

# FORD, WALKER, HAGGERTY & BEHAR



Law Review  
December 1999

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.<sup>1</sup>

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## Updating the Law Review

### Recent Cases

#### APPEAL

**ORDER DENYING MOTION TO ENFORCE SETTLEMENT IS NOT APPEALABLE:** The Fifth Appellate District has dismissed an appeal from an order denying a motion to enforce a settlement on the grounds that the order was not appealable. (Doran v. Magan 99 Daily Journal D.A.R. 12627.) [File #77.]

#### ARBITRATION

**GENERALLY, REQUEST FOR TRIAL DE NOVO VACATES AWARD AS TO ALL PARTIES:** Reviewing applicable principles, the Fourth Appellate District has rejected the argument that the claims of certain parties were so factually distinct so as to allow the arbitration award to remain in effect as to one party, but not as to another. The Court explained, "Case law holds generally that, where one party to a multi-party judicial arbitration proceeding requests a trial de novo, the entire arbitration award is vacated and the whole case must be tried. A limited exception has been recognized, under which an award in favor of one party may stand despite a trial de novo request by another, where the two parties' claims are legally and factually unrelated." (Dibble v. Superior Court 99 Daily Journal D.A.R. 12307.) [File #180.]

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<sup>1</sup> 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.

## CIVIL PROCEDURE - FEDERAL

**TRIAL JUDGE’S DISBELIEF DOES NOT CONSTITUTE GROUNDS TO IGNORE EVIDENCE ESTABLISHING TRIABLE ISSUE OF FACT ON SUMMARY JUDGMENT:** The Ninth Circuit has reversed a summary judgment on the grounds that evidence disregarded by the trial court was sufficient to raise a triable issue of fact. On summary judgment, the Court must construe the non-moving party’s declaration as true. (Leslie v. Grupo ICA 99 Daily Journal D.A.R. 12323.) [File #85.]

## CIVIL PROCEDURE – STATE

**1. DECLARATION OF EXPERT IS SUFFICIENT TO DEFEAT MOTION FOR SUMMARY JUDGMENT:** Division One of the Second Appellate District has reversed a summary judgment granted in favor of the defense in a medical malpractice action on the grounds that the trial court erred in concluding that the plaintiff’s expert’s declaration was lacking in factual basis. The decision is noteworthy due to footnote 6 in which the Court rejects the decision in Kelley v. Trunk (1998) 66 Cal.App.4<sup>th</sup> 519, a decision of Division Seven of the Second Appellate District, to the extent that the Kelley decision “suggests that even on summary judgment, an expert’ declaration must set forth in excruciating detail the factual basis for the opinions stated therein.” (Hanson v. Grode 99 Daily Journal D.A.R. 11985.) [File #85.]

**2. CHAPTER 13 DEBTOR HAS STANDING TO SUE:** Reversing the trial court, the First Appellate District has held that Chapter 13 reorganization does not deprive a debtor of the right to sue because unlike a Chapter 7 debtor, a Chapter 13 debtor remains in possession of all the assets. In addition, the Court rejected the application of the “judicial estoppel” theory on the facts of this case where no evidence indicated the debtor knew his claim had any value at the time he filled out his bankruptcy schedules. As a result, his failure to list his claim was not willful. (Kelsey v. Waste Management 99 Daily Journal D.A.R. 11975.) [File #312.]

**3. TRIAL COURT CORRECTLY DISMISSED COMPLAINT WHERE PLAINTIFF COULD NOT DEMONSTRATE LIKELIHOOD OF NAMING ANY DEFENDANT IN PLACE OF A DOE:** Plaintiff sued 646 defendants – all Does. The Second Appellate District has upheld the dismissal of the action on the grounds that the plaintiff was unable to identify even one person to name in place of one of the Doe defendants. Absent any concrete evidence that a real defendant existed, the complaint consisted of a mere “fishing expedition.” (Pearlson v. Does 1 to 646 99 Daily Journal D.A.R. 12343.) [File #89.]

## CONSTRUCTION DEFECT

**CROSS-COMPLAINT IS BARRED BY 10-YEAR STATUTE OF LIMITATIONS FOR LATENT DEFECTS:** The Third Appellate District has upheld a judgment entered against a cross-complainant seeking express and implied indemnity on the grounds that the cross-complainant’s tolling agreement with the plaintiff did not toll the 10-year statute as to the cross-defendant and on the additional ground that “[s]ection 337.15 is not subject to equitable

tolling for repair work.” (FNB Mortgage Corp. v. Pacific General Group 99 Daily Journal D.A.R. 12423.) [File #307.]

