statute of limitations has expired. Here, the statute had not expired and, as a result, the plaintiff could have filed an entirely separate lawsuit against the chiropractor and it would still have been timely filed. Consequently, there was no reason why the doctor could not be added as a defendant in the action already pending.

In addition, the Court held that the action was not barred by Code of Civil Procedure, section 364, because the amendment adding the chiropractor had been served within 90 days after delivery of the statutorily mandated notice of intent to sue and the notice had been served within one year of discovery of the alleged malpractice. (Davis v. Marin '00 Daily Journal D.A.R. 4445.) [File #43.]

CONSTRUCTION DEFECT

1. CONDOMINIUM ASSOCIATION PLAINTIFFS NEED NOT DISCLOSE PRIVILEGED INFORMATION TO INDIVIDUAL HOMEOWNERS: The Fourth Appellate District has held that "[c]ondominium associations may bring construction defect lawsuits against developers without fear of having to disclose privileged information to individual homeowners. Like closely-held corporations and private trusts, the 'client' is the entity that retained the attorney to act on its behalf." Here, homeowners who were unhappy with an assessment imposed to raise money to fund the litigation, demanded to see the association's attorneys' work product and bills. Since the association was the client, the association and not the individual homeowners was the holder of the attorney/client privilege. The attorneys were entitled to assert the work product privilege and the association was similarly entitled to assert the attorney/client privilege. (Smith v. Laguna Sur Villas Community Association '00 Daily Journal D.A.R. 3521.) [File #35.]

2. CONTRACTUAL PROVISION AWARDING ATTORNEYS FEES TO THE PREVAILING PARTY APPLIES REGARDLESS OF WHO INITIATED THE LITIGATION: The Second Appellate District has reversed an order denying attorney's fees. The trial court concluded that there was no prevailing party under the attorneys fees provision in the subcontract at issue. The appellate court held that the trial court had read the attorneys fees provision too narrowly when it held that the provision applied only where an action was brought against the subcontractor and not where the subcontractor initiated the action. (Pacific Custom Pools, Inc. v. Turner Construction Company '00 Daily Journal D.A.R. 3985.) [File #60.]

INSURANCE

UIM INSURER IS NOT ENTITLED TO SUBROGATION UNLESS ITS INSURED'S ADVERSARY'S PRIMARY COVERAGE HAS BEEN EXHAUSTED:

The Second Appellate District has affirmed a decision holding that an underinsured motorist provider was not entitled to subrogation benefits because it owed no duty to pay UIM benefits to its insured.

Plaintiff sued the driver of a rental car in which he was a passenger and the rental car company itself. The rental car agency was self-insured by virtue of a cash deposit in satisfaction of the Financial Responsibility Law. But, the rental car agency had not exhausted the \$15,000 limit provided by law and, as a result, the coverage afforded by the underlying "insurance," had not been exhausted. Absent exhaustion of the underlying coverage, the UIM insurer had no duty to pay UIM benefits. Rather, payment made by the UIM provider had been made voluntarily. Because the UIM provider had no duty to pay benefits to its insured, it could not invoke equitable principles to obtain subrogation. (Mercury Ins. Co. v. Enterprise Rent-A-Car '00 Daily Journal D.A.R. 4237.) [File #223.]

TORTS

1. CAUSE OF ACTION FOR WRONGFUL DEATH ARISING FROM MEDICAL MALPRACTICE IS SUBJECT TO THE SAME PUNITIVE DAMAGE LIMITATIONS AS APPLY TO OTHER MEDICAL MALPRACTICE ACTIONS: In an elder abuse case, the Fourth Appellate District has held that "[w]hen an action for wrongful death is grounded upon the alleged malpractice of the health care provider, the action is subject to the rules pertaining to punitive damages in medical malpractice actions. (Community Care and Rehabilitation Center v. Superior Court '00 Daily Journal D.A.R. 3559.) [File #56.]

2. THE INFORMATION KNOWN BY LANDLORD WAS SUFFICIENT TO ESTABLISH A DUTY TO ADVISE TENANTS THAT CO-TENANT'S SON WAS DANGEROUS: The First Appellate District has addressed the issue of the existence of a "duty in a negligence action brought by a tenant against a landlord, for injuries inflicted by a third party on the landlord's premises." Because "the evidence established that the landlords were in possession of sufficient information about Eric to make his conduct foreseeable to a reasonably prudent landlord," the landlords had a duty to "exercise reasonable care in making an effort to remove Eric from the property." Eric was the adult son of tenants who lived on the same floor as the plaintiff.

