The 27th Anniversary

1993 - 2020

West Coast Casualty's

Construction Defect Seminar

Seminar Handout for 2020

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The 27th Anniversary

1993 - 2021

May 13th and 14th, 2021

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David Stern, RPA
President
West Coast Casualty Service, Inc.

May 14, 2020

Dear Friends and Colleagues,

Here it is May 14th 2020 and at this time I expected to be speaking to all of you from the stage of the Grand Ballroom of the Disneyland Hotel instead of sitting at my desk wondering what this year's seminar would have been like.

These are strange and unusual times for all of us in that the world that we once knew as normal has changed.

However, despite the challenge that we all face in these days, we are as strong and resilient a people as we have always been and we ***WILL*** come out of this stronger, tougher, and more resilient than ever because that is who we are.

Our little corner of the world, meaning the construction defect community has been through constant changes since the late 1980s so change is something that we are all used to and while times now seem tough, as a strong and resilient a community we are, we will get through this also.

As West Coast Casualty has been a part of the construction defect community since the beginning and while this would have been the 27th year of our seminar we still feel the commitment to go forward with the educational commitment that we made back in 1993. In that regard we asked our speakers to prepare their handout material even though the seminar has been canceled and many of them did that for you, our community members.

I'm extremely proud to join them in providing this handout to all of you, all 22,000 members of the construction defect community who are receiving this handout because we are all part of this community whether you attend our seminar or not. This year we felt compelled to share it with everybody since we do not know how many seminars and conferences there will be this year. We feel that the educational aspect that founded this seminar series must go on. Education is something we all need to continue with as our own little corner of the world keeps changing and for 27 years, we changed with it.

As part of our commitment to the construction defect community we are also sharing some special messages that have been placed throughout this handout by those who chose to do so just to let their friends and colleagues know that everything is okay.

Please enjoy the contents of this handout with the compliments of our company, our speakers, sponsors, and our vendors.

Lastly, on a personal note I wanted to wish you all the best as we go through this ***TOGETHER***. For you and your families, I wish you well, to remain in good health and that all of you remain safe.

I will look forward to seeing you on May 13th and 14th 2021 when we all get the chance to be together again.

Very truly yours,

West Coast Casualty Service, Inc.

David Stern, RPA, President and Corporate Secretary
davestern@westcoastcasualty.com

The Topics and Speakers Committee of
West Coast Casualty's
2020 Construction Defect Seminar

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Hon. Jerrold S. Oliver (1934 - 1996)

The Jerrold S. Oliver Award of Excellence

Each year, West Coast Casualty's Construction Defect Seminar recognizes an individual who is outstanding or has contributed to the betterment of the construction defect community. This person is recognized at the seminar and receives a plaque citing his or her achievement. This award has been named after the late Judge Jerrold S. Oliver who was truly a "founding father" in the alternate resolution process in construction defect claims and litigation. His loyalty and commitment to this community were beyond mere words as he was a true believer in the process of resolution. The award, affectionately referred to as the "Ollie" is presented each year at our seminar to someone who has invoked the same spirit of commitment, loyalty and trust for the betterment of the entire construction defect community. Each year we ask all the members of the construction defect community to nominate those who they feel invoke the same spirit as Judge Oliver. We then narrow it down, by simple majority to the four names who appear below.

Along with the recognition of the award is a donation in the winner's name to Habitat for Humanity

No matter who wins in the end . . . . They are all winners . . . so says the Construction Defect Community

Kenneth Bloom, Esq.
Gartner Bloom

Steve Lokus
Hartford Ins. Co

Linda Pretzel
Riverstone

Diana Winfrey, Esq.
Selman Breitman

But the Construction Defect Community has spoken for 2020 and One was Chosen . . . .

(See next Page)

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516 Pennsfield Place # 208, Thousand Oaks, CA 91360
Tel. 818 735 3595 - Fax. 818 735 3596 - E-mail: claims@westcoastcasualty.com

America's Construction Defect Community has spoken and by majority has selected

Linda Pretzel
RiverStone

to receive the The Jerrold S. Oliver Award of Excellence for 2020

Linda received notice of this award before this handout was printed and sent the following message to us:

"Judge Jerrold S. Oliver played an outsized role in the careers of many of us in this industry. In my case, I spent the formative years of my career appearing before Judge Oliver. I learned immensely from his intellect, skill and talent in negotiation strategies to resolve complex CD claims. I respected him immensely as a judge/mediator and treasured him as a friend. I thought his charm, wit, and intelligence were inspirational.

When I heard I was nominated for the "Ollie" award, I was elated! It's an honor, and humbling, to be nominated alongside such distinguished and accomplished peers as Ken Bloom, Steve Lokus, and Diana Winfrey. Their professionalism, kindness and intellect is what we should all strive to achieve.

To win this year's "Ollie" is the honor of a lifetime. Not only do I feel privileged to have my name associated with Judge Oliver, but what truly makes this award so meaningful is that it was determined by all of you, my colleagues. You are my teammates, my allies, my friends, and my inspiration in this complicated, wonderful, frustrating, and rewarding profession.

I would like to thank Dave Stern and the professionals at West Coast Casualty for turning our industry into a community we all love and respect. Without Dave's ability to bring kindness and cooperation into our industry, we would never have the close personal friendships with our colleagues we so treasure. I am forever grateful to Dave.

I also want to remember Coral Stern, whose grace, dignity, and warm smile always comes to mind when I think of West Coast Casualty. If not for Coral, the annual CD seminar we all have enjoyed for so many years would not be the landmark conference it is. Coral guided WCC to provide a seminar to educate, innovate and bring together an industry spread across the United States. Thanks to Coral and Dave, this annual seminar made all of us in the industry better.

Finally, I would like to thank the fantastic management and my tremendous co-workers at Riverstone. Their enlightened leadership, complete support, and sheer talent have created a culture of continuous improvement we all admire and respect. I've been lucky enough to spend the past 14 years of my career with Riverstone and am deeply grateful for the chance to help make a difference every day.

Thinking back on my career, I am filled with gratitude. I started handling claims in 1985, thirty- five years ago. Times have changed, but everything I adore about claims is still the same. I love the challenge, and appreciate working alongside the professionals that make our industry work: plaintiff and defense attorneys, experts, mediators, judges, vendors, and fellow claims examiners. Looking back, I can assure you, I will remember and cherish this honor forever.

While it is disappointing this year's West Coast Casualty Conference is cancelled, we are so lucky to have our friendships and our community. To each of you, your loved ones, your family, and your friends, I hope this message finds you safe and well. Hope to see you soon to thank you, in person, for this great honor.

With heartfelt gratitude and appreciation,

Linda Pretzel

Buy a Banner . . . . Support a Charity . . . . Lift a Life . . .

Although we were unable to put up our Buy A Banner, Support A Charity Life A Life Banners this year, the following organizations

GAVE ANYWAY

So, we are proud to recognize and salute them here for their kindness and generosity for the organizations they supported this year.

We will be proud to fly their banners for their support at our 2021 seminar.

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The Salvation Army

Dion Cominos

Taking Control of Your Diabetes

West Coast Casualty Service, Inc.

The Salvation Army

This year West Coast Casualty through this seminar sought to help achieve the goals of the Salvation Army by enlisting all those in the construction defect community through its own sponsorship, our partner corporate sponsorships and individual sponsorships but due to the onset of the Coronavirus, our efforts were caught short . . . but we are proud to say that ***DOING THE MOST GOOD*** was achieved by

---

With so many in need this year due to the pandemic, won't you consider a donation to the Salvation Army?

https://give.salvationarmyusa.org/give/164006/#!/donation/checkout

The Salvation Army USA
615 Slaters Lane, Alexandria, Virginia 22313 | 1-800-SAL-ARMY

Messages from the Members of the Construction Defect Community for the Construction Defect Community

Good afternoon to the WCC community and greetings from the great state of Alabama. Like all of you I am saddened we will not be gathering in the happiest place on earth to celebrate our community, to break bread (and bottle tops) with one another and to spend time together. “speaking the language of claims”. The silent villain has stricken all of our towns, cities, states and businesses but we WILL GET THROUGH THIS TOGETHER as we have other disasters and tragedies. Please know that Adams and Reese LLP and myself are operational albeit with a different view and rather than dealing with interruptions from a ringing phone and office visitors I am now battling with the cat to stay off my papers and with the dog who thinks I am here to walk her rather than to do my work. Please accept my best wishes for your good health and fortune and until we meet again May God hold you in the palm of His hand. God bless. Jannea Rogers Jannea.rogers@arlaw.com

Jannea S. Rogers, Esq.
Partner
Bar Admission in Alabama, Florida, Georgia and Texas
Certified Litigation Management Professional (C.L.M.P.)
Certified Claims Professional in Construction (C.C.P. Construction)
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Mobile, AL 36602
251-433-3234 Main Office
800-725-1990 Toll Free
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jannea.rogers@arlaw.com
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Happy Passover Dave.

Resnick & Louis has been doing well during the virus situation. We appreciate and value the incredible and loyal relationships with our insurance and client partners. We also thank all of our dedicated and hard working employees for seamlessly transitioning to working at home and provdinig the same level of quality customer service. We hope to see you and the normal crew at the Confernce in 2021.

Sincerely,

Mitch Resnick
mresnick@rlattorneys.com

Dave, Thank you for the note. I hope you, your family, and friends are doing well. You run a great seminar and I am sorry to miss it this year. Next year bigger and better than ever. The same to the WCC community, I hope you are all well and continue to do so.

I am not one who does well working from home. Way too many distractions. I have become expert at several video conference software packages and seem to spend most of my day video conferences with clients and fellow employees. I decided that I would start thinking about what the next phase of the Corona Virus response will be. My work depends on site inspections, documents, and depositions. I consulted with CCA LLC's Health, Safety, and Environmental experts and came up with protocols for site visits that comply with guidance federal and state guidance. We successfully completed a few site visits using these protocols. Next we completed general protocols for holding in person depositions safely and in compliance with applicable guidance. One of our clients has noticed a deposition using this protocol. We will see how that flies.

I did these so that I COULD GET OUT OF THE OFFICE.

Until then we have instituted a company-wide Zoom cocktail hour at 4:30 every Friday. Best part of the week.

Good luck to you all. See you next year.

Ken

Kenneth R Quigley, PE, MS | Executive Vice President | *CCA*, Construction Consulting Associates, LLC
Direct: 781-301-5216 | Mobile: 781-710-3033 | Office: 781-280-0660 | www.ccaco.com

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Dave, Thank you for your thoughtful email regarding the canceled conference and availability of materials. This is a truly unexpected and generous gift from you, your team, and all those involved in putting together the conference this year and every year. You asked for updates – here is mine:

To my great delight, I have found mediating online a seamlessly-ideal substitute for the in-person business-as-usual variety. Participation is easy for everyone, and when things get heated during negotiations, my big furry 'colleagues' can join our session to break the tension. This public health crisis brings a lot of challenge and uncertainty for all of us. Despite this, rest assured your favorite neutrals are settling into a new routine around the mediation process, which keeps things going even when the courts are not able to keep up. From the bottom of my heart, I do hope that everyone is staying healthy and managing all of their responsibilities as best they can. Be well.

Melissa Blair Aliotti, Esq.
Aliotti Dispute Resolution PC
Direct: 916-215-7645

For inquiries and scheduling, please contact my Case Manager, Valerie Egerton
via email: ValerieE@JudicateWest.com or phone: 714-852-5156

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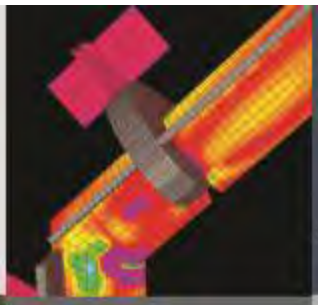

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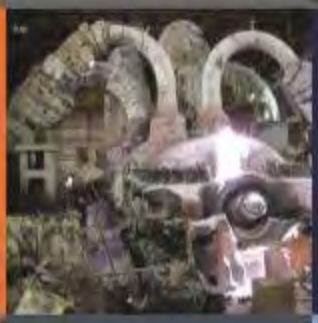

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April 2, 2020

Dear Clients & Friends:

We simply want to take this opportunity to wish you, your family and your team the very best

We regret not being able to see you in person at WCC this year. Our Annual Luncheon has become something of a tradition – a great chance to catch-up, share a meal and gossip. Since we can't do that this year, let's try to keep in touch via email and phone. Social distancing does not mean a lack of socialization. We'll be looking forward to the next event, which we hope will be even bigger and better, and can't wait to see you there.

We would also like to personally thank Dave Stern and West Coast Casualty for their ongoing commitment to the industry.

Should you require any support or insight in navigating your claims and cases during these challenging times, I want you to know you can call upon me at any time. We're continuing to ensure our attorneys and carriers have the right experts in the right place at the right time. To stay up-to-date with all of our latest news and information, you can visit and bookmark our website: guardiangroup.com

Again, we're hoping this finds you well, but we're also sending thoughts of optimism, fortitude and resiliency your way. Please stay safe!

To your health and success,

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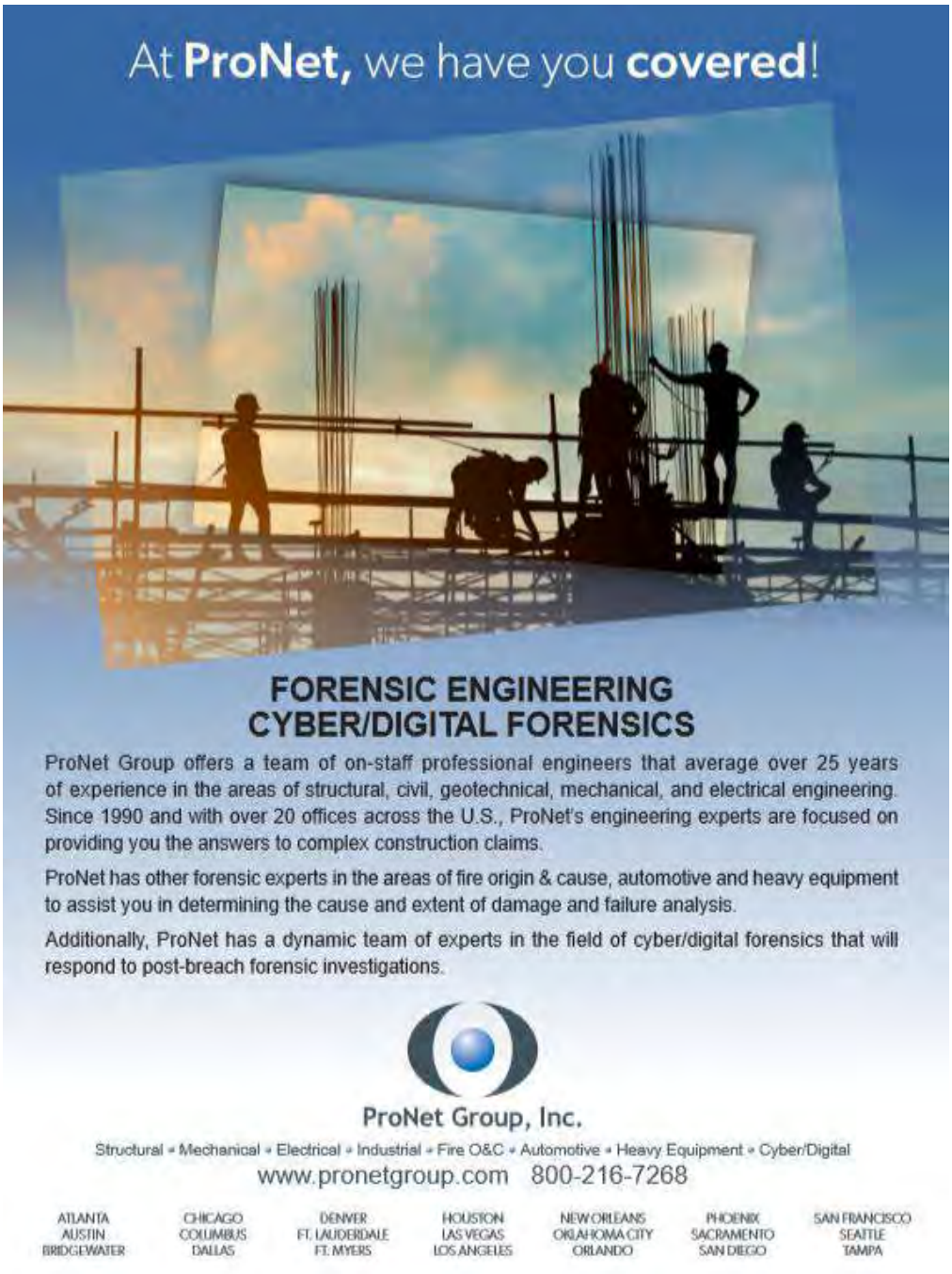

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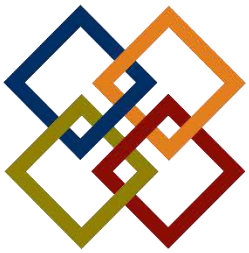

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Jon Turigliatto is a partner in the law firm of Chapman Glucksman Dean & Roeb. His practice focuses on the representation of the developers and general contractors in complex multi-party construction litigation, products liability and commercial/business litigation. He also counsels owners and contractors in the drafting and negotiation of construction agreements. Mr. Turigliatto has trial, arbitration and mediation experience.

