

# FORD, WALKER, HAGGERTY & BEHAR



Law Review  
May 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.<sup>1</sup>

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## Updating the Law Review

November '99 Edition, p. 3: Midiman v. Farmers Ins. Co. has been decertified. Consequently, the opinion is no longer authoritative. See "Coverage" below. '00 Daily Journal D.A.R. 4973, May 10, 2000.

March '00 Edition, p. 4: Foxgate Homeowners' Ass'n. v. Bramalea California, Inc. has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no longer authoritative. See "Civil Procedure – State" below. '00 Daily Journal D.A.R. 5219, May 17, 2000.

## Recent Cases

### APPEAL

**APPEAL IS DISMISSED FOR FAILURE TO ADEQUATELY CITE TO THE RECORD:** The Ninth Circuit has dismissed an appeal on the grounds that the appellant failed to include citations to the record in his brief on appeal. The Court noted that plaintiff "has exhibited complete disregard for the requirements' of the appellate rules respecting citations to the record." (Han v. Stanford University '00 Daily Journal D.A.R. 4511.) [File #93.]

### ARBITRATION

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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.

**THE RIGHT TO ARBITRATE CAN BE WAIVED:** The Second Appellate District has affirmed an order of the trial court denying an HMO's petition to compel arbitration pursuant to the arbitration provision signed by the plaintiff upon enrollment in the HMO. The trial court held that the plaintiff had been prejudiced by the HMO's delay in seeking to enforce the arbitration provision. The delay was caused by the HMO's conducting discovery during the litigation. During that discovery, the plaintiff had disclosed considerable information in response to numerous discovery requests. This information would not have been available to the HMO had it timely proceeded with arbitration. (Berman v. Health Net '00 Daily Journal D.A.R. 5573.) [File #180.]

## BAD FAITH

1. **"NO ACTION" CLAUSE IS ENFORCED:** The First Appellate District has affirmed an award of summary judgment in favor of a defendant insurer on the grounds that the bad faith action was brought more than one year after the loss of which the plaintiff complained. In doing so, the Court gave effect to the defendant's policy's "no action" clause, requiring that any action on the policy be brought within one year of the loss. "Where denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad faith action is on the policy and the limitations period applies." (Jang v. State Farm Fire and Casualty Co. '00 Daily Journal D.A.R. 5469.) [File #91.]

2. **INSURER WHICH PROMPTLY PAYS ALL BENEFITS DUE ON THE POLICY IS NOT VULNERABLE TO BAD FAITH LAWSUIT MERELY BECAUSE IT SUED ITS INSURED FOR FRAUD:** The Second Appellate District has reversed a trial court's ruling that the defendant insurer had engaged in bad faith conduct when it sued its insured for fraud. Nothing the defendant insurer had done interfered with its insureds right to receive benefits under the contract. Nor had the insured sued for failure to properly investigate the claim. Here, the claim was fully and promptly paid. The insurer's action was privileged pursuant to Civil Code, section 47(2), the "litigation privilege." The insured's remedy is a cause of action for malicious prosecution if its elements can be proven. (Old Republic Ins. Co. v. FSR Brokerage, Inc. '00 Daily Journal D.A.R. 4795.) [File #14.]

## CIVIL PROCEDURE – FEDERAL

1. **FEDERAL TORT CLAIMS ACT REQUIRES FILING ADMINISTRATIVE CLAIM BEFORE LITIGATION:** Like California's Tort Claims Act, the Federal counterpart requires that an administrative claim be filed and denied before litigation can ensue. Here, a district court dismissed the plaintiff's lawsuit on the ground that she had failed to exhaust her administrative remedies by presenting an administrative claim to the appropriate federal agency before filing her complaint against the USA. The Ninth Circuit affirmed. (Brady v. USA '00 Daily Journal D.A.R. 4689.) [File #185.]

**2. FEDERAL COURT CAN REVISIT SUMMARY JUDGMENT AWARDED IN STATE COURT:** This case was removed to federal court after a successful summary adjudication motion in state court resulted in the elimination of the California defendants, establishing diversity between the plaintiff and defendant. The defendant's motion for summary adjudication of the retaliatory termination claim was denied in state court before the transfer. Once the case had been removed, the defendant renewed its motion with regard to the retaliatory termination claim. The plaintiff argued that principles of comity barred the federal court from reconsidering the motion which had already been denied in state court.

The District Court held and the Ninth Circuit agreed that the differing standards on summary judgment between California and federal law constituted a cogent reason to reach the merits of the defendant's motion. "The lack of authority to grant summary judgment sua sponte [in California] is the difference that creates a distinction." In federal court, summary judgment can be obtained by simply pointing out to the court that there is no evidence to support one's adversary's case. This cannot be done in California unless the adversary has served vague and factually void discovery responses. Since the standard for ruling on summary judgment motions differs in state and federal courts, the federal court did not abuse its discretion in allowing the defendant to move for summary judgment in federal court. (Fairbank v. Johnson '00 Daily Journal D.A.R. 4815.) [File 85.]