## COVERAGE

**1. POLICY EXCLUSION FOR MYSTERIOUS DISAPPEARANCE OF PROPERTY IS NOT AMBIGUOUS:** Holding that the words “physical” and “evidence” are unambiguous, the Second Appellate District affirmed a judgment entered in favor of the defendant insurer on the grounds that its denial of its insured’s claim was justified. The insured contended property had been stolen from its warehouse, but was unable to present any physical evidence of the theft. (Blasiar, Inc. v. Fireman’s Fund Ins. Co. 99 Daily Journal D.A.R. 12115.) [File #91.]

**2. INSURED CANNOT CREATE A DUTY TO PAY UNDERINSURED MOTORIST BENEFITS BY SETTling THE UNDERLYING CLAIM AND OFFERING TO GIVE THE UNDERINSURED MOTORIST INSURER CREDIT FOR THE FULL POLICY LIMIT AS IF IT HAD BEEN PAID:** “Insurance Code section 11580.2, subdivision (p)(3) provides that underinsured motorist coverage does not apply until the limits of any policy covering the underinsured vehicle ‘have been exhausted by payment of judgments or settlements . . . .’ The question presented in this case is whether a settlement for less than the policy limits satisfies the exhaustion requirement provided the insured agrees to credit the underinsurance carrier with the full policy limits as if they had been paid. We conclude that, under the plain terms of section 11580.2(p)(3), actual payment of the full policy limits is required.” (Farmers Insurance Exchange v. Hurley 99 Daily Journal D.A.R. 12193.) [File #174.]

**3. UMBRELLA POLICY “ADVERTISING LIABILITY” COVERAGE FOR INFRINGEMENT EXTENDS TO INFRINGEMENT OF NAMES OF LITERARY OR ARTISTIC WORKS OR NAMES THAT ARE SLOGANS ONLY:** California’s Supreme Court has reversed a decision dealing with the scope of “advertising liability” coverage. The Court explained, “In this case we consider whether certain insurance policy provisions relating to advertising liability caused by ‘title’ or ‘slogan’ infringement cover infringement of *any* name. Interpreting the relevant policy language in the context of the policy as a whole, we hold that these provisions only cover infringement of names of literary or artistic works or names that are slogans – and no other names.” (Palmer v. Truck Ins. Exch. 99 Daily Journal D.A.R. 12247.) [File #91.]

**4. DEMURRER PROPERLY SUSTAINED WHERE “ADVERTISING INJURY” COVERAGE DOES NOT EXTEND TO “INDUCEMENT OF PATENT INFRINGEMENT”:** A trial court ruled correctly when it sustained a defendant insurer’s demurrer to a claim that it owed a duty to defend its insured in an action alleging its insured induced a patent infringement. The court concluded “that the advertising injury provisions of Pacific’s policy did not provide coverage to Mez for inducement of patent infringement and, in any event, such coverage would have been precluded by Insurance Code section 533.” (Mez Industries, Inc. v. Pacific National Ins. Co. 99 Daily Journal D.A.R. 12277.) [File #68.]

## GOVERNMENTAL IMMUNITY

### **COMMUNITY COLLEGE IS ENTITLED TO IMMUNITY FOR INJURIES SUSTAINED BY STUDENTS WHILE TRAVELING ON SCHOOL-SPONSORED EVENT:**

Plaintiffs were injured while being driven by a college employee to a school-sponsored soccer match. Because statutes which specifically address a particular situation control over more generally drafted statutes and the plaintiffs were “on a field trip or excursion” at the time of the accident, the defendant community college district was entitled to the immunity conferred upon it by Education Code, section 55450. (Barnhart v. Cabrillo Community College 99 Daily Journal D.A.R. 12203.) [File #185.]

## INSURANCE

### **“CUMIS COUNSEL” MUST BE INCLUDED IN SETTLEMENT**

**NEGOTIATIONS:** The First Appellate District has concluded that counsel provided by an insurer owes a duty when negotiating settlement on behalf of the insured to include independent counsel appointed pursuant to Civil Code, section 2860 (“Cumis counsel”), in settlement negotiations. (Novak v. Low, Ball & Lynch 99 Daily Journal D.A.R. 12933.) [File #11.]