Mr. Turigliatto is a contributor to Chapman Glucksman Dean & Roeb's National Construction Risk Management Handbook. He has been a speaker and author on issues related to construction and real estate, including events sponsored by West Coast Casualty, the Association of Southern California Defense Counsel, Quality Built, and Lorman.

Mr. Turigliatto is a native of Southern California. He received his undergraduate degree in Political Science from the University of California, Irvine and earned his Juris Doctor degree from Southern Methodist University School of Law.

Luke Ryan concentrates in construction defect litigation. His primary focus has been representing homeowners throughout Southern California since 1993. In the last few years, Luke has expanded his practice to include homeowner representation throughout Arizona as well. He also has extensive experience representing both plaintiffs and defendants in a wide variety of general civil litigation, products liability, and real estate litigation matters.

Luke has a Bachelor of Science degree in Chemistry from the University of Nebraska and a Juris Doctor from the University of San Diego School of Law. While attending law school, he was a member of the University of San Diego Law Review and a tutor in the academic support program.

Before his legal career, Luke completed ten and one-half years of Naval Service as a commissioned Special Warfare Officer, S.E.A.L. in the United States Navy.

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ARIZONA

CONSTRUCTION

HOMEOWNER WHO SOUGHT RECOVERY FROM THE RESIDENTIAL CONTRACTORS' RECOVERY FUND DUE TO ALLEGED FAILURES ON THE PART OF A WARRANTY COMPANY WAS NOT ENTITLED TO RECOVERY WHERE NO VIOLATION OF CONTRACTORS REGULATIONS WERE ALLEGED, AND THE CONTRACT WAS PRIMARILY FOR A WARRANTY ON EXISTING CONSTRUCTION INSTEAD OF WORK PURSUANT TO A CONSTRUCTION CONTRACT.

***GORDON V. ARIZONA REGISTRAR OF CONTRACTORS* (2019) 247 ARIZ. 146**

A homeowner purchased a home warranty policy from an insurer. The insurer held a license to sell home warranty policies, issued by the Department of Insurance ("DOI"), and a license for air system repair and replacement, issued by the Registrar of Contractors ("ROC"). The homeowner's policy promised coverage through 2012. Although the insurer's DOI license expired in 2009, the homeowner continued to pay premiums through mid-2011. In October 2011, the insurer stopped answering the homeowner's service calls and the homeowner thereafter filed a complaint with the Registrar of Contractors, alleging that the insurer performed work outside the scope of its ROC-issued license, aided and abetted an unlicensed contractor, operated as an insurance company without a license and failed to respond to new requests for service. After the insurer failed to answer the complaint, the ROC deemed all allegations admitted, issued a default decision and revoked the insurer's air system license.

The homeowner then sought an award from the Residential Contractor's Recovery Fund (the "Fund"). The ROC denied the homeowner's claim based on its determination that that (1) the warranty policy was not a construction contract; and (2) the damages claimed did not result from "incomplete or defective workmanship," which were the only damages covered by the Fund. The homeowner subsequently requested a hearing with an administrative law judge, who upheld the ROC's decision. The homeowner then appealed to the Superior Court which affirmed the administrative law judge's decision, explaining that the policy was a home warranty agreement regulated by the DOI and not the ROC and the complaints about the work on the air system did not stem from any "workmanship issues." The homeowner appealed.

The Arizona Court of Appeal affirmed the trial court decision, holding that: (1) the homeowner did not have a construction contract with the insurer to perform all the warranty repairs; (2) the homeowner was not a "person injured" under the relevant statute; and (3) the homeowner did not suffer any actual damages. The Court concluded that the alleged breach arose from breach of the warranty policy and not from "defective or incomplete work by a contractor." As a result, this fell "within the purview of the DOI – not the ROC." Further, the Fund was available only to a "person injured" defined by applicable statute as one who "is damaged by the failure of a residential contractor or dual licensed contractor to adequately build or improve a residential structure or appurtenance on that real property." A.R.S. § 32-1131(3)(a). Because the homeowner did not allege damages from workmanship deficiencies for any incomplete work, he did not meet the

statutory definition for a "person injured." The Court additionally noted that that the Fund was created to compensate homeowners for actual damages suffered as a direct result of the contractor's failure to adequately build or improve a residential structure or appurtenance. Here, the homeowner did not claim that any contractor's work was performed defectively, or that any of the work was not complete.

INSURANCE

DAMAGES CAUSED BY CATS CHARACTERIZED IN PLAINTIFFS' COMPLAINT AS "FERAL" ARE NOT EXCLUDED FROM COVERAGE BY A POLICY EXCLUSION FOR DAMAGES CAUSED BY "DOMESTIC ANIMALS."

***GOLDBERGER V. STATE FARM FIRE AND CASUALTY COMPANY* (2019) 247 ARIZ. 261**

Homeowners filed a claim with their insurer due to damages sustained as a result of the homeowners' tenants allowing feral cats to access the property. The insurer denied the claim based on a policy exclusion for damage caused by, "birds, vermin, rodents, insects or *domestic animals*." The homeowners then filed suit based on breach of contract and insurance bad faith. The insurer thereafter filed a Rule 12(b)(6) motion to dismiss based on the policy exclusion.

The trial court granted the motion to dismiss, reasoning in part: (1) a cat, feral or not, is a domestic animal; (2) these feral cats were acting as if they were domesticated; and (3) a reasonably intelligent consumer would understand the exclusion to apply to damage caused by feral cats. The homeowners subsequently appealed.

At the outset, the Court of Appeal observed that the trial court seemed to base its decision that the cats were domestic in part on facts not alleged in the complaint, specifically that the cats were "peacefully living in the home with the tenant." Next, noting that "domestic animals" was not a defined term, the Court interpreted the term to mean "specific animals that are subject to the care, custody, and control, of a person," rather than applying a broader "species-based" definition. The Court explained that the intent of the exclusion was to limit coverage for animals over which the insured has control. Thus, the Court held that the exclusion of "domestic animals" does not necessarily exclude damage by "feral" cats, over which the insured may not exercise "care, custody or control." As a result, the Court of Appeal reversed the trial court's ruling on the 12(b)(6) motion to dismiss.

CALIFORNIA

ARBITRATION

A REQUEST FOR COSTS UNDER CALIFORNIA *CODE OF CIVIL PROCEDURE* § 998 IS TIMELY IF FILED WITH THE ARBITRATOR WITHIN FIFTEEN DAYS OF A FINAL AWARD, AND IF THE ARBITRATOR REFUSES TO AWARD COSTS, JUDICIAL REVIEW IS LIMITED.

***HEIMLICH V. SHIVJI* (2019) 7 CAL.5TH 350**

An attorney brought suit against his client, seeking $125,000 in unpaid legal fees. One year into the litigation, the defendant client made an offer to settle the case under *Code of Civil Procedure* § 998 ("998 offer"), for $30,001, which the plaintiff attorney did not accept. The defendant later made a subsequent 998 offer for $65,001. Thereafter, the trial court granted the defendant's motion to compel arbitration and ordered the case to arbitration.

Following arbitration, the arbitrator issued an award of $0 and directed each side to pay their own fees and costs. Six days later, the defendant advised the arbitrator of the previous 998 offers and sought costs as the plaintiff had failed to obtain a more favorable result. The arbitrator responded that he had issued a final award and no longer had jurisdiction to take any further action in the matter. As such, the defendant filed a motion with the trial court to confirm the award and seek costs of $76,684.02.

The trial court confirmed the award but denied the request for costs, relying on *Maaso v. Signer* (2012) 203 Cal.App.4th 362, which held that a request for costs pursuant to a 998 offer in connection with an arbitration must be resolved by the arbitrator. The defendant thereafter appealed, and the Court of Appeal reversed, holding that the defendant's post award request to the arbitrator was timely. The Court of Appeal explained that evidence of a 998 offer *must* postdate an arbitration award as it cannot be given in evidence upon the trial or arbitration. The California Supreme Court granted certiorari.

The California Supreme Court reversed the Court of Appeal's order and affirmed the trial court's confirmation of the arbitration award and denial of costs. The Court held that a request for costs under *Code of Civil Procedure* § 998 is timely if filed with the arbitrator within 15 days of a final award, and if the arbitrator refuses to award costs, judicial review is limited. The California Supreme Court further determined that, with certain limits, evidence of a 998 offer may be presented *before or after* an arbitrator's final award on the merits. The Court discussed that although evidence of a 998 offer is inadmissible to prove liability, under certain circumstances, it may be admissible to prove unrelated matters. Thus, although the defendant's requests for costs was timely, because he chose to raise the 998 offer only after the arbitrator's award on the merits, he ran the risk that the arbitrator would erroneously refuse to award costs, which left him without recourse under the narrow grounds for vacation or correction contained in the statutory scheme of arbitration. The California Supreme Court further explained that it is within the power of the arbitrator to make a mistake, either legally or factually, and when parties opt for arbitration as a

forum, they agree to be bound by the decision of that forum.

CIVIL PROCEDURE

PURSUANT TO CALIFORNIA *CODE OF CIVIL PROCEDURE* § 2034.280, A PARTY MAY SUPPLEMENT ITS EXPERT DESIGNATION TO ADD ADDITIONAL EXPERTS WHO INTEND TO TESTIFY ON SUBJECT MATTERS IN WHICH THE PARTY HAD NOT PREVIOUSLY DESIGNATED EXPERTS.

***DU-ALL SAFETY, LLC V. SUPERIOR COURT* (2019) 34 CAL.APP.5TH 485**

A man fell from a bridge when the floor gave out. As a result of the fall, the man sustained injuries that caused him to become a paraplegic. He and his wife filed suit seeking damages for negligence and loss of consortium against Du-All Safety, LLC ("Du-All"), a safety inspection company, and a number of other defendants.

Du-All served its expert designation and included two experts it intended to call at trial. On the same day, the plaintiffs filed their expert designation which included seven experts. Du-All then filed a supplemental expert disclosure to identify an additional five experts testify in rebuttal to the plaintiffs' experts. The plaintiffs thereafter filed a motion to strike all of Du-All's supplemental experts claiming that the supplemental disclosure was an act of "gamesmanship" and those experts should have been disclosed in the original expert designation. The trial court agreed, granting the plaintiffs' motion and finding that Du-All "knew or should have known" that the plaintiffs would call experts in each of those areas and subsequently had waived its right to name additional experts. Du-All filed a petition for peremptory writ to challenge the decision. The Court of Appeal reviewed the case de novo.

The California First District Court of Appeal held that pursuant to *Code of Civil Procedure* § 2034.280, a party may supplement its expert designation to add additional experts who intend to testify on subject matters in which the party had not previously designated as experts. The appellate court noted that *Code of Civil Procedure* § 2034.280 provides that "any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject". The Court further explained that *Code of Civil Procedure* § 2034.280 was enacted to provide that when a party designates an expert, it is possible the other side might want to designate a rebuttal expert on the same topic.

AN INSUFFICIENT MEET AND CONFER PURSUANT TO CALIFORNIA *CODE OF CIVIL PROCEDURE* § 430.41 IS NOT GROUNDS TO OVERRULE OR SUSTAIN A DEMURRER.

***DUMAS V. LOS ANGELES COUNTY BOARD OF SUPERVISORS* (2020) 45 CAL.APP.5TH 348**

A man filed suit against the Los Angeles County Board of Supervisors and the Los Angeles County Sherriff's Department (collectively the "County"), among others, alleging various violations of his civil rights related to his arrest. The County demurred to the plaintiff's complaint. The County had sent the plaintiff a written meet and confer request and received no response. The trial court sustained the demurrer and the plaintiff appealed. The plaintiff argued that the court erred in several ways, including sustaining the demurrer despite the County's failure to meet and confer.

The California Second District Court of Appeal affirmed, holding that any insufficiency in the meet and confer process would not undermine the trial court's ruling on the demurrer. The Court explained that although *Code of Civil Procedure* § 430.41 requires that the demurring party must meet and confer with the party who filed the challenged pleading "in person or by telephone," and that statute goes on to state in Subsection (a)(4) that, "any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Notably, the Court of Appeal did leave open the possibility of the trial court imposing monetary sanctions or additional meet and confer requirements to punish a party's failure to comply with the statutory meet and confer requirements.

FAILING TO REBUT A PRESUMPTION OF PREJUDICE WHERE THERE IS JUROR MISCONDUCT IS GROUNDS FOR A NEW TRIAL.

***NODAL V. CALWEST RAIN, INC.* (2019) 37 CAL.APP.5TH 607**

A vineyard worker brought a negligence action against an installer of irrigation systems after a valve assembly blew off a vineyard irrigation pipe and injured the worker. After the jury rendered a verdict for the installer, the worker moved for a new trial based upon juror misconduct and moved for judgment notwithstanding the verdict ("JNOV"). The motion was based on a juror who was a pipefitter for over thirty years and had designed and built an irrigation system for his own ranch. The juror shared his experience with other jurors during deliberations explained to the other jurors that he believed the installer had not been negligent. The trial court denied the worker's JNOV in favor of the installer, determining that juror misconduct occurred but did not prejudice the worker. The court also ruled that the verdict was supported by substantial evidence. The worker appealed.

The Court of Appeal reversed and remanded, holding that the juror's statements during deliberations regarding his opinion based on personal work experience constituted misconduct that raised a presumption of prejudice, because a juror may not discuss an opinion explicitly based on specialized information obtained from outside sources and such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct. Moreover, juror affidavits reflected that the juror's statements potentially influenced the votes of as many as four other jurors, which raised a presumption of prejudice that was not rebutted by the installer. Thus, the Court of Appeal reversed the judgment and remanded for a new

trial. The Court also affirmed the order denying the motion for JNOV, holding that where the evidence is conflicting or several inferences may be drawn, as was the case here, a motion for JNOV should be denied.

CONSTRUCTION

A PRIME CONTRACT BETWEEN A GENERAL CONTRACTOR AND DEVELOPER CANNOT CONCLUSIVELY DETERMINE THE DATE OF SUBSTANTIAL COMPLETION.

***HENSEL PHELPS CONSTRUCTION CO. V. SUPERIOR COURT* (2020) 44 CAL.APP.5TH 595**

A general contractor entered into contract with a developer to build a condominium tower which would be managed by the Homeowners Association ("HOA"). The HOA was not a party to the contract. After the tower was built, the HOA sued the general contractor for violation of building standards codified in the Right to Repair Act (*Civil Code* §§ 895, *et seq*.).

The general contractor filed a motion for summary judgment contending that the HOA's claims were barred by the 10-year limitations period under *Civil Code* § 941, which provides, "Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion." The general contractor asserted that "substantial completion" under the statute had the same meaning as "substantial completion" in its construction contract with the developer. Because the parties to the construction contract agreed that "substantial completion" occurred on a certain date at the time of construction, the general contractor argued that the limitations period began to run on that date. Thus, the general contractor contended that as the HOA asserted its claims more than 10 years later, they were untimely.

The trial court denied general contractor's motion for summary judgment, holding that the definition of "substantial completion" in the contract did not trigger the running of the statute. And, even if it did, the HOA had raised a triable issue of fact whether the definition of "substantial completion" under the contract had been satisfied on the date asserted by the general contractor. The general contractor appealed, primarily arguing that the date of substantial completion adopted by the parties to the contract "conclusively established" the date of substantial completion under the statute.

The California Fourth District Court of Appeal affirmed the trial court's ruling, holding that the prime contract between the general contractor and the developer could not conclusively determine the date of substantial completion. The Court stated that the general contractor offered no authority for the "novel proposition" that certain parties may, by contract, conclusively establish the date when a limitations period begins to run on another party's cause of action. Likewise, the general contractor had not shown that the statute should be interpreted to adopt the provisions of its construction contract. The Court explained that while it need not precisely define "substantial completion" under the statute for purposes of this writ proceeding, it is clear that the statute does not simply adopt the date determined by private parties to a contract for their own purposes as the date of substantial completion.

A GENERAL CONTRACTOR MAY BE ENTITLED TO WITHHOLD FUNDS PURSUANT TO A CONTRACTUAL RETENTION CLAUSE WHERE THE SUBCONTRACTOR ABANDONS THE WORK BEFORE IT IS COMPLETED.

***REGENCY MIDLAND CONSTRUCTION, INC. V. LEGENDARY STRUCTURES INC.* (2019) 41 CAL.APP.5TH 994**

A general contractor and concrete subcontractor sued each other after the subcontractor quit halfway through the job. The dispute between the parties turned on whether the general contractor had a right to keep the retention amount set forth in the subcontract. The subcontract at issue stated that 10% of the subcontractor's contract amount would be withheld and "released 35 days after completion of subcontractors work." The retention clause was one of the primary provisions of the subcontract and included strikeout wording, a typed substitute insertion that replaced the strikeout words, and two sets of handwritten initials in the margin to show approval of the wording change.

Together with the strikeout words, the original retention clause read: "Ten percent (10%) of Subcontractor's contract amount shall be withheld and will be released ~~30 days after final completion of the building.~~"

The general contractor filed a motion for summary judgment, arguing that the contract language entitled it to withhold the funds because the subcontractor did not complete its work. In opposition, the subcontractor argued that the term "subcontractors work" referred to *any* subcontractor, not just the concrete work it performed. The subcontractor, therefore, contended that after the entirety of the concrete work was performed by the subsequent replacement subcontractor, the original subcontractor should get the withheld payments and receive the full amount due for the work it performed before it abandoned the project. The trial court granted the general contractor's motion for summary judgment and the subcontractor appealed.

The California Second District Court of Appeal affirmed the trial court's granting of the general contractor's motion for summary judgment holding that the drafters of the subcontract "carelessly" omitted the possessive apostrophe from the inserted word "subcontractors" and that the purpose of the retention clause was to ensure proper performance by the subcontractor. The Court explained that the Subcontractor must suffer the consequences of its contractual failing, which is loss of the withheld funds. The Court of Appeal also held that the general contractor was the prevailing party in the litigation because it established that the subcontractor was liable and won a dollar judgment, despite the fact that the judgment was less than the general contractor had requested. Thus, the general contractor was entitled to an award of attorneys' fees under the subcontract.

CONTRACTS

ONE MAY NOT CONTRACT TO ACCEPT RISK, DECIDE TO BE SELF-INSURED, AND THEN RETROACTIVELY DEMAND TO BE PAID BY THE OTHER SIDE AFTER THERE IS A LOSS.

***KANOVSKY V. AT YOUR DOOR SELF STORAGE* (2019) 42 CAL.APP.5TH 594**

Plaintiffs contracted with the defendant for the delivery, transportation, and storage of storage vaults. The plaintiffs loaded the vaults with various possessions and the defendant picked up, transported and maintained possession of the vaults until the plaintiffs opened them. Upon opening the vaults, the plaintiffs allegedly discovered water damage to their possessions. The plaintiffs then filed suit against the defendant, seeking damages for breach of contract, tortious breach of covenant, negligence and violation of the Consumer Legal Remedies Act (*Civil Code* § 1750) ("CLRA"). The defendant's insurer intervened and moved for summary judgment, noting several portions of the contract at issue which allocated risk to the plaintiffs. The trial court granted the motion. The plaintiffs appealed.

The California Second District Court of Appeal affirmed the trial court's decision, holding that one may not contract to accept risk, decide to be self-insured, and then retroactively demand to be paid by the other side after there is a loss. The Court explained that the contract in this case allocated risk and specified that the company was not responsible for water damage. The contract also offered insurance options to the plaintiffs, which the plaintiffs declined. The Court noted that the contract specifically limited liability for damage or theft of the plaintiffs' possessions and included a paragraph explicitly excluding liability for water damage (which was separately initialed by the plaintiffs). Finally, the Court disposed of plaintiffs' arguments under the CLRA, concluding that the defendant did not act "unconscionably" by specifying it was not liable for water damage, and noted that the plaintiffs' allegations of "false advertising" claims were not made in their complaint and thus were "improperly beyond the pleadings."

DANGEROUS CONDITION

A PUBLIC ENTITY IS NOT LIABLE FOR WRONGFUL DEATH ON AN ADJACENT NON-PUBLIC PROPERTY WHEN THE PUBLIC ENTITY DID NOT CREATE THE HAZARDOUS CONDITION.

***HEDAYATZADEH V. CITY OF DEL MAR* (2020) 44 CAL.APP.5TH 555**

In the City of Del Mar (the "City") the North County Transit District ("NCTD") owned a railroad right-of-way that ran along the top of an ocean bluff, perpendicular to the end of 13th Street. A guardrail on the City's property prevented automobiles from reaching NCTD's right-of-way, but not pedestrians. Pedestrians regularly walked around the guardrail and next to NCTD's right-of-way despite "No Trespassing" signs and, over many years, multiple train-related injuries, fatalities and near-misses occurred on the tracks. The plaintiff's son and two friends parked at the end of 13th Street, walked around the guardrail, down an unimproved dirt embankment, and crossed the train tracks. The group then walked northbound on the west side of the tracks to a spot where they sat and smoked marijuana. Unfortunately, plaintiff's son stood too close to the train tracks and was

killed by the oncoming train. The plaintiff sued the City, NCTD, and BNSF Railway Company, the alleged operator of the freight train, for the wrongful death of his son.

The location of the incident was more than 50 feet from the City's property to the east and more than 40 feet from the City's property to the west. The City did not perform any maintenance of the NCTD right-of-way and had no authority to correct any defects on the NCTD property. Thus, the City filed a motion for summary judgment. The trial court granted the City's Motion as a matter of law because the City's *own property* was not in a dangerous condition. On appeal, Plaintiff argued that the City's property posed a dangerous condition because (1) it was *adjacent* to NCTD's right-of-way; (2) the train tracks posed a danger to trespassers; and (3) the City had not taken any action, such as constructing a fence at the location of the guardrail at the end of 13th Street to prevent pedestrians from walking around the guardrail and trespassing on NCTD's train tracks.

The California Fourth District Court of Appeal affirmed the trial court's ruling holding that, as a matter of law, a public liability does not arise from a failure to erect a barrier preventing the public from willfully accessing a hazard on an adjacent property. The Court distinguished from other cases that the City's failure to install a guardrail did not *create* a condition of public property that necessarily endangered members of the public because pedestrians were not required to walk toward the train tracks and encounter any hazard on NCTD's right-of-way.

WITHOUT KNOWLEDGE OF A DANGEROUS CONDITION THERE IS NO BREACH OF DUTY OF CARE TO VISITORS, AND NEGLIGENCE PER SE IS NOT APPLICABLE TO OWNERS WITHOUT NOTICE OF APPLICABLE BUILDING CODES OR A DANGEROUS CONDITION WHO DID NOT TAKE PART IN THE DESIGN OR CONSTRUCTION.

***JONES V. AWARD* (2019) 39 CAL.APP.5TH 1200**

Plaintiff fell while stepping down two steps into the defendants' garage. The plaintiff sued the defendants on a single count of personal injury for premises liability, claiming that the two steps down to the garage violated building code requirements. The defendants filed a motion for summary judgment on the basis that plaintiff could not establish her premises liability claim because the garage step was open and obvious, the defendants did not have any actual or constructive notice of the unreasonable danger of the step, and the plaintiff could not prove causation. In opposition, the plaintiff argued that expert testimony showed that the step violated building codes, making it unreasonably dangerous and that the steps were the cause of her injuries.

The trial court granted the defendants' motion for summary judgment, finding no breach of duty. The trial court further found that there was not a claim of negligence per se on the basis of the building code violations because the defendants did not build the home or hire the contractor who built the garage steps. The plaintiff appealed.

The California Fifth District Court of Appeal affirmed the trial court's ruling, holding that the defendants were not liable because there was no evidence that the defendants had any actual or constructive notice of the danger. Moreover, the Court held that negligence per se did not apply based upon the building code because the defendants did not take part in the design or construction

of the step area of the garage, did not have knowledge of the building code violations which existed when the defendants purchased the house, and were not aware that the condition of the steps violated the building code. Accordingly, the Court of Appeal affirmed the trial court's judgment in favor of the defendants.

ETHICS

CALIFORNIA *CODE OF CIVIL PROCEDURE* § 47 (THE "LITIGATION PRIVILEGE") DOES NOT PROTECT COMMUNICATIONS INTENDED TO INTERFERE WITH A CONTRACT.

***MANCINI & ASSOCIATES V. SCHWETZ* (2019) 39 CAL.APP.5TH 656**

Gina Rodriguez ("Rodriguez") hired Mancini & Associates ("Mancini") to sue Jason Schwetz ("Schwetz") for wrongful termination, sexual harassment, sexual battery and breach of contract. Mancini secured a favorable judgment on behalf of Rodriguez at trial. Schwetz, however, was generally judgment proof. Rodriguez later sought to resolve all issues and reestablished a friendship with Schwetz. Mancini continued to pursue collection of the judgment from Schwetz and hired Michael Berke ("Berke"), a collections attorney, to aid in those efforts. Schwetz and Rodriguez thereafter signed a settlement agreement that broadly released Schwetz from his financial obligations related to the 2015 lawsuit.

Schwetz knew that Mancini represented Rodriguez and had a fee agreement with Rodriguez, and was present when the trial court awarded attorneys' fees to Rodriguez. Moreover, post-judgment, Schwetz had occasionally offered nuisance value settlements and acknowledged that he knew Berke was attempting to collect judgment prior to the execution of his settlement agreement with Rodriguez. Mancini sued Schwetz alleging intentional interference with contract and other tort claims. The trial court ruled for Mancini and Schwetz subsequently appealed, arguing that his settlement communications with Rodriguez were privileged under *Code of Civil Procedure* § 47.

The California Second District Court of Appeal held that the litigation privilege "applies only to communicative acts and does not apply to tortious courses of conduct." The Court emphasized that although Schwetz's act of executing the settlement agreement with Rodriguez was communicative, given the totality of circumstances, it was one act in the course of tortious conduct intended to deprive Mancini of its attorneys' fees.

CC&RS REQUIRING VOTE TO COMMENCE ARBITRATION OF CONSTRUCTION DEFECT CLAIMS IS HELD UNREASONABLE AND UNCONSCIONABLE IS INTERPRETED TO GIVE VETO POWER TO DEVELOPER.

***DOS VIENTOS V. CALATLANTIC GROUP, INC.* (2020) 4 CAL.APP.5TH 1073**

A condominium association ("HOA") sued the developer alleging construction defects. The HOA's Covenants, Conditions and Restrictions ("CC&Rs") required that construction defect disputes be arbitrated and that "[p]rior to filing a claim pursuant to the ADR Provisions, the Association must obtain the vote or written consent of Owners other than Declarant who represent not less than fifty-one percent (51%) of the Association's voting power (excluding the voting power of Declarant)."

The HOA filed a demand for arbitration in June 2016 after mediation attempts failed. In its answer to the HOA's demand, the developer raised the section of the CC&Rs requiring a majority vote as a defense. The HOA admitted that it had not obtained a vote from its members prior to initiating arbitration, so the arbitrator stayed the matter to permit the HOA to petition the trial court to resolve the issue of arbitrability. While its petition was pending, the HOA secured a 99% vote in favor of the arbitration. The HOA moved the trial court to rule that the retroactive vote allowed arbitration to proceed. The court denied the motion, holding that arbitrability was for the arbitrator to decide.

The developer filed a motion to dismiss the arbitration on the ground that the HOA failed to obtain the requisite vote before initiating arbitration. The HOA filed a cross-motion on the ground that the ratifying vote of the HOA's members satisfied the voting requirement. The HOA also filed a second demand for arbitration. The arbitrator dismissed the HOA's original demand for arbitration. The developer moved the trial court to confirm the arbitrator's award. The trial court held that the dismissal of the original arbitration constituted a final determination of the rights of the parties, notwithstanding the second demand for arbitration and entered judgment in favor of the developer. The HOA appealed.

The California Second District Court of Appeal reversed the trial court's judgment, holding that the voting requirement, as interpreted by the arbitrator, was unreasonable and unconscionable, and the Davis-Stirling Common Interest Development Act (*Civ. Code* §§ 4000, *et seq.*) prohibited the enforcement of the same. The Court rejected the developer's reliance on *Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2018) 26 Cal.App.5th 743, and expressed disagreement with the Court's holding therein. The Court explained that an interpretation of a pre-litigation vote requirement that results in the HOA forever forfeiting its right to purse its claims in any forum in spite of a ratifying vote directly violates the public policy and "amounts to a trap for the unwary set by the Developer to bar claims against it."

The Court went on to discuss Senate Bill No. 326 which took effect on January 1, 2020. The bill adds Section 5986 as part of the Davis-Stirling Act and bars the use of pre-litigation votes as a

defense for developers against claims of condominium associations. (Please see below for further information regarding *Civil Code* § 5986).

A CONDOMINIUM UNIT OWNER ESTABLISHED A PRIMA FACIE CASE FOR BREACH OF CONTRACT REGARDING THE CONDOMINIUM ASSOCIATION'S FAILURE TO MAINTAIN PIPES THAT LEAKED INTO THE UNIT BUT FAILED TO ESTABLISH A PRIMA FACIE CASE FOR NEGLIGENCE AGAINST THE ASSOCIATION.

***SANDS V. WALNUT GARDENS CONDOMINIUM ASS'N. INC.* (2019) 35 CAL.APP.5TH 174**

The plaintiffs sued a condominium association (the "Association") when a pipe on the roof broke, causing water damage to the plaintiffs' bedroom. The Association repaired the pipe and the roof, but did not compensate the plaintiffs for the damage they sustained as a result of the water leak from the pipes. The plaintiffs thereafter sued the Association for breach of contract and negligence. The trial court granted a nonsuit in favor of the Association, holding that the plaintiffs did not present sufficient evidence to support their negligence claim against the Association. The plaintiffs appealed, arguing that the trial court erred by granting the nonsuit.

The California Second District Court of Appeal held that the Association had a contractual obligation to maintain the common areas in a "first class condition" per the Association's Covenants, Conditions and Restrictions ("CC&Rs"), and that the Association breached that obligation by failing to perform preventative maintenance and failing to inspect the roof and pipes for years. The Court found the Association's argument that there was no evidence the Association was on notice to make repairs to the roof or pipes incorrect. The property manager testified that no maintenance occurred, and the Court thereby concluded that the Association's knowledge that no maintenance was being performed was sufficient evidence to prove a breach of the CC&Rs' requirement that the common areas be maintained in a "first class condition." The Court ultimately held that a complete lack of preventive maintenance proves the Association did not keep the roof or pipes in first class condition, and thus, the trial court's nonsuit was reversed and remanded relating to the breach of contract cause of action.

As to the negligence claim, the Court sustained the trial court's nonsuit, holding that the plaintiffs failed to provide sufficient evidence to prove that the Association was negligent. The Court held that the Association did not have an independent duty regarding the pipes and roof on the basis of tort law. Thus, absent a showing of duty independent of the CC&Rs, the Association would not be held liable for negligence.

CALIFORNIA *CIVIL CODE* § 5986

Effective January 1, 2020, Section 5986 was added to the *Civil Code*. The new Section details the requirements regarding a Homeowners Association ("HOA") board's ability to file defect claims against a developer and/or builder. The statute provides that:

1. Notwithstanding any provision to the contrary in an HOA's governing documents;
2. If an association board of directors "has reason to believe" that the applicable statute of

limitations will expire before a homeowner authorization process contained in the governing documents can be completed, the board "shall have the authority to commence and pursue a claim, civil action, arbitration, pre-litigation process . . . or other proceeding" against a developer or builder; and

3. If the board includes members or representatives appointed by the developer or builder (which is often the case in a project's early years, before many units are sold), the decision and authority to commence and pursue legal proceedings shall be vested solely in the board's nonaffiliated members.

Under *Civil Code* § 5986(b):

1. Governing documents for an HOA "shall not" impose and preconditions or limitations on any claim, including lawsuit, arbitration or pre-litigation claim procedure, against the developer or builder; and
2. Any such provision in the governing documents, or a provision which empowers a developer or builder to veto the retention of counsel or commencement of a claim, is "unenforceable, null, and void."

Significantly, this statute does not invalidate all HOA voting requirements related to defect lawsuits against builders. Pursuant to *Civil Code* § 5986(c), a provision in Covenants, Conditions and Restrictions ("CC&Rs") or other governing document which requires a vote of the membership before a claim may be pursued is not void, if the requirement was approved and enacted by HOA members who are not associated with the developer or builder. An HOA may therefore impose a majority pre-claim voting procedure.

Further, pursuant to *Civil Code* § 5986(d), the statute applies, "to all governing documents," whether the documents were recorded before or after the new law's effective date, and the law applies retroactively to claims initiated before it became effective, although it does not apply to claims which have been formally settled, or resolved by arbitration or final judgment.

Lastly, *Civil Code* § 5986(e) dictates that the new law does not extend or modify any application statutes of limitation/repose and does not affect other CC&R provisions.

INSURANCE

A CARE, CUSTODY, AND CONTROL PROVISION IN A POLICY IS JUDICIALLY CONSTRUED TO REQUIRE EXCLUSIVE CUSTODY AND CONTROL.

***MCMILLIN HOMES CONSTRUCTION, INC. V. NATIONAL FIRE & MARINE INS. CO.* (2019) 35 CAL.APP.5TH 1042**

An insurer issued a policy to a roofing subcontractor covering the general contractor as an additional insured. The policy excluded damage to property in the general contractor's "care, custody or control." After water damage and roofing defects were discovered at two projects the subcontractor worked on for the general contractor, the general contractor tendered its defense to

the insurer. After the insurer denied a duty to defend, the general contractor brought suit against the insurer as an additional insured for declaratory relief, breach of contract and breach of the covenant of good faith and fair dealing.

Following bifurcation of the proceedings, the trial court entered judgment in favor of the insurer and held there was no duty to defend. The court broadly construed the duty to defend for general contractors as additional insureds. The general contractor appealed.

The Fourth District Court of Appeal reversed the trial court's judgment, holding that the Insurer did owe a duty to defend the general contractor. The Court held that the care, custody and control exclusion of the policy had been judicially construed to require *exclusive* custody and control, and because it was undisputed that the general contractor and subcontractor shared control, the exclusion did not apply. The Court reasoned that when resolving ambiguity in provisions, they must be interpreted by what an insured reasonably understood at the time of the contract formation. Therefore, the court explained that because the insurer did not prove coverage for the underlying construction defect suit was impossible, the general contractor had a reasonable expectation of coverage.

THE NOTICE-PREJUDICE RULE IS A FUNDAMENTAL PUBLIC POLICY WHICH AFFECTS THE ENFORCEABILITY OF A CHOICE OF LAW PROVISION AND APPLIES TO CONSENT PROVISIONS IN FIRST PARTY INSURANCE POLICIES.

***PITZER COLLEGE V. INDIAN HARBOR INS. CO.* (2019) 8 CAL.5TH 93**

An insured purchased an insurance policy (the "Policy") that covered remediation expenses resulting from pollution conditions discovered during the policy period. The Policy contained a notice provision requiring the insured to provide notice of any pollution condition and provide a written report as soon as practicable. The Policy also had a consent provision, requiring the insured to obtain written consent from the insurer before commencing remediation due to a pollution condition, unless written consent was not feasible due to an emergency. Lastly, a choice of law provision in the Policy stated that New York law would govern all matters arising under the Policy.

After discovering pollution at its construction site, the insured determined remediation would be required and began the remediation process without obtaining insurer's written consent. The insured did not inform the insurer of the remediation until six months after it discovered the pollution, three months after the remediation was complete. The insurer denied coverage based on the insured's failure to give notice as soon as practicable, and failure to obtain the insurer's consent before commencing the remediation process. The insured brought suit against the insurer for declaratory relief and breach of contract by denying coverage.

The insurer removed the case to federal court on the basis of diversity jurisdiction and moved for summary judgment, claiming that it had no obligation to indemnify the insured for remediation costs because the insured had violated the Policy's notice and consent provisions. The District Court entered summary judgment in favor of the insurer. The District Court held that New York law applied as the insured failed to establish that the California notice prejudice-rule was a state

fundamental policy that could override a choice of law provision. The California notice-prejudice rule generally allows an insured to proceed with their insurance policy claims even if they give their insurer late notice to the claim, provided that the late notice does not substantially prejudice the insurer. In applying New York law, the court concluded that summary judgment in favor of the Insurer was warranted as the insured failed to provide timely notice and comply with the consent provision. The District Court explained that the emergency exception to the consent provision did not apply as insured failed to notify the Insurer immediately after incurring costs. The insured appealed and the Ninth Circuit Court of Appeal issued certified questions to the California Supreme Court, seeking the court to determine whether California's common law notice-prejudice rule is a fundamental public policy for the purposes of choice of law analysis, and, if so, whether the notice-prejudice rule applies to the consent provision of the insurance policy in this case.

The California Supreme Court held first that the notice-prejudice rule is a fundamental rule of public policy affecting enforceability of a choice of law provision, and second, the rule applies to provisions in first party insurance policies requiring insured to obtain insurer's consent. The Court explained that a party's choice of law does not govern if it conflicts with a state's fundamental public policy, and here, the notice-prejudice rule is a fundamental policy because it cannot be contractually waived and a restriction on parties' freedom to contract has led to the adoption of fundamental policies in other contexts. The Court also found the notice-prejudice rule fundamental because it protects the insured against inequitable results that are generated by insurer's superior bargaining power, and, it promotes objectives that are in the general public's interest. Next, the Court determined that California's notice-prejudice rule is applicable to a consent provision in a first party policy where coverage does not depend on the existence of a third party or potential claim, as failure to obtain consent in the first party insurance context is not inherently prejudicial

WHERE A LEASE PLACES THE BURDEN OF OBTAINING FIRE INSURANCE ON THE LANDLORD, WHO IS A NAMED INSURED ON THE POLICY, THE TENANT IS AN IMPLIED INSURED UNDER THAT POLICY.

***WESTERN HERITAGE INS. CO. V. FRANCES TODD, INC.* (2019) 33 CAL.APP.5TH 976**

A fire insurer (the "Insurer") filed a negligence complaint in subrogation against the tenants (the "Lessees") of a condominium unit after a fire that started in the Tenants' unit damaged the building and other nearby properties.

By way of background, the subject condominium's Covenants, Conditions and Restrictions ("CC&Rs") required the condominium's Owners' Association (the "Association") to "obtain and maintain a master or blanket policy of all risk property insurance coverage for all Improvements within the Project, insuring against loss or damage by fire or other casualty. ... The policy shall name as insured the Association, the Owners and all Mortgagees of record, as their respective interests may appear." The CC&Rs also provided, in part, "Any insurance maintained by the Association shall contain [a] 'waiver of subrogation' as to the Association, its officers, Owners and the occupants of the Units and Mortgagees. ..." and required that all "occupants and tenants"

comply with the CC&Rs. The CC&Rs prohibited an individual owner from obtaining fire insurance while allowing an owner to obtain individual liability insurance.

The subject condominium unit was owed by Surfwood Properties (the "Lessor") and was let to the Lessees through a written lease (the "Lease"). The Lease required the Lessees to "keep in force a public liability insurance policy covering the Leased Premises, including parking areas, if any, included in this Lease, insuring Lessee and naming Lessor as an additional insured. ... Said insurance policy shall have minimum limits of coverage of $ 1,000,000 in the aggregate." The Lease did not specify which party (Lessor or Lessee) would carry fire insurance. The Lease also contained an indemnification clause running in the Lessor's favor. The Lease further provided that in the event of a fire, other casualty or taking rendered less than ten percent of the property tenantable, "the Lessor shall proceed to repair the Premises and/or the building and/or the property of which the Premises are a part to the extent of any insurance proceeds received on account of a Casualty."

The plaintiff Insurer issued an insurance policy (the "Policy") to the Association. Each of the condominium owners, including the Lessor, was a named insured on the Policy.

After a fire in the Lessor's condominium, the Insurer paid for the damage caused under the Policy. It then filed a complaint in subrogation against the Lessees alleging that the fire was caused by their negligence. The Lessees filed a motion for summary judgment, arguing that the Insurer was barred from suing them for causing the fire, even in subrogation, because they were implied insureds under the Policy and the Insurer could not sue its own insured. The Insurer opposed the motion, arguing that the Lessees were not implied insureds given the language of their Lease with the Lessor, and because the Lessees had no contractual relationship with the Association, which was the only named insured for the fire loss. The trial court granted the motion for summary judgment, finding that the Lease contemplated that the Policy would be for the Lessee's benefit and that the Lease could only be interpreted as placing the burden of insuring the Leased premises from fire loss (caused by Lessor or Lessee's negligence) on the Lessor. The insurer thereafter appealed.

The California First District Court of Appeal affirmed the trial court's granting of summary judgment in favor of the Lessees. In so holding, the Court found that the Lessees were implied insureds under the policy because they reasonably expected their landlord, an insured under the policy, to procure fire insurance for the following reasons. Frist, the Lease required the Lessee to obtain only liability insurance, not fire insurance, the implication being that fire insurance would be carried by the Lessor, and the Lessor was, in fact, an additional insured on the Association's Policy, as required by the CC&Rs. Second, condo owners, such as the Lessor, were prohibited by the CC&Rs from purchasing an individual fire policy, as were "occupants" and "tenants" of the premises to whom the CC&Rs applied. The Lessees could not, therefore, purchase their own first-party fire insurance for the structure. Third, the yield-up clause in the Lease provided that the Lessees agreed to surrender the premises at the termination of the Lease in substantially the same condition, except for casualty, including fire damage, among other things. Thus, the Court found that the fire insurance was maintained for the Lessees' benefit such that the Insurer could not

maintain a negligence claim in equitable subrogation against them due to their status as implied insureds.

Specifically, the Court explained, "'In California, courts have held a lessee is not responsible for negligently caused fire damages where the lessor and lessee intended the lessor's fire policy to be for their mutual benefit.' [Citation]. The import of this rule is that an insurer may not seek subrogation against an insured's lessee in such cases for a fire he or she negligently causes, even when the elements necessary for subrogation have otherwise been met." The Court went on to explain, "The rule adopted in California precludes a subrogation action by the fire insurance company of a lessor against a lessee where a lessee's negligence causes a fire, but the policy is intended to benefit the lessee. In such cases, the lessee is treated as an insured, despite the lessee not being a named insured on the policy. Because the insurance company could not seek subrogation against its own named insured (the lessor), it cannot seek subrogation against the lessee."

AN E-MAIL EXCHANGE MAY CONSTITUTE A DEFENDANT'S ACCEPTANCE OF A BINDING SETTLEMENT AGREEMENT.

SETTLEMENT

***J.B.B. INVESTMENT PARTNERS, LTD. V. FAIR* (2019) 37 CAL.APP.5TH 1**

Plaintiffs invested into limited liability companies managed by the defendant attorney who was an inactive member of the California State Bar. The plaintiffs alleged that the defendant made fraudulent representations, and the parties tried to come to a settlement to resolve the dispute. The plaintiffs' attorney sent the defendant attorney a final pre-litigation settlement offer via e-mail, and after not receiving a response, the plaintiffs filed suit the following day. Later that same day, the defendant responded to the e-mail, agreeing to settle the case and repeated his acceptance of the settlement offer to the plaintiffs' attorney via e-mail, voicemail and text messages. Six days later, the plaintiffs' attorney sent a draft of the final settlement agreement, but the defendant failed to sign it.

The trial court found that the defendant attorney, on behalf of himself and the three entity defendants, entered into a binding settlement agreement with the plaintiffs by his actions, and that the defendants subsequently breached the settlement agreement by refusing to comply with its terms.

The California First District Court of Appeal affirmed the trial court's holding. The Court rejected the defendant's argument that a contract was not formed because there was no mutual consent to the agreement. Rather, the Court held that the defendant's acceptance of the agreement various times via e-mails, voicemails and text messages to plaintiffs' counsel constituted evidence of contract formation. The defendant further argued that the settlement agreement was invalid because the plaintiff offered a formal written agreement one week after the defendant's acceptance of the original agreement. The Court of Appeal did not agree. The Court found that although the formal written agreement contained additional terms, those terms did not materially alter the terms

of the original formal agreement. As such, the Court affirmed the trial court's holding that the defendant entered into a settlement agreement and thereafter breached the contract by not signing the written settlement agreement.

THE *PRIVETTE* DOCTRINE

ROOF INSPECTOR HIRED BY POTENTIAL BUYER PREVAILS AGAINST BUILDING'S OWNER FOR INJURIES SUSTAINED WHEN HE FELL THROUGH A HOLE IN THE ROOF.

***GORDON V. ARC MANUFACTURING, INC.* (2019) CAL.APP.5TH 705**

Plaintiff Beau Gordon ("Gordon"), a professional roofer, was hired by West Pack to inspect the roof of a commercial building owned by defendant ARC Manufacturing, Inc. ("ARC"), which West Pack was interested in purchasing. The inspection was performed free of charge. When Gordon arrived at the building, an ARC employee told him that the roof "leaks everywhere" during the rain and other roofers who had recently been on the roof reported that the southeast corner was unsafe. Gordon advised he would stay away from that area. No other warnings were provided and Gordon's access to the roof was not limited. Gordon did not wear fall protection gear while on the roof, as none was feasible for inspecting the flat roof and a parapet wall provided protection.

On the roof, Gordon saw that the southeast corner was extensively damaged, though he was surprised by the finding because his inspection of the inside of the building showed only minor problems in that area. He avoided walking on that portion of the roof. Approximately 20 to 30 feet from the damaged area, in an area that looked "absolutely and completely normal," the roof suddenly went out from Gordon. A forklift driver attempted to raise a pallet underneath Gordon's legs as he hung in the hole, but it was 15 feet too short. Five minutes later, the roof around him collapsed. Gordon fell onto the upraised pallet and then the remaining 20 feet to the ground. Another inspector on the roof with Gordon opined that Gordon fell because rotted wood in that area was concealed under a new covering (cap sheet) and "[t]he roof was a hundred percent camouflaged hole where he fell through."

The jury found ARC negligent and awarded Gordon just shy of $875,000. ARC appealed, contending that the trial court erred by refusing to instruct the jury with CACI No. 473 on primary assumption of risk, and arguing that the primary assumption of risk applies "as a matter of law to a roofer who is injured while inspecting a roof," or at least is a jury issue.

The California Fourth District Court of Appeal affirmed the judgment against ARC, holding that the assumption of risk doctrine did not apply, as a matter of law, because ARC did not hire or engage Gordon, and as such, there was no relationship between ARC and Gordon from which it could be inferred that ARC "purchased exoneration from [its] otherwise applicable duty of care." The Court of Appeal addressed ARC's contention that primary assumption of risk "does not turn on compensation," stating, "We agree that determining whether primary assumption of risk applies does not turn exclusively on the fact or amount of compensation. Rather, the 'the nature of the activity involved and the parties' relationship to the activity' are the key considerations in

determining whether primary assumption of risk applies," and the requisite relationship did not exist between Gordon and ARC, irrespective of compensation.

The Court of Appeal also rejected ARC's attempt to invoke the *Privette* doctrine, which provides that when an employee of an independent contractor hired to do dangerous work suffers a work-related injury, the employee cannot recover against the individual who retained the independent contractor. (*Privette v. Superior Court* (1993) 5 Cal.4th 689), by claiming that they were acting as West Pack's agents for the roof inspection, and, thus, should be entitled to *Privette* immunity. The Court first noted that *Privette* is not a form of the primary assumption of risk doctrine, as ARC contended. The Court also went on to explain that ARC was not an agent of West Pack as there was no evidence that West Pack had the right to control ARC with respect to the roof inspection, as would be necessary to permit a finding of agency. Additionally, the Court rejected ARC's contention that *Privette* should apply because ARC was required to allow the buyer to inspect the property and the buyer did so through retention of Gordon, so there should not be different rules depending on who Gordon sued. Again, the Court stressed that the relationship of the parties that is controlling.

AN OWNER CANNOT BE LIABLE ON A RETAINED CONTROL THEORY OR PREMISES LIABILITY FOR INJURIES CAUSED BY UNSAFE CONDITIONS WHERE SAFE CONDITIONS EXISTED ELSEWHERE ON THE PREMISES.

***JOHNSON V. THE RAYTHEON CO., INC.* (2019) 33 CAL.APP.5TH 617**

Plaintiff Laurence Johnson ("Johnson") was the employee of ABM Facilities Services, Inc. ("ABM"), an independent contractor which provided maintenance engineering staff to The Raytheon Company, Inc. ("Raytheon"). Raytheon was renovating a water cooling tower on its property and retained Systems XT, Inc. ("SXT") as the prime contractor for the renovation project.

While performing maintenance engineering work at Raytheon's property, Johnson investigated a low water level alarm by looking over the water cooling tower wall. Johnson decided to use a ladder to look over the wall. In the past, there had been a Raytheon-owed platform ladder at the wall. However, there was no platform ladder this time, but rather what appeared to him to be a straight ladder, which had been left at the wall by one of SXT's subcontractors working on the renovation project. The "ladder" turned out to be the upper half of an extension ladder, which was intended only for use with the bottom half and did not have a proper footing. The upper portion of the ladder had a caution label on it stating, in all capital letters, "CAUTION" and "THIS LADDER SECTION IS NOT DESIGNED FOR SEPARATE USE." Johnson did not see the caution label, nor did he move or adjust the ladder to make certain it was secure prior to using it, though he noticed the ground was wet from the rain. While he was on it, the ladder slipped, causing Johnson to fall and sustain serious injuries. He sued Raytheon and SXT, among others, alleging that they were responsible for the unsafe conditions which resulted is fall. Raytheon and SXT moved for summary judgment.

As Johnson was injured during the course of his employment with an independent contractor, Raytheon's motion was based on the *Privette* doctrine, which provides that that when an employee

of an independent contractor hired to do dangerous work suffers a work-related injury, the employee cannot recover against the individual who retained the independent contractor. (*Privette v. Superior Court* (1993) 5 Cal.4th 689). Johnson argued that *Privette* did not apply because his theory of liability against Raytheon was direct liability for its own breach of duties owed to him. Specifically, he contended that Raytheon had retained control over which ladders ABM employees could use to look over the water cooling tower wall by leaving a platform ladder at the wall for ABM's use, and that said course of conduct constituted an implied agreement to always have one present, upon which ABM's employees relied. He argued that Raytheon was negligent by failing to have a platform ladder at the wall on the night of the accident. Raytheon argued that Johnson's concession that it was unknown why there was no platform ladder at the wall was dispositive under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, which provides for hirer liability only when the retained control is negligently exercised in a manner that *affirmatively contributes* to the accident, and there could be no affirmative contribution when there is no evidence that Raytheon itself removed the ladder. The trial court granted Raytheon's motion for summary judgment.

SXT also moved for summary judgment on the basis of the *Privette* doctrine, arguing that it was Raytheon's agent and, therefore, entitled to Raytheon's immunity under *Privette*. SXT also argued that even if *Privette* did not apply to it, it did not owe any duty to Johnson as he was a stranger to it, inasmuch as he was not its employee or that of any subcontractor that reported to it, and was not even working on the renovation project at all. In opposition to SXT's motion, Johnson argued that SXT owed him duties to (1) ensure that its subcontractor properly hooked up the sensor that was generating the false alarm he was checking at the time of the accident; (2) ensure that its subcontractor put away its ladders at the end of each day; and (3) provide temporary lighting at the worksite, all on the general principles of foreseeability. The trial court also granted SXT's motion.

The California Second District Court of Appeal affirmed summary judgment in favor of Raytheon, holding that *Privette* applied and that neither of the exceptions to *Privette* as set forth in *Hooker* and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 495 (holding "[A] landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition.") applied to create liability for Raytheon. In so holding, the Court found that Johnson failed to show (1) that Raytheon's failure to ensure the presence of a platform ladder on the night of the accident affirmatively contributed to his fall, because the undisputed evidence showed that Raytheon provided ABM employees with access to numerous other safe ladders; and (2) that Raytheon knew or should have known that the unsafe partial extension ladder had been left at the wall or that ABM could not reasonably have discovered the hazardous condition, because the "ladder" was clearly marked with a caution sticker.

As to SXT's motion for summary judgment, the Court of Appeal did not decide whether SXT was entitled to the benefit of the *Privette* doctrine, as it simply found that it owed no duty to Johnson

and affirmed the trial court's judgment in favor of SXT.

EVEN IF A JURY INSTRUCTION BASED ON THE CACI DID NOT CORRECTLY STATE THE LAW REGARDING AFFIRMATIVE CONTRIBUTION, SUCH AN ERROR IS NOT REVERSIBLE IF IT DOES NOT IMPOSE PREJUDICE.

***STROUSE V. WEBCOR CONSTRUCTION, L.P.* (2019) 34 CAL.APP.5TH 703**

A subcontractor's employee suffered a workplace injury and thereafter brought a negligence action against the general contractor. The general contractor subsequently filed a cross-complaint against the subcontractor for indemnity.

At trial the jury found the general contractor 100% liable and rendered a special verdict finding that the general contractor designed the safety cover which caused the employee's injury, the general contractor retained control over the safety cover and safety conditions, the general contractor negligently exercised its retained control over safety conditions and the general contractor's negligence was a "substantial factor" in causing harm to the employee.

The general contractor appealed, contending that the trial court erred in instructing the jury using CACI No. 1009B, which uses the substantial-factor-causation instead of *affirmative contribution*. The general contractor argued that CACI No. 1009B did not accurately state California authority in accordance with *Privette v. Superior Court* (1993) 5 Cal.4th 689, in which the Supreme Court held that if an employee of an independent contractor is injured in the workplace, he or she may not recover tort damages from the hirer of the independent contractor, unless the hirer *affirmatively contributes* to that injury. The general contractor also contended that the trial court erroneously instructed the jury on negligence per se based on a Cal-OSHA regulation because the general contractor had delegated its Cal-OSHA responsibilities to the subcontractor in the subcontract.

The California First District Court of Appeal affirmed the trial court's ruling, holding first that even if CACI No. 1009 did not correctly state the authority, such error did not prejudice the general contractor and thus there was no reversible error. The Court explained that for purposes of applying *Privette's* bar to liability, there is an articulated exception where the hirer has retained control over safety conditions at a worksite, and the hirer's negligent exercise of retained control has "affirmatively contributed" to the employee's injuries. Here, the general contractor's affirmative act of prohibiting subcontractors from maintaining or repairing the safety covers, combined with its retention of control over safety in the general access area and its act of conducting daily inspections, reasonably induced the subcontractors and their employees to rely on the presumed adequacy of the safety covers. Thus, the failure to instruct the jury regarding the precise language of "affirmative contribution," even if erroneous, was harmless. Next, the Court held that the evidence supported an instruction on negligence per se based on the Cal-OSHA regulation as the evidence established that the general contractor did not delegate to its subcontractors the duty to maintain and repair. Subsequently, the general contractor filed a petition for review, which was granted by the California Supreme Court.

COLORADO

APPRAISALS

A CONTINGENT FEE CAP PROVISION DOES NOT RENDER AN APPRAISER IMPARTIAL WHERE THE PARTIES DID NOT EXPECT THE PROVISION TO APPLY, AND AN IMPARTIAL APPRAISER PROVISION REQUIRES AN APPRAISER TO BE UNBIASED, DISINTERESTED, WITHOUT PREJUDICE, NOT SWAYED BY PERSONAL INTERESTS AND PROHIBITS ADVOCACY.

***OWNERS INSURANCE COMPANY V. DAKOTA STATION II CONDOMINIUM ASSOCIATION, INC.* (2019) 443 P.3D 47**

An insured filed claims with its insurer for weather damage to its property. When the insured and insurer could not agree on the money owed, the insured invoked the appraisal provision of the insurance policy, requiring each party to select an impartial appraiser and an umpire to decide any disagreements by the appraisers. The appraisers thereafter submitted conflicting value estimates to the umpire, who issued a final award. Later, the insurer moved to vacate the award, arguing that the insured's appraiser was not impartial and acted improperly by entering into a contract with the public adjuster that capped the appraiser's fees at five percent of the insurance award.

The trial court dismissed the motion to vacate, concluding that the appraiser did not act improperly or unlawfully. The trial court rejected the insurer's contention that appraisers must act as impartially as an arbitrator in every instance, but instead held that appraisers must render decisions based upon experience and not allow their findings to be influenced by the side that hired them. The trial court also rejected the insurer's contention that the contingent-fee cap provision gave the appraiser a financial interest in the appraisal as the evidence was clear that neither party thought the fee cap applied. The insurer appealed and in a split decision, a division of the court of appeals affirmed the trial court's judgment. The insurer thereafter filed a certiorari petition to vacate the appraisal award.

The Colorado Supreme Court affirmed the judgment of the court of appeals with respect to the contingent-cap fee agreement, but reversed and remanded with respect to the impartiality requirement. The Court reasoned that the fee cap did not render the appraiser impermissibly partial because the appraiser did not believe the fee cap provision applied and the award did not meet the stated cap. Further, the Supreme Court mandated that the appraisal provision of the policy required interpreting the plain meaning of the word, "impartial", which instructs appraisers to be unbiased, disinterested, without prejudice, not swayed by personal interested and prohibit advocacy.

NEVADA

ATTORNEYS' FEES

A COURT MAY NOT AWARD ATTORNEY FEES AS SPECIAL DAMAGES IN A BREACH OF CONTRACT LAWSUIT, UNLESS THOSE DAMAGES ARE SPECIALLY PLED.

***PARDEE HOMES OF NEVADA V. WOLFRAM* (2019) 135 NEV. 173**

The defendant brokers facilitated the plaintiff's acquisition of land from a third party. The contract between the broker and plaintiff provided that the prevailing party on any legal dispute shall be awarded reasonable attorneys' fees and costs. The brokers subsequently brought an action against the plaintiff, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and an accounting.

The District Court found in favor of the brokers on each cause of action and awarded them attorneys' fees as special damages in the amount of $135,500.00 and $428,462.75. The plaintiff thereafter appealed, claiming that the District Court erred by awarding the brokers attorneys' fees as special damages. Plaintiff also appealed the District Court's determination that the brokers prevailed under the prevailing party clause in the contract.

The Nevada Supreme Court affirmed in part and reversed in part, holding that attorneys' fees were properly awarded based on the parties' contractual prevailing party fees provision. It further held that the District Court erred in awarding attorneys' fees as special damages for the two-party breach-of-contract action. The Court explained that attorneys' fees do not constitute special damages under the limited exceptions recognized in Nevada and a party seeking attorneys' fees as special damages in a breach of contract action without affirmatively pleading them is not entitled to special damages. As such, the lower court's award of attorneys' fees as special damages was reversed.

HOMEOWNERS ASSOCIATIONS

A COMMUNITY IS A COMMON INTEREST COMMUNITY WITHIN NEV. REV. STAT. § 116.021 WHERE A HOMEOWNER HAS NOTICE OF A DECLARATION CONTAINING AN IMPLIED PAYMENT OBLIGATION FOR THE COMMON ELEMENTS, AND NEV. REV. STAT. § 116.3101(1) DOES NOT APPLY TO COMMON-INTEREST COMMUNITIES FORMED BEFORE 1992.

***ARTEMIS EXPLORATION CO. V. RUBY LAKE ESTATES HOMEOWNERS ASS'N* (2019) 135 NEV.ADV.OP. 48**

A homeowner filed a declaratory relief action challenging the authority of the defendant Homeowners Association ("HOA") to impose assessments on homeowners. The homeowner argued that the community was not a validly created common-interest community as defined by Nev. Rev. Stat § 116.021 and the recorded Declaration that created the HOA did not expressly

state that the residents would be responsible for paying assessments. The homeowner also alleged the HOA was not a validly created "unit-owners' association" because it was not formed until 2006, despite the first lot being sold in 1989. The District Court granted summary judgment, affirming the HOA's authority to impose assessments.

The Nevada Supreme Court affirmed the trial court's finding in favor of the HOA imposing assessments, holding that (1) the community was a common-interest community because its Declaration contained an implied payment obligation for the common elements and other real estate of which the homeowners had notice, and (2) Nev. Rev. Stat. § 116.3101(1) does not apply to common-interest communities formed before 1992, and therefore, the HOA did not need to be organized before the first lot in the development was conveyed.

SUMMARY JUDGMENT

TRIAL COURTS SHOULD DISCOURAGE MERITLESS LITIGATIONS WHERE CLAIMS ARE DEFICIENT OF EVIDENTIARY SUPPORT.

***BOESIGER V. DESERT APPRAISALS, LLC* (2019) 135 NEV. 192**

After unsuccessfully attempting to refinance their home, the plaintiffs became aware of a discrepancy in their home's square footage. The original mortgage lender contracted with an appraisal company, who determined there was 3002 square feet of living space, which conflicted with the local property tax assessor's office's estimated 3553 square feet. The appraiser explained that the added footage appeared to be based on outdated information from when the home's garage was used as a model home office.

The plaintiffs brought claims for professional negligence, negligent misrepresentation, breach of the statutory duty to disclose a material fact and breach of contract as third-party beneficiaries against the appraisal company and the individual appraiser, (collectively the "defendants"). Specifically, the plaintiffs alleged that the defendants negligently relied on inaccurate information in calculating the home's size and market value which resulted in an inflated purchase price. The defendants moved for summary judgment, arguing that the plaintiffs failed to designate an expert witness to establish the professional standard of care for real estate appraisers. The trial court agreed and granted summary judgment, concluding that the plaintiffs failed to establish the appropriate professional standard of care by failing to designate an expert. The plaintiffs thereafter appealed to the Supreme Court.

The Nevada Supreme Court affirmed and took the opportunity to emphasize the important role of summary judgment in promoting sound judicial economy. It stated that, "trial courts should not hesitate to discourage meritless litigation in instances where…claims are deficient of evidentiary support and are based on little more than [plaintiffs] conclusory allegations and accusations".

SKILLS AND TECHNIQUES FOR VIRTUAL MEDIATION

Justice Nancy M. Saitta(ret.), Advanced Resolution Management

Glenn T. Barger, ADR Services

David S. Schlueter, AMCC

Gerald A. Kurland, JAMS

Ross W. Feinberg, JAMS

Introduction

Our country and the entire world are living in unprecedented times and everyone has had to adjust to the new "norms," at least temporarily, as rapidly as possible. This of course includes the legal world, including moving matters to resolution. As a result, matters that just weeks ago went forward with face to face mediations, have now gone forward on-line with the parties appearing virtually through various platforms in order to allow the parties to continue to move matters to successful resolutions. This is especially important as the courts deal with these issues as well.

The matters now being mediated on a daily basis on-line have varied from basic two party bodily injury matters where the counsel and the parties do not see or speak to each other even once during the mediation to complex construction matters involving multiple attorneys, parties, carriers and experts where the parties make presentations and exchange and conduct discussions on-line in both private and joint sessions. As it is difficult to predict when "normalcy" will return, it is readily apparent on-line mediations will continue for the foreseeable future and then will likely continue, at least in part, as part of the new "norm."

Deciding To Go Forward With On-Line Mediation—Justice Nancy M. Saitta(ret.), Advanced Resolution Management

In light of the situation that Covid brings to our work as mediators, one of the most basic considerations for the parties is whether to go forward with an already scheduled mediation. The easiest answer to that is: ABSOLUTELY. While it goes without saying that the in person, traditional mediation is still perhaps the 'gold standard', mediation via virtual platforms can be equally as successful.

To determine whether your case should go forward, one of the very first considerations must be time. The procedural process or trajectory of a case is always essential when deciding whether to mediate. Given that most, if not all, courts have suspended litigation practice as we know it, this may be the time to assess cases that are still in the early, even pre-litigation, stages and honestly determine whether now is the time to look at resolution. Discovery is and likely will continue to be suspended and/or protracted. If a case is or could be made ready to seek settle without traditional litigation techniques, mediation is the perfect vehicle to use. Without delving into specific case types in depth, certainly injury cases where treatment has plateaued or where the

plaintiff has reached maximum medical improvement, are among the case type for early resolution consideration, more now than ever before.

Similarly, those cases that were set for trial in the last few months that have now been continued to dates in the future, are ripe for mediation, arbitration or private trials. If a case was trial ready, discovery closed or complete, this is a perfect time to engage in alternative dispute resolution. We all know that putting a case in front of a jury has numerous perks, but, the new normal that we face will not likely provide the best pool of jurors, if and when the court process is up and running again. The court system will have a tremendous amount of 'catch up' to do when the health crisis is under control and cases are not likely to be set and heard for some time. In this genre of case type, parties may rightfully see mediation as the very best form of resolution and those who may have been reticent to consider (or who have had a failed mediation) should be encouraged to re-engage.

As the following sections will explain in detail, the new technology should not be a deterrent to scheduling or maintaining mediation settings. All of the traditional methods of case review and preparation remain unchanged. A full and complete explanation of how the 'rooms' will work in the virtual set up should be carefully discussed and considered with all clients and participants. The confidentiality and privacy in whatever virtual platform is being used, should be emphasized. It would be wise to determine the type of technology that clients have when discussing the virtual process as not everyone has the access that lawyers and corporate clients have. If call-in/telephonic conferencing is necessary, mediation can proceed. Within this consideration, however, it would be helpful to do a pre-mediation check in; that is, to be sure that everyone is comfortable with the manner in which the case will proceed.

The mediation process has changed only in situs. It goes without saying that some cases will have to be convened in person but only a small number. The ability to provide case information, medical records, expert reports and the like has not changed. The need to talk privately outside of the mediation room has only changed in that we don't physically leave the room now, we simply move to a different 'room' in our virtual platform. Side conversation boxes, cell or text communication, pre and post mediation discussions still provide the same opportunity to move cases toward resolution.

Finally, it should be noted that some of the typical detriments to mediation remain present in the virtual environment. A demand that is too high and unrelated to the true facts and circumstances of the case will chill the process and ultimately influence outcome. Similarly, offers that are too low and not meaningfully related to the case will jettison the process. Reactive mediation, where the parties make demands and offers that simply bounce off of the number the other party is making does absolutely nothing to move the case toward a fair and just settlement plateau. Perhaps one of the most helpful by-products of the virtual world of mediation is the fact that efficiency can be maximized. If the parties discuss in advance with the mediator where (and why) the case needs to get to a certain number as usual in pre- mediation discussions, and then carefully craft their demands/offers in both range and movement, the process will be dramatically enhanced.

While the "new normal" which brings us to discuss something as unique as virtual mediation is likely something no one could have predicted, the process of a neutral, fairly guided mediation has not changed as dramatically as we might think. Preparation and candid discussion of the case with your mediator remains the key to success.

The Technical ABCs of Virtual Mediation—Glenn T. Barger, ADR Services, Inc.

Based on the likelihood all attorneys will ultimately go forward with mediations on-line, in order to be effective and efficient as attorneys representing your clients, it is important to understand the basics of these on-line programs. There are many programs that are available to successfully allow on-line mediations to go forward, including but definitely not limited to, GoToMeeting, Microsoft Teams, Webex Meetings and ZOOM.

Of course, each program is slightly different in order to confuse the non-technical, legal user. However, for the most part, the basics of utilizing each program are quite similar. As each mediator may use a different program, it is a good idea to find out in advance of your scheduled mediation which program will be utilized as well as confirm any technical requirements you and your client may need to effectively participate in the mediation. All programs will require a camera on your computer if you want the mediator to see you and of course a screen so you can see the mediator and other participants. As this eye contact and even watching expressions can be important, it is worthwhile to confirm you have a clear picture before your first on-line mediation. It is also recommended that you check your lighting so all participants can clearly see you throughout the day, to find a quiet place to set up and many utilize headphones to allow them to better hear the discussions. It is also recommended that you have access to a phone line as a back-up for audio. Finally, most mediators will offer a test-run in advance of the mediation to ensure all goes smoothly on the day of the mediation.

Once these technical requirements are met, you can literally participate in the mediation from the top of any mountain, at the beach or in your backyard. Just remember that the other participants can see and hear everything in your background unless your video is off, and audio is muted. Both features are also part of most of the extensively used programs.

In general terms, an on-line mediation can be analogized to coming in person to the location of the mediation, without the traffic and no lunch or afternoon cookies. For most matters, each attorney in the case receives a link via email in advance of the mediation. This email may then be forwarded to anyone that plans to participate in the mediation. Each person may then participate by simply clicking on the link at the time of the mediation. If you have not used the on-line platform prior to the day of the mediation, once you click the link, you will then be prompted to download the program to your devise. Once you have used the program, it should not be necessary to download the program the next time you use it on the same device.

On the day and time of the mediation, some mediators place everyone in a 'waiting room' after they are 'admitted' to the mediation which is similar to being checked in by the receptionist and being asked to sit in a reception area where you may talk to others in the same waiting room. While others admit each person individually and immediately place them into their own private

'meeting room' where they may only communicate with others in their room. Again, this would be similar to being assigned to a particular conference room after being checked in at the location of an in-person mediation. Most programs allow you to see who else is in the room with you, but oftentimes it is not clear as only a phone number or some other random naming may be shown on the screen without the benefit of seeing each particular person. As a result, in the abundance of caution, if you have not confirmed the mediator's approach in advance, you should be careful to avoid any confidential communications and you should advise your client to be careful what is said until you have confirmed you are in a private room. The programs allow for as many people as necessary in each meeting room and participants can be together in the same location or spread out throughout the country but appear online in the same meeting room through the program. Most mediators also set up a couple extra meetings rooms at the beginning of the session so that if further break-out sessions are necessary throughout the day, it is easy to move people into different private rooms.

In complex, multi-party matters, it is recommended that you let the mediator know in advance of anyone you expect to be joining so they know where to place the person at the beginning of the mediation. If this does not occur, it is easily handled by the mediator when they check in each person at the beginning of the session. It is also a good practice to exchange cell phones with the mediator in advance of the mediation to deal with technical glitches and for private conversations throughout the day. Another good reason to exchange cell phones before you get started is for when you want the mediator to step out of your meeting room to discuss something in private, as counsel can then just text the mediator when you want the mediator to return to your room.

Once everyone is checked in to their individual, private meeting rooms, the mediator can easily move from room to room, without the need to walk up and down the hall by simply clicking on the screen. In addition, just as if the mediator knocked on your conference room door before entering, you receive a notice each time the mediator or anyone comes and goes so that you do not have to worry about any privacy issues. Also, it is not possible for the mediator or for that matter anyone to hear you through the program unless they are in the room with you. Once in a room, anyone there can see and talk to each other. You also should have a list on your screen of anyone in the room. Importantly, even when the mediator is not in the room, just like normal, you can see and talk to whoever is in the on-line room, even if you are all in different physical locations.

Another important feature of most programs is the ability to turn over control of the screen to anyone, in any location, if the person wants to make a presentation or show a video or exhibit from their computer. Once the screen is turned over to someone, anyone in the room can then see their screen and discuss it together. As everyone continues to adjust to on-line mediations, many also continue to use emails, texts and phone calls when counsel want to talk privately, to circulate documents, including the settlement agreement at the end of the day and simply as a back-up plan. There is also typically a 'chat feature,' but most caution from using it in order to avoid inadvertently transmitting confidential information as they are simply more comfortable texting or emailing.

Most probably still prefer going forward in person, but for the time being, these programs do allow for flexibility as you can go forward from anywhere you have an internet connection or if you want to use it for audio only, anywhere you have a phone connection, so that you can still be in a private meeting room without video. The others in the room simply cannot see you. People may also come and go as they please so a Claims Professional or a client who may not sit through the entire session can log out at any time and come back in throughout the session. Overall, the programs are effective and relatively easy to use and knowing the basics in advance should help you succeed.

Preparation for Mediation—David S. Schlueter, AMCC

Once you have decided to take the leap into virtual mediation, preparing for it is a bit different than most of us are used to doing with in-person sessions. Although online dispute resolution has been around for many years, its use has been highlighted and more vigorously being "road tested" with the current COVID 19 health crisis. Online mediation brings its own challenges and unique limitations that have us using technology in a way that is foreign and new to many now finding themselves involved in virtual mediation for the first time. However, one thing is true for both virtual and in-person mediation: proper preparation is key in having a successful mediation and reaching resolution.

After now having handled multiple mediations via Zoom as mediator, the following are some steps in preparing that I have been found to be extremely helpful:

(1) Embrace the technology! Since we are all familiar with having the first meeting with the mediator actually being an in-person session, many parties and counsel are uneasy and unfamiliar with the technology offered by Zoom and other online platforms and are hesitant about how the mediation will work, will it be secure, how am I able to talk confidentially with the mediator, etc. This can be a daunting concept and event for many, so it is helpful to request the mediator to schedule an initial pre-mediation conference prior to the actual mediation session with all counsel and possibly parties to discuss the use of Zoom (I am using Zoom to refer to all of the various online platforms since it is the one I use most often and the one with which I am most familiar). This preliminary conference will allow parties and counsel to use and get familiar with the technology ahead of the mediation session itself, discuss how confidentiality and privacy is achieved and maintained (the use of breakout rooms, share screen, etc.) , discuss scheduling and logistics using the Zoom platform with this possibly being the first time the counsel and parties actually get to meet each other, particularly in the virtual world, and encourage cooperation and collaboration among the participants. The mediator (usually being the most knowledgeable having already used Zoom for several mediations and conferences) can help put the counsel and parties at ease as to how the session will be held and lay the ground work for the eventual resolution of the case. Having this pre-mediation status conference is a great tool to allow the participants to use and get familiar with the online mediation format, have the schedule set for the mediation, answer questions about the virtual concept and allay any apprehensions of the participants regarding communication and privacy.

(2) Document exchange is key! As mediators, we are very appreciative of briefs presented in advance of the mediation, as well as having the parties provide documents and information, they

deem important to a full understanding of their positions. In Zoom mediation, these pre-mediation briefs and documents are of increased importance since it is more difficult for many to virtually provide briefs and documents online during the mediation. Non-confidential briefs are most useful since the mediator will know that all the parties and counsel have the same information, and that he or she can discuss the information contained in the brief without divulging any confidential information. Of course, the parties can still provide the mediator with a confidential brief with details not to be shared with the opposing party ahead of time.

Another useful tool is to consider providing your brief online via pdf as a virtual binder with bookmarks so that the mediator has it on hand during the mediation and can easily access and use it during the session. This is a very helpful way to provide your brief and documentation to the mediator (as always, a few days prior to the mediation is preferred) without having to mail a binder and numerous documents. This is also an easy way for the mediator to share this information with the opposing side if allowed by the generating party and counsel.

Zoom does have a feature called "share screen" in which parties can present and share their screen with any participants on the Zoom mediation, this feature can be used to share information just with the mediator or with as many other participants as one wants. This is a useful feature but it does take a little practice typically to get the hang of it.

(3) Are you ready to mediate? Once you have had the "all-hands" pre-mediation Zoom status conference and hopefully sent briefs and information to the mediator, it is helpful to have brief separate Zoom video conferences with the counsel, party and others that are going to participate in the mediation (claims adjusters and experts come to mind) to have confidential dialogue about their case and positions, and allowing the mediator to ask pertinent questions in order to get a more detailed understanding of the claims, arguments and dynamics of that party's case. This is also another opportunity for the participants to use and get familiar with the technology and answer further questions as to how the virtual mediation is going to be run, security and confidentiality issues and any other questions (including anticipated follow up if the case does not resolve during the virtual session, issues about how a settlement agreement will be finalized, etc.). This also is an opportunity for the mediator to really get to know the participants before the mediation, understand and flesh out agendas, etc. In turn, this is an opportunity for the counsel and party to confidentially discuss their case, arguments, claims and concerns with the mediator ahead of the mediation so that time is used to its best advantage once the mediation commences- an opportunity to tell their story ahead of time. I find these separate pre-conferences to be time well spent in terms of maximizing the chances of settlement during the joint virtual mediation.

(4) Lastly, in having these pre-mediation Zoom meetings and conferences, the participants have now had the opportunity to see what savings they can enjoy with the virtual mediation, as compared to the traditional in-person meeting. They will have experienced the technology and seen how easy it is to use once one has played with it a little. Also, the participants have already experienced other advantages with Zoom over in-person mediation: no travel, no parking costs, no lodging or meal costs, the ability to work from your office and on other matters when the mediator is in the other party's breakout room, and no stress about having to head out early because of traffic or a flight. I have found that in the Zoom mediation, we actually get the full attention of all the participants as much, if not more, than when we have everybody in person.

This is a tremendous advantage and allows the mediator to focus on the issues with the decision makers without the stress of having that person needing to leave early or being mentally pulled out of the session by the press of other issues.

In closing, although the increased use of technology has been forced on many of us due to COVID 19, including the need to consider virtual mediation and other conferences, it is already clear that this technology is here to stay and will be used regularly because of the ease in using it and the immense

savings in time, travel and costs. Embrace it, properly prepare and you will reap the great benefits of virtual mediation in the post COVID world of litigation.

Once Virtual Mediation Begins—Gerald A. Kurland, JAMS

While there are many articles now being circulated that generally discuss the conduct of remote mediations, based on our collective experiences in conducting remote or Zoom mediations regularly over the past two months, we prefer to highlight five areas that we are commonly finding will help or hinder the settlement process once the mediation begins:

1. The "chat" feature of Zoom is a useful way to enhance and advance communication with the mediator and other parties; however, some mediators have concerns that messages intended just for the mediator could wind up going to the entire group, thereby breaching confidentiality. For that reason, some of us make clear that this feature should only be used for messaging all parties in the session. We have found that the best use for "chat" is the joint expert meeting in which a large group of experts, counsel and other party representatives are present, and participants can log in their questions in real time, to be either answered on the spot by the presenting expert or counsel, or the questions can be saved until an appropriate break point for questions and answers. This has been a useful tool in moving the information exchange aspect of the process much more quickly than even meeting in person.

2. The effectiveness of the mediation will be enhanced by using not just the video conference, but by combining multiple remote tools, including texting, emailing and phone calls. In a remote mediation, we lose one of the most important elements of the live mediation – the ability of the mediator to talk privately with key participants at opportune times (including the chance meeting in the hallway or at the coffee machine) and the ability of decision-makers to talk principal-to-principal, face-to-face, whether planned or spontaneous. The mediator needs to be able to identify critical decision-makers and counsel from every party, and be prepared to contact those persons privately during the mediation by texting or emailing to set up a private call at an appropriate break point. Likewise, participants should be encouraged to text the mediator if they would like to have a private conference just with the mediator or with particular people. In a recent mediation, one of the authors of this submission was able to completely cut through all of the traditional back and forth negotiation, which was moving at a snail's pace, by receiving information from one of the parties on a private call as to what the real end-game settlement range was for that party.

3. In the preparation stage for mediation, the mediator will typically find out from counsel who will be attending for each group and who the persons with settlement authority will be. As mentioned above, once the mediation begins, the mediator should focus on those key participants and be especially attentive to their comments and body language even more so than in a live mediation. It is very easy to be distracted by not being in the same room so it is important to be attune to cues from the participants that may be helpful in moving the process or breaking impasse. The mediator should also make sure that participants remain in the remote mediation all day, unless there is specific direction to log off until a specified time to return.

4. Since we are not used to speaking with people through a computer screen, it is easy to look up and down and to the side, rather than looking people right in the eye. The mediator and the participants should take extra care to remain focused on their subjects as if you are talking them face to face. There is no substitute in the mediation process for attentive listening.

5. Just because we have all this great new computer technology, there is no imperative that we have to use it for every mediation. Some cases can be more easily settled through old-fashioned telephone calls, just like we always have done with telephone follow-up in the pre-pandemic era. If telephonic efforts are not working, or the mediator identifies a need for a visual information exchange (whether it be photos, schedules, documents or the like), a Zoom session can always be arranged on the spur of the moment to physically view these materials or to have face-to-face discussions.

Virtual Mediation – The Final Stages—Ross W. Feinberg, JAMS

Whether conducting a virtual complex multi-party mediation with screen images that would put the Brady Bunch to shame or a two party highly emotional case, the mediator's number one job remains that of case closure.

Working through this new medium, we continue to have a multitude of options for both case consensus and binding documentation. Just as in traditional sessions, the virtual platform allows us to confirm settlement terms while concurrently orchestrating the execution of binding agreements.

When settlement is achieved before signing off, the mediator should see to it that binding settlement and release terms are negotiated and finalized. Of course, the resolution will not be binding until a settlement and release agreement has been signed by all parties.

Practically speaking, the mediator can transmit e mails confirming the terms of the settlement reached during the virtual session. However, for the resolution to be binding, the terms must either be agreed upon or writing or placed on the record before the court. In that we do not currently have the benefit of court supervision, it is incumbent upon the mediator and the parties to see that the settlement is formalized by way of a signed settlement and release agreement.

The obvious question becomes that of how, pursuant to a virtual mediation, we ensure that the parties exchange, negotiate and execute a binding agreement.

Much like with traditional mediation, proposed agreements can be e mailed and comments can be relayed back and forth. The Web Ex application provides another means of sharing a document and making edits in real time. Further, electronic applications allow the parties to share documents directly.

In the event that additional time is needed to complete the formal settlement and release agreement, alternatives include having the parties sign either a term sheet or a memorandum of understanding.

Should the case not settle at the conclusion of the day's session, it remains incumbent upon the mediator to pursue resolution through a myriad of strategies. Just as in the pre virtual world, effective follow up tools remain at the mediator's disposal.

Whether it be multi party blind proposals, high low electives or case bracketing, the mediator can follow up with all counsel via e mail, cell or even a private virtual session to press resolution alternatives. The point is that every methodology in existence prior to the onset of our virtual mandate remains available to the mediator, to counsel and to the parties.

Rather than viewing virtual mediation as a replacement for the traditional format, let it serve as yet another vehicle to achieve resolution and a platform create the necessary documentation for permanent case closure.

Biographys

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Glenn T. Barger, Esq. is one of California's most well-regarded litigation attorneys, including serving as lead counsel at multiple long cause, complex trials and has handled countless bodily injury, professional liability and construction matters which were ultimately settled throughout California. Mr. Barger was admitted to the State Bar of California, the United States District Court, and the California Supreme Court in 1991. He then began as an associate and ultimately became a Partner at Chapman Glucksman Dean Roeb & Barger, one of California's premier full-service law firms.

Throughout his accomplished career, Mr. Barger has handled numerous high-value, multi-party litigation matters worth upwards of seven and eight figures. He has experience with both state and federal court matters, including bankruptcy issues. In addition to his construction expertise, Mr. Barger has extensive experience in catastrophic injury and products liability, business and commercial litigation, real estate, environmental law, professional liability, public and governmental entities, and transportation law.

Mr. Barger is an active member of the community and is involved in several legal and professional organizations in Los Angeles. He is a past President of the Association of Southern California Defense Counsel and served on the LACBA Litigation Executive Committee. Mr. Barger is also an avid proponent of promoting civility and ethics in the courtroom and is highly respected by attorneys on both sides of the bar. He helped create the CAALA/ASCDC/LA-ABOTA Annual Joint Litigation Conference and worked with leaders of the Los Angeles Superior Court, CAALA and ABOTA to develop and implement the current successful Mandatory Settlement Conference program in the Personal Injury courts.

Mr. Barger has extensive trial, arbitration, and mediation experience, which he draws upon to assist parties in designing pragmatic and creative resolutions. He is consistently ranked a Super Lawyer, has received various prestigious designations and has the distinction of achieving the highest rating of "AV-Preeminent" by the prominent national lawyer rating organization Martindale-Hubbell.

AREAS OF EXPERTISE

- Construction Litigation
- Products Liability
- Real Estate
- Eminent Domain & Inverse Condemnation
- Transportation Law
- Employment
- Landlord/Tenant/Warranty of Habitability
- Professional Liability
- Catastrophic Injury
- Business & Commercial Litigation
- Environmental Law
- Public & Governmental Entities
- Complex Litigation
- Subrogation

EDUCATION AND LICENSES

- California Supreme Court, 1991
- United States District Court, Central District of California, 1991
- State Bar of California, 1991
- Pepperdine University School of Law, J.D., 1991
- University of California, Davis, B.A. in Economics, 1988

PROFESSIONAL AFFILIATIONS

- Association of Southern California Defense Counsel, Past President
- Association of Defense Counsel of Northern California, Member
- California Defense Counsel, Executive Board
- Claims & Litigation Management Alliance, Member
- Federation of Defense & Corporate Counsel, Member
- Los Angeles County Bar Association, Litigation Executive Committee, Past Member
- West Coast Casualty, Speakers & Topics Committee

PUBLICATIONS

Mr. Barger's publications include: "A White Report For General Contractors On Apartment Conversion Issues"; "The Impact of Disappearing Carriers on Construction Defect Litigation", The Construction Lawyer; "Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation", The Construction Lawyer; "Additional Insured Endorsement Issues Which Are Currently Impacting Construction Defect Litigation"; "Managing Construction Defect Cases", The Construction Lawyer; "Tight Building Syndrome – In The Defense Of HVAC Contractors", HVAC Products News; "In Defense Of Tight Building Syndrome, For The Defense, Joint Defense Agreements", Verdict Magazine. He has also been published on Mold and Environmental Bodily Litigation topics, the *Crawford* decision, SB 800 (Right to Repair Statutes), pre-trial motions, and indemnity issues in various publications.

SPEAKING ENGAGEMENTS

Mr. Barger has been a profiled speaker and panelist at numerous industry-related events, including: HB Litigation Conference (2009); Lorman's California Mold Bodily Injury and Construction Conference (2002, 2003); MC2 Consultants Seminar (2007, 2008); Mealey's Construction Conferences (2002, 2004, 2005); West Coast Casualty Construction Defect Seminars (2001, 2002, 2004, 2005, 2007, 2009, 2010, 2015); Association of Southern California Defense Counsel's Annual Seminar (2004, 2009, 2013); Association of Southern California Defense Counsel and Construction Defect Claims Managers' CD Seminar (2005-2013); California Building Industry Association Annual Meeting (2004); CLM Conference on Mediation (2012); CAALA Las Vegas on General Damages (2016); Perrin Conference Florida (2016, 2017) and CAALA/ASCDC/LA-ABOTA Joint Litigation Conference (2016, 2017, 2018).

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Biography

Gerald A. Kurland is consistently named by the Los Angeles *Daily Journal* as one of California's most sought-neutrals. He is known as one of the leading construction mediators and special masters in the state and is uniformly cited for his ability to achieve consensus in the most difficult and complex cases.

Mr. Kurland's construction dispute resolution experience includes virtually every type of commercial project – university, school and sports facilities, government and airport buildings, theatres, high rises, hospitals, flood control channels, roadways, and pipelines. He has mediated disputes involving breach of contract, environmental remediation, landslides, inverse condemnation, surety, cost overrun, delay, disruption, differing site conditions, and loss of productivity claims.

Jerry previously served as corporate counsel to a large real estate development company whose portfolio included commercial, industrial, hotel, apartment, and residential community projects. One of his primary responsibilities was the management and negotiation of settlements of company litigation, which included numerous complex matters and involved direct working relationships with the company's lenders, insurers, and partners.

Representative Matters

- Resolution of construction claims involving 38-building dormitory complex at a major California university
- Resolution of environmental remediation claims resulting from the transfer of dirt containing asbestos from a Santa Monica public works site to commercial project site in Los Angeles County
- Settlement involving construction of a Central California public high school – delay, disruption, loss of productivity, cost overrun, contract payment, and defect claims
- Settlement involving construction of an Orange County flood control channel – delay, loss of productivity, differing site conditions, breach of contract, surety, and defect claims

Honors, Memberships, and Professional Activities

- Recognized as an “ADR Champion”, *National Law Journal*, 2018
- Jerrold S. Oliver Award of Excellence, presented at West Coast Casualty Construction Conference for outstanding contribution to the construction community, 2008
- Selected as a Top 50 California Neutral, *Daily Journal*, 2003, 2009, 2011-2013 (This ranking ended in 2013.)
- Selected as a Top 40 California Neutral, *Daily Journal*, 2007 and 2008
- Selected as a Top 30 California Neutral, *Daily Journal*, 2006
- Selected as one of California’s 20 Most Sought-After Neutrals, *Daily Journal*, 2002
- Selected as a Southern California Super Lawyer in the field of Alternative Dispute Resolution, 2010-2016, 2019
- United States Bankruptcy Court (Central District of California) Panel of Mediators
- Appointed by Mayor of Los Angeles to San Fernando Valley Citizens’ Committee addressing traffic and transportation issues
- Commended by Los Angeles City Councilmembers Joel Wachs and Michael Woo for efforts in securing land for the expansion of the Studio City Library (1991)
- UCLA Alumni Association Board of Directors, 1979-80 and 1985-1988
- Recipient of UCLA Alumni Association’s “Outstanding Senior Award” (1980)
- "High-Level Connector," ADR Profile, *Daily Journal*, March 25, 2011

Background and Education

- J.D., University of California, Berkeley School of Law (formerly Boalt Hall School of Law),1983 (Law Review)
- B.A., *summa cum laude*, UCLA, 1980 (Phi Beta Kappa, Student Body President)

General Biography

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Biography

Ross W. Feinberg Esq. has served as a full time mediator and special master since 2007. A highly respected and sought after neutral, he has been the recipient of numerous awards from all sides of the bar. Critical to his work, Mr. Feinberg is equally respected by all sides. Mr. Feinberg, known originally for solving and settling complex construction defect matters also actively handles complex disputes including business and commercial, personal injury/tort, insurance, school district claims, and construction and community association disputes.

ADR Experience and Qualifications

After spending 22 years mediating complex multi-party cases, Mr. Feinberg joined JAMS in 2007. He has been recognized by the Daily Journal as a top neutral and was the recipient of the prestigious Jerrold S. Oliver Award of Excellence in 2003.

An AV rated lawyer, author and speaker, Mr. Feinberg has been the chair and/or a speaker of well over 100 national seminars from personal injury and mold claims to construction defect litigation and numerous facets of real estate brokerage and common interest development law.

Mr. Feinberg has successfully mediated over 2,000 cases both as counsel and as a mediator. For 33 years, Mr. Feinberg has been widely recognized for his ability to initiate open communication in cases with a myriad of complex situations leading to constructive results. Mr. Feinberg is admitted in the states of California, Nevada and Colorado.

Representative Matters

Accounting/Finance

- Mediation of corporate dissolutions
- Mediation of shareholder proxy challenges
- Mediation of accountings and corporate appraisals
- Mediation of officer and shareholder liability actions

Business/Commercial

- Breach of contract involving multi-million-dollar real estate purchase and sale agreement and related disclosures
- Claim of breach of contract, fraud and misrepresentation related to purchase and sale agreement
- Commercial business interruption claim stemming from construction and occupancy delays
- Fire loss cases involving business interruption, profit valuations, and governmental intervention
- Resolved Claims by athletes and celebrities concerning contractual disputes, insurance coverage and confidentiality requirements

Class Action

- $21.5 million settlement of 3,000 single-family home thermogalvanic corrosion class action
- $41.8 million resolution of 5,000 home class action case involving galvanized corrosive plumbing
- Settlement reached after incorporating several different lawsuits into single global mediation. Mediation included over one hundred parties, insurance carriers, and counsel worldwide
- Mediation and resolution of complex pharmaceutical and consumer class actions
- Successful resolution of two multi project certified class action cases resulting in settlement pursuant to a pipe repair opportunity for owners of multiple homes across several large scale projects
- Successful resolution of a $41.8 million thermogalvanic pipe claim after the parties agreed to consolidate several cases into one 5,000 home action

Construction

- **Construction Defect**
  - In excess of 33 years of experience litigating and resolving multi-party, multi-issue litigation brought by community associations, multiple single family homeowner plaintiffs and commercial property owners
  - Construction defect litigation involving luxury single family homes
  - Resolution of Dispute involving 460 condominium units in the amount of $13 Million
  - For a detailed list of construction defect cases that Mr. Feinberg has resolved, please visit his construction defect biography
- **Common Interest Development Law**
  - Mediated condominium and planned unit development disputes including:
    - Davis-Stirling inter community complaints and litigation
    - Breach of fiduciary duty actions against boards of directors
    - Litigation involving management companies
    - Statutory election challenges
    - Violation of CC&Rs
    - Construction of Governing Documents
  - Representation and resolution as a mediator of complex homeowner's association matters at all phases of litigation
  - Mediated matters involving the separation of separate area, common area and exclusive use common area

Construction and Engineering

- Mediation of infrastructure construction project disputes
- Mediation of large construction projects including bridges, roads and highways
- Mediation of surety claims and performance bonds
- Mediation of disputes concerning cost overruns and delays in private and governmental funded projects
- Representation and resolution as a mediator of commercial and residential construction matters including construction delays, accidents, premises liability and coverage litigation
- Settlement of Turbine Accident on a California Freeway Overpass. Worked with various agencies, builder, supplier and installer

Energy/Utility

- Mediation of disputes arising from fires and explosions
- Mediation of boiler fires in hotels
- Mediation of wind farm investment dispute in the California desert
- Mediation of natural gas pipelines located within four corners grid

Environmental Cases

- Mediation of toxic tort claims involving the impact on the human senses including those of the ear, nose and throat, due to:
    - Airborne spores
    - Water quality and contaminants
    - Waste management
    - Chemical safety
    - Algae and fungi
- Mediation of cases involving damage to human cells from environmental toxins such as mold and asbestos.
- Mediation of personal injury claims due to neurotoxins in both the airborne environment and water including lead, mercury, formaldehyde and chlorine

Insurance

- Bad Faith Actions
    - Bad faith/Brandt fee litigation involving carrier disputes over coverage in real property and tort actions
    - Bad faith denial in construction defect claim and cross actions
- Insurance Subrogation Claims
    - Subrogation claims involving fires, mechanical failures, floods and other incidents/natural disasters
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- Mediation over purchase and sale agreement dispute involving failure to disclose allegations
- Resolution of complex real estate breach of contract and non-disclosure matter among parties with strong religious and cultural differences
- Use agreement dispute mediated between private citizen and government entity

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- Recipient, Jerrold S. Oliver Award of Excellence, West Coast Casualty Conference on Construction Defects, 2003
- AV Rated by Martindale - Hubbell
- Recipient of 15 national and local awards from organizations on behalf of Homeowners Associations
- National Board of Trustees, Community Associations Institute (CAI), 2007 and member of its College of Community Association Lawyers and Board of Governors (national president, 2006)
- Senior faculty member, CAI; member of 5 member panel Speakers and Topics Committee for the annual West Coast Casualty Conference on Construction Defects; senior seminar advisor for national construction defect coverage seminars held by MC Consultants; co-chair for numerous Mealey's Lexis Nexis construction defect seminars; helped coordinate Brookings Institute annual Construction Defect Seminars in Washington, D.C. and Orange, CA
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ADR Profiles

- "Dogged Determination," *Daily Journal*, ADR Profile, April 27, 2018
- "Building Consensus," *Daily Journal*, ADR Profile, August 6, 2010

Background and Education

- Partner, Feinberg, Grant, Mayfield, Kaneda & Litt, LLP
- J.D., University of San Diego School of Law, 1984
- B.S., *cum laude*, University of Southern California, 1981

Available nationwide ›

Ross W. Feinberg, Esq.

Case Manager

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Biography

Ross W. Feinberg Esq. has served as a full time mediator and special master since 2007. A highly respected and sought after neutral, he has been the recipient of numerous awards from all sides of the bar. Critical to his work, Mr. Feinberg is equally respected by all sides. Mr. Feinberg, known originally for solving and settling complex construction defect matters also actively handles complex disputes including business and commercial, personal injury/tort, insurance, school district claims, and construction and community association disputes.

ADR Experience and Qualifications

After spending 22 years mediating complex multi-party cases, Mr. Feinberg joined JAMS in 2007. He has been recognized by the Daily Journal as a top neutral and was the recipient of the prestigious Jerrold S. Oliver Award of Excellence in 2003.

An AV rated lawyer, author and speaker, Mr. Feinberg has been the chair and/or a speaker of well over 100 national seminars from personal injury and mold claims to construction defect litigation and numerous facets of real estate brokerage and common interest development law.

Mr. Feinberg has successfully mediated over 2,000 cases both as counsel and as a mediator. For 33 years, Mr. Feinberg has been widely recognized for his ability to initiate open communication in cases with a myriad of complex situations leading to constructive results. Mr. Feinberg is admitted in the states of California, Nevada and Colorado.

Representative Matters

Accounting/Finance

- Mediation of corporate dissolutions
- Mediation of shareholder proxy challenges
- Mediation of accountings and corporate appraisals
- Mediation of officer and shareholder liability actions

Business/Commercial

- Breach of contract involving multi-million-dollar real estate purchase and sale agreement and related disclosures
- Claim of breach of contract, fraud and misrepresentation related to purchase and sale agreement
- Commercial business interruption claim stemming from construction and occupancy delays
- Fire loss cases involving business interruption, profit valuations, and governmental intervention
- Resolved Claims by athletes and celebrities concerning contractual disputes, insurance coverage and confidentiality requirements

Class Action

- $21.5 million settlement of 3,000 single-family home thermogalvanic corrosion class action
- $41.8 million resolution of 5,000 home class action case involving galvanized corrosive plumbing
- Settlement reached after incorporating several different lawsuits into single global mediation. Mediation included over one hundred parties, insurance carriers, and counsel worldwide
- Mediation and resolution of complex pharmaceutical and consumer class actions
- Successful resolution of two multi project certified class action cases resulting in settlement pursuant to a pipe repair opportunity for owners of multiple homes across several large scale projects
- Successful resolution of a $41.8 million thermogalvanic pipe claim after the parties agreed to consolidate several cases into one 5,000 home action

Construction

- **Construction Defect**
  - In excess of 33 years of experience litigating and resolving multi-party, multi-issue litigation brought by community associations, multiple single family homeowner plaintiffs and commercial property owners
  - Construction defect litigation involving luxury single family homes
  - Resolution of Dispute involving 460 condominium units in the amount of $13 Million
  - For a detailed list of construction defect cases that Mr. Feinberg has resolved, please visit his construction defect biography
- **Common Interest Development Law**
  - Mediated condominium and planned unit development disputes including:
    - Davis-Stirling inter community complaints and litigation
    - Breach of fiduciary duty actions against boards of directors
    - Litigation involving management companies
    - Statutory election challenges
    - Violation of CC&Rs
    - Construction of Governing Documents
  - Representation and resolution as a mediator of complex homeowner's association matters at all phases of litigation
  - Mediated matters involving the separation of separate area, common area and exclusive use common area

Construction and Engineering

- Mediation of infrastructure construction project disputes
- Mediation of large construction projects including bridges, roads and highways
- Mediation of surety claims and performance bonds
- Mediation of disputes concerning cost overruns and delays in private and governmental funded projects
- Representation and resolution as a mediator of commercial and residential construction matters including construction delays, accidents, premises liability and coverage litigation
- Settlement of Turbine Accident on a California Freeway Overpass. Worked with various agencies, builder, supplier and installer

Energy/Utility

- Mediation of disputes arising from fires and explosions
- Mediation of boiler fires in hotels
- Mediation of wind farm investment dispute in the California desert
- Mediation of natural gas pipelines located within four corners grid

Environmental Cases

- Mediation of toxic tort claims involving the impact on the human senses including those of the ear, nose and throat, due to:
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- Senior faculty member, CAI; member of 5 member panel Speakers and Topics Committee for the annual West Coast Casualty Conference on Construction Defects; senior seminar advisor for national construction defect coverage seminars held by MC Consultants; co-chair for numerous Mealey's Lexis Nexis construction defect seminars; helped coordinate Brookings Institute annual Construction Defect Seminars in Washington, D.C. and Orange, CA
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- J.D., University of San Diego School of Law, 1984
- B.S., *cum laude*, University of Southern California, 1981

Available nationwide ›

Arbitration, Mediation & Conciliation Center

David S. Schlueter, Esq.

Practicing law since 1983 and now an AMCC neutral, Mr. Schlueter's expertise lies in the fields of Construction Law, Construction Defect, Real Estate, Business Litigation and Personal Injury. In addition to his extensive experience in both mediation and arbitration, he is well versed in negotiated settlements and trial matters. As a founding partner of Northrup Schlueter, he led the firm's practice in Alternative Dispute Resolution.

Mr. Schlueter is both an effective advocate and a skillful risk manager who, by taking into account the strengths and weaknesses of a case, strategically positions stakeholders for maximum resolution opportunities early in the litigation process. His experience and training in mediation benefits Parties throughout the dispute resolution process, often leading to early settlement.

As a trained neutral, Mr. Schlueter has fine-tuned his skills, developed through his years of litigation practice, for ascertaining the sometimes complicated agendas in a dispute, whether they be financial, emotional or, as is often the case, some combination thereof. He assists Parties in finding common ground and reaching compromises that provide for resolutions consistent with their litigation objectives while preserving the dignity of all involved.

Mr. Schlueter represented clients in construction related disputes for over thirty years, including contractors, subcontractors, suppliers, construction managers and professionals such as architects and engineers, consistently achieving favorable results for his clients.

Mr. Schlueter is involved in civic activities and is an active supporter of the Wounded Warriors project and a sponsor of the annual Pepperdine Law School charity golf tournament.

Education:

1982	Santa Clara University School of Law, J.D.
1979	University of Illinois, B.A., 1979

Bar Admissions:

California Supreme Court
U.S. District Court, Central District of California

Profession Affiliations and Memberships

Los Angeles County Bar Association
DRS Mediator Certificate Program
Advance Skills Practicum, certification studies
Pepperdine University School of Law's Strauss Institute for Dispute Resolution
Defense Research Institute, Past Member
Inns of Court (1994-1997)

Rate:

$600.00 per hour

AMCC
ARBITRATION MEDIATION CONCILIATION CENTER
www.AMCCENTER.COM | (800) 645-4874

David Schlueter, Esq.

MEDIATION FEES

Mr. Schlueter will charge his current standard rate of $600.00 per hour for all mediation services provided, including but not limited to, review of briefs and documents, telephonic and e-mail communication with the Parties and Counsel, and for conducting in-person and/or virtual mediation sessions. The Parties will be billed in accordance with the billing split they have agreed upon. Mr. Schlueter will have the discretion to adjust the allocation of fees to the Parties depending upon the nature of the activity being billed and the participation or non-participation of certain parties in a particular activity. *By participating in the mediation, the Parties expressly agree to remit all fees as invoiced and that the fees are the responsibility of respective Counsel.*

CANCELLATION POLICY

Due to heavy demands on the calendar and the reality of turning away other matters because dates are already reserved, if a matter is cancelled less than twenty (21) days prior to the first mediation session, the Parties will be billed for the time reserved unless we are able to rebook the cancelled time for other matters. Therefore, the Parties are strongly encouraged to assess the actual readiness of the matters for scheduled proceedings at least three weeks before the scheduled mediation session.

NOTICE OF CANCELLATION MUST BE SUBMITTED IN WRITING AND COPIED TO ALL PARTIES.

DAILY FACILITY / TECHNOLOGY / FILE MANAGEMENT / DOCUMENT SERVICES FEE

Parties shall each pay a non-refundable facility, file management and document services fee of $250.00. All facility, file management and document services fees are non-refundable.

1000 Wilshire Boulevard, Suite 1150
Los Angeles, CA 90017
(213) 688-3470 Fax: (213) 383-2843

West Coast Casualty's Construction Defect Seminar

Construction Claims Management 2020 and Beyond—Passing The Torch To The Next Generation of Claim Professionals