#### CIVIL PROCEDURE – STATE

**1. IN-HOUSE COUNSEL CAN RECOVER ATTORNEY'S FEES:** According to California's Supreme Court, "an entity that is represented by in-house counsel may recover attorney fees under Civil Code section 1717." The Court explained that, "[l]ike private counsel, in-house counsel stand in an attorney-client relationship with the corporation and provide comparable legal services. In the case of such representation, the trial court retains broad discretion under Civil Code section 1717 to fix an award of attorney fees in a reasonable amount." (PLCM Group, Inc. v. Drexler '00 Daily Journal D.A.R. 4831.) [File #60.]

**2. DECERTIFIED & REVIEW GRANTED: WHEN IMPOSING SANCTIONS UNDER CODE OF CIVIL PROCEDURE, SECTION 128.5, THE TRIAL COURT MUST ISSUE A FACTUALLY SPECIFIC WRITTEN ORDER:** The Second Appellate District has reversed and remanded an award of \$30,000 in sanctions imposed upon a law firm and its clients for failing to bring their expert witness to court-ordered mediation. Noting that the sanctions might have been appropriate, the appellate court remanded the sanction order because the trial court "must also enter a written order which 'recite[s] in detail the conduct or circumstances justifying the order.'" (Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc. '00 Daily Journal D.A.R. 2069; Decert. & Rev. Gr. 5/17/00, '00 Daily Journal D.A.R. 5219.) [File #81.]

#### COVERAGE

1. **DECERTIFIED: INSURED NOT ENTITLED TO “CUMIS COUNSEL” IN COPYRIGHT INFRINGEMENT ACTION:** According to the Second Appellate District, a trial court erred in concluding that an insured was entitled to personal counsel paid for by the insured’s insurer. The insurer had reserved its right to recover money paid on its insured’s behalf arising from uncovered claims. “Cumis counsel” was not necessary because there was no potential that information learned by defense counsel, if communicated to the insurer, could support a denial of coverage. (Midiman v. Farmers Ins. Co. 99 Daily Journal D.A.R. 11335; Decert. ’00 Daily Journal D.A.R. 4973, 5/10/00.) [File #11.]

2. **“EXCESS ONLY” CLAUSE IS NO BAR TO PRORATION OF DEFENSE COSTS:** This is an action between successive third-party liability insurers. Both insurers had issued Commercial General Liability policies to the same insured. One accepted the defense; the other rejected it. A lawsuit followed wherein the defending insurer sought contribution from the insurer which had failed to defend. The Fourth Appellate District discussed the “Effect of Other Insurance Clauses.” Notwithstanding the “other insurance” clause, the Court held that both insurers were primary insurers and that proration was to be used to apportion the loss among them as concurrent insurers. (Pacific Indemnity Co. v. Bellefonte Ins. Co. ’00 Daily Journal D.A.R. 5477.) [File #105.]

3. **EMPLOYEE DISHONESTY POLICY DOES NOT COVER INSURED’S OBLIGATION TO THIRD PARTY:** “Employee dishonesty policies insure against the risk of property loss through employee dishonesty,” explained the Ninth Circuit. Liability policies, on the other hand, “require an insurer to discharge an obligation of the insured to a third party for some act of the insured or its employee. . . Although employee dishonesty policies may cover the loss of third-party property in the possession of the insured, . . . these policies do not serve as liability insurance to protect employers against tortious acts committed against third-parties by their employees.” (The Vons Companies, Inc. v. Federal Ins. Co. ’00 Daily Journal D.A.R. 4891.) [File #170.]

4. **POLICY COVERING DEFAMATION PROVIDES NO COVERAGE FOR PUBLICATIONS FIRST MADE PRIOR TO POLICY’S INCEPTION:** The First Appellate District has applied the “first publication” exclusion to affirm a judgment in favor of the defendant insurer. The Court noted, “we interpret the language of the Policy exclusion at issue as barring coverage of replication of any identifiably defamatory ‘material’ whenever the first publication of *substantially the same material* occurred before the inception of the policy period, without regard to whether or not the defamatory material is literally restated in precisely the same words.” (Ringler Associates v. Maryland CasualtyCo. ’00 Daily Journal D.A.R. 5421.) [File #233.]

#### GOVERNMENTAL IMMUNITY

**PLAINTIFF IS ENTITLED TO JURY IN DETERMINATION OF “CHANGED CONDITIONS”:** The Second Appellate District has reversed a judgment entered after a trial court held that it and not a jury was entitled to serve as the trier of fact on the question of whether “changed circumstances” deprived the governmental defendant of

the defense of design immunity. The trial court bifurcated the issue of the design immunity defense, heard, and decided the issue itself.