## TORTS

### **1. “RESCUE DOCTRINE” IS EXPANDED TO INCLUDE INJURIES SUSTAINED BY ONE WHO ATTEMPTS TO RESCUE THE “ACTOR” WHO CAUSED THE DANGER:**

According to the Third Appellate District, “[u]nder the rescue doctrine, an actor is usually liable for injuries sustained by a rescuer attempting to help another person placed in danger by the actor’s negligent conduct. The question here is whether an actor is liable for injuries sustained by a person who is trying to rescue *the actor* from his own negligence. The answer is yes.” (Sears v. Morrison 99 Daily Journal D.A.R. 11991.) [File #50.]

### **2. AN ACTION FOR DAMAGES UNDER THE CONSUMER LEGAL REMEDIES ACT IS ARBITRABLE AND SHOULD BE SEVERED FROM ANY CLAIM FOR INJUNCTIVE RELIEF:**

California’s Supreme Court has concluded that claims brought under Civil Code, section 1750 et seq. are subject to different types of relief. Claims for damages can be arbitrated even though claims for injunctive relief cannot. Of particular import in this decision is the Court’s refusal to allow disgruntled consumers to circumvent arbitration agreements in sales contracts in favor of litigation. (Broughton v. Cigna Healthplans of Calif. 99 Daily Journal D.A.R. 12141.) [File #110.]

### **3. FAMILY OF CONVICTED CHILD MOLESTER OWED NO DUTY TO TELL MOLESTER’S NEW GIRLFRIEND OF HIS PREVIOUS CRIMINAL CONDUCT:**

In so holding, the Fourth Appellate District based its decision on well-established legal precedent, i.e., “[y]ou are not responsible for mere inaction without some sort of special relationship which

creates a duty to take some action; the law does not require people to be good samaritans.” (Eric J. v. Betty M. 99 Daily Journal D.A.R. 12087.) [File #50.]

**4. NEGLIGENCE PER SE NOT PROVABLE WHERE INJURY NOT CAUSED BY VIOLATION OF STATUTE AT ISSUE:** The fact that the defendant’s vehicle was illegally parked on the sidewalk was not a contributing cause of the plaintiff’s injury according to the Second Appellate District. Consequently, the theory of negligence per see was inapplicable. (Victor v. Hedges 99 Daily Journal D.A.R. 12945.) [File #140.]

**5. ACTION FOR FRAUD NOT TIME BARRED:** According to the Fourth Appellate District, a trial court erred when it granted summary judgment on a fraud cause of action because the undisputed facts did not establish that the plaintiffs knew facts sufficient to place reasonable individuals on notice of the alleged misrepresentations. The plaintiffs alleged that the builder had failed to disclose a plan to realign a highway and to expand it from two to six lanes. (McGill v. M.J. Brock & Sons, Inc. 99 Daily Journal D.A.R. 12609.) [File #274.]

**6. LANDLORD’S DUTY TO WARN IS LIMITED TO FORESEEABLE DANGERS:** California’s Supreme Court has held that a parking garage owner and operator owed no duty to provide security measures where a violent third party sexual assault was not sufficiently foreseeable to support such a requirement. (Sharon P. v. Arman, Ltd. 99 Daily Journal D.A.R. 12615.) [File #50.]

## TRIAL PRACTICE

**1. JURORS’ CONCEALED BIAS WARRANTS NEW TRIAL:** The Second Appellate District has overturned a jury verdict and ordered a new trial in this conversion and breach of contract action on the grounds that the majority of voting jurors had concealed their bias against the defendant City and LAPD. (Enyart v. City of L.A. 99 Daily Journal D.A.R. 11979.) [File #291.]

**2. UNCLEAN HANDS DEFENSE UNAVAILABLE ABSENT A DIRECT LINK BETWEEN THE SUSPECT CONDUCT AND THE TRANSACTION AT ISSUE:** “The misconduct that brings the clean hands doctrine into play must relate directly to the cause at issue,” according to the Fifth Appellate District. “Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice.” (Kendall-Jackson Winery, Ltd. v. Superior Court 99 Daily Journal D.A.R. 12265.) [File #186.]

**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.)

Samuels v. Mix: Defendant attorney must establish plaintiff's knowledge of alleged malpractice more than one year prior to filing complaint in order to successfully assert a statute of limitations defense. (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)

Fairmont Ins. Co. v. Riverside County Superior Court: "Admissions" at issue in Code of Civil Procedure section 2033(m) include all matters "deemed" admitted by the court.

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.

Schreiber v. Estate of Kiser: Failure to provide narrative statement of expert's testimony supports exclusion of expert's opinion testimony at trial.

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.

Rosales v. Depuy Ace Medical Company: Statutory definition of "power press" is to be interpreted broadly and whether a particular machine is a "power press" is a question of fact for the trier of fact.

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.