The Court established the following test for the existence of a duty to warn on the part of a landlord: "As a first step in the analysis the court must determine the measures that the plaintiff asserts the defendant should have taken to prevent the harm. This frames the issue for the court's determination by defining the scope of the duty under consideration. Next, the court must analyze how burdensome these proposed measures are to the landlord, both financially and socially. On a continuum from minimally to significantly burdensome, where does the proposed scope fall? The third step is to identify the nature of the third party conduct that plaintiff claims could have been prevented had the landlord taken the proposed

measures. Given the facts of the case, on a continuum from a mere possibility to a reasonable probability, how foreseeable was it that this type of conduct would take place? Once the burden and foreseeability have been independently measured, they can be weighed together in determining the scope or extent of the duty which the court is willing to impose on a given defendant. The more certain the likelihood of harm, the higher the burden we will impose to prevent it; the less foreseeable the harm, the lower the burden we will place on a landlord. And finally, where appropriate to the case, other mitigating or aggravating factors may be taken into account in the weighing process, such as those set forth in Rowland . . .” (Valencia v. Michaud ’00 Daily Journal D.A.R. 3453.) [File #119.]

3. NEGLIGENCE SPOILIATION CAUSE OF ACTION WILL NOT LIE: The Fourth Appellate District has held that the trial court erroneously denied a defendant’s motion for judgment on the pleadings where the plaintiff sought to recover for negligent spoliation of evidence.

Plaintiff sued Farmers Insurance when it was unable to produce a tire from the vehicle involved in an accident which caused plaintiff’s bodily injury. Farmers had allegedly been informed of the accident and the fact that it was caused by the tire on the date of the accident itself. Farmers took possession of the tire, but was unable to produce it subsequently.

California courts have previously held that neither a first-party nor third-party can state a cause of action for intentional spoliation. In rejecting a cause of action for negligent spoliation, the Court agreed with Farmers that, “If a party cannot be held liable for intentionally destroying or suppressing evidence that would be relevant to a lawsuit, surely the party cannot be held liable if it *negligently* commits these acts.” (Farmers Ins. Exchange v. Superior Court ’00 Daily Journal D.A.R. 4121.) [File #47.]

4. AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR CAN CIRCUMVENT THE “PRIVETTE” DOCTRINE BY ADVANCING LEGAL THEORIES OF NEGLIGENCE HIRING AND SUPERVISION: In an opinion crying out for decertification, the Fifth Appellate District has held that a cause of action for negligent hiring survives our Supreme Court’s decisions in Privette v. Superior Court (1993) 5 Cal.4th 689 and Toland v. Sunland Housing Group (1998) 18 Cal.4th 253. In Privette and in Toland, the Supreme Court held that an employee of an independent contractor may not recover personal injury damages from the person or entity which retained his or her employer unless the hirer had retained control over the instrumentality of the injury. In addition to a petition for review filed by the unsuccessful defendant, numerous requests for decertification of this opinion have been received by the Supreme Court. (Camargo v. Tjaarda Dairy ’00 Daily Journal D.A.R. 3885.) [File #229.]

5. UNITED STATES SUPREME COURT LIMITS REACH OF “RICO” CONSPIRACY LAW: The United States Supreme Court addressed the issue of “whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under section 1964(c) [RICO], even if the overt act is not an act of racketeering” and concluded that “such a person does not have a cause of action under section 1964(c).” The decision includes an excellent discussion of the necessary elements of a conspiracy cause of action, explaining that conspiracy is not actionable absent the commission of an

underlying tort. Conspiracy is “the mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act.” (Beck v. Prupis ’00 Daily Journal D.A.R. 4285.) [File #78.]

6. EXPRESSION OF OPINION WHICH DOES NOT IMPLY A FALSE ASSERTION OF UNDISCLOSED FACT IS NOT ACTIONABLE DEFAMATION: The Ninth Circuit succinctly explained, “a statement of opinion is not automatically entitled to First Amendment protection simply by virtue of its status as opinion; rather, a statement of opinion may be actionable to the extent that it ‘impl[ies] a false assertion of fact.’ [Citation omitted.] In this case, however, no reasonable factfinder could conclude that Peyser’s expression of opinion implies any false assertion of undisclosed facts serving as the basis for her views.” (Cochran v. NYP Holdings, Inc. ’00 Daily Journal D.A.R. 4485.) [File #233.]

**CASES OF INTEREST CURRENTLY PENDING
BEFORE THE UNITED STATES SUPREME COURT**

Sacramento County, Ca v. Lewis: Deliberate indifference or reckless disregard is the necessary standard for action based on police high-speed pursuits.

**CASES OF INTEREST CURRENTLY PENDING
BEFORE CALIFORNIA'S SUPREME COURT**

Kransco v. American Empire Surplus Lines Ins. Co.: The issue on appeal has been narrowed to whether "an insurer may assert an affirmative defense of the insured's comparative bad faith in a bad faith action brought against the insurer." (See August '97 law review.)

Walker v. 20th Century Ins. Co.: Felony drunk driver cannot recover attorney's fees in bad faith action against insurer. (See July '97 Law Review.)

Orrick v. San Joaquin Community Hospital: Medical malpractice plaintiff is not collaterally estopped by arbitration agreement with doctor from pursuing recovery against hospital. (See April '98 Law Review.)

Truck Insurance Exchange v. Superior Court: Negligent failure to meet a contractual deadline is not covered by general liability policy. (See March '98 Law Review.)

Aas v. San Diego County Superior Court (The William Lyon Company): Pure economic loss damages and/or market "stigma" damages are not recoverable in a construction defect lawsuit.

Galanty v. Paul Revere Life Ins. Co.: Disability Insurance policy's incontestability clause does not override policy's coverage limitation.

Preferred Risk Mutual Ins. Co. v. Reiswig: Limitations period for indemnity action is not tolled by service of Notice of Intent to Sue.

Carrisales v. Dept. of Corrections: Only those supervisors who participate in or aid sexual harassment can be held personally liable. (See Aug/Sept. Law Review)

Richmond v. A.P. Green Industries, Inc.: Separate limitations period is triggered by each distinct injury suffered due to asbestos exposure.

Paxton v. Stewart: Failure to designate treating physician as expert witness bars opinion testimony.

Moore v. First Bank of San Luis Obispo: Even when their decisions ignore contractual terms, arbitrators do not exceed their power.

Comedy III Productions Inc. v. Gary Saderup Inc.: Use of deceased celebrity's image without consent for sole purpose of profit is not protected speech.

Safeco Ins. Co. v. Robert S.: Homeowners' policy exclusion for "illegal acts" is unambiguous and insurer is not required to indemnify in wrongful death action.

Moshonov v. Walsh: Existence of statutory ground to vacate or correct arbitration award warrants judicial review.

Gwartz v. Super. Ct.: Oral argument is required on all summary judgment motions.

Fox v. Kramer: As "subsequent remedial measures," hospital peer review records are inadmissible at trial.

Gonzalez v. Hughes Aircraft Employees Federal Credit Union: Employment contract's arbitration agreement held unenforceable.

P.L.C.M. Group Inc. v. Drexler (Dearborn Ins. Co.): Reasonable value of legal services performed by in-house counsel may be recoverable.

Bechtel v. City of Beaumont: Failure to exhaust judicial remedies in prior proceeding bars judicial action in subsequent proceeding when party has same right at stake.

Kazi v. State Farm Fire & Casualty Co.: Doubts as to whether duty to defend exists must be resolved in favor of insured.

Transportation Ins. Ltd. v. ShinMaywa Industries Ltd.: If defective part did not damage final product, there is no coverage under a product liability insurance policy.

Industrial Indemnity Co. v. Apple Computer Inc.: Insurer owes no duty to defend English trademark infringement lawsuit.

Torres v. Parkhouse Tire Service: To invoke the willful, unprovoked act of aggression exception to the exclusive remedy provision of the Workers' Compensation Act, it is not necessary to establish a specific intent to injure.

Day v. City of Fontana: Proposition 213 is properly applied retroactively.

Nelson v. Adams, USA, Inc.: Assessment of attorneys fees against non-party without service of process upon said non-party is permissible.