Statutory law provides a “design immunity” defense when a public entity is sued for an alleged dangerous condition on public property. But, that defense can be lost upon proof of changed circumstances. Here, the Court held that a plaintiff is entitled to a jury trial if disputed material facts exist as to the applicability of the “changed conditions” exception. (Cornette v. Department of Transportation ’00 Daily Journal D.A.R. 4701.) [File #185.]

## MEDICAL MALPRACTICE

**CALIFORNIA’S MEDICAL BOARD MAY TAKE ACTION FOR “UNPROFESSIONAL CONDUCT” BASED ON AS FEW AS TWO INCIDENTS:** Business & Professions Code, section 2234, empowers the Medical Board of California to take action against a medical licensee charged with “unprofessional conduct,” which includes “[r]epeated negligent acts.” The Third Appellate District has conducted that two such acts are sufficient to satisfy the statute’s requirement of “[r]epeated negligent acts.” (Zabetian v. Medical Board of California ’00 Daily Journal D.A.R. 4569.) [File #279.]

## TORTS

**1. NEGLIGENT SPOILIATION CAUSE OF ACTION FAILS:** The Second Appellate District has rejected a cause of action for negligent spoliation, but reversed a dismissal in order to allow plaintiffs to allege a cause of action for breach of a contractual duty to preserve evidence. The defenses available to such a cause of action would include unconscionability, impossibility, illegality, and impracticability. (Coprich v. Superior Court ’00 Daily Journal D.A.R. 5345.) [File #47.]

**2. FEDERAL GENDER-MOTIVATED VIOLENCE STATUTE IS UNCONSTITUTIONAL:** The Fourth Circuit has held that 42 U.S.C. 13981, which provides a federal civil remedy for the victims of gender-motivated violence, violates both the Commerce Clause and section 5 of the Fourteenth Amendment to the Federal Constitution. “The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct’s aggregate effect on interstate commerce.” (US v Morrison ’00 Daily Journal D.A.R. 5061.) [File #243.]

**3. THE “DIRECT THREAT” DEFENSE IS NOT AVAILABLE IN ACTIONS FOR VIOLATION OF THE AMERICANS WITH DISABILITIES ACT:** The Ninth Circuit has concluded “that the ADA’s direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or

safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake.” (Echazabal v. Chevron, Inc. ’00 Daily Journal D.A.R. 5407.) [File #162.]

**4. ELDER ABUSE LAW CONFERS ABSOLUTE IMMUNITY UPON THOSE WHO REPORT SUSPECTED ELDER ABUSE AND FACILITATE ACCESS TO VICTIMS:** According to the First Appellate District, the privilege created by Welfare and Institutions Code, section 15634 is “absolute rather than qualified.” (Easton v. Sutter Coast Hospital ’00 Daily Journal D.A.R. 4557.) [File #279.]

**5. DOCTOR CAN BE SUED UNDER ELDER ABUSE ACT:** The Third Appellate District has held that the surviving children of a patient of the defendant doctor could state a cause of action for violation of the Elder Abuse Act against the doctor. The Court rejected the defendant’s argument that the provision’s of Welfare and Institutions Code, section 15610.7, defining “abuse of an elder to include “neglect,” could not apply to him. The Court stated that it had “no trouble concluding that a doctor who conceals the existence of a serious bedsore on a nursing home patient under his care, opposes her hospitalization where circumstances indicate it is medically necessary, and then abandons the patient in her dying hour of need commits ‘neglect’ within the meaning of the Act.” The Court rejected the assertion that the defendant could not be liable because he was neither the custodian nor caretaker. (Mack v. Soung ’00 Daily Journal D.A.R. 5181.) [File #279.]

## TRIAL PRACTICE

**1. EXPERT’S TESTIMONY AT TRIAL IS LIMITED TO SCOPE OF TESTIMONY AT DEPOSITION:** In this legal malpractice action, the defendant attorney represented the plaintiff in connection with the division of marital property attendant to her divorce. Plaintiff’s expert was asked during his deposition to provide every basis for his opinion that the defendant’s services had fallen below the standard of care. The expert’s answers were limited to the time frame leading up to and concluding with the entry of a further judgment dividing the community property. At trial, however, plaintiff’s expert attempted to testify as to his opinion regarding the attorney’s conduct after the entry of the further judgment. None of his answers at deposition had focused on conduct after the entry of the further judgment even though he had been afforded ample opportunity to express his opinion fully as to all possible bases for a finding of malpractice. The Second Appellate District held that the trial court was correct in excluding all opinion which had not been voiced at the expert’s deposition, i.e., “exclusion of testimony going beyond the opinions he expressed during his deposition was justified.” (Jones v. Moore ’00 Daily Journal D.A.R. 4589.) [File #76.]

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## **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.

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.

Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.: When imposing sanctions under Code of Civil Procedure, section 128.5, the trial court must issue a factually specific written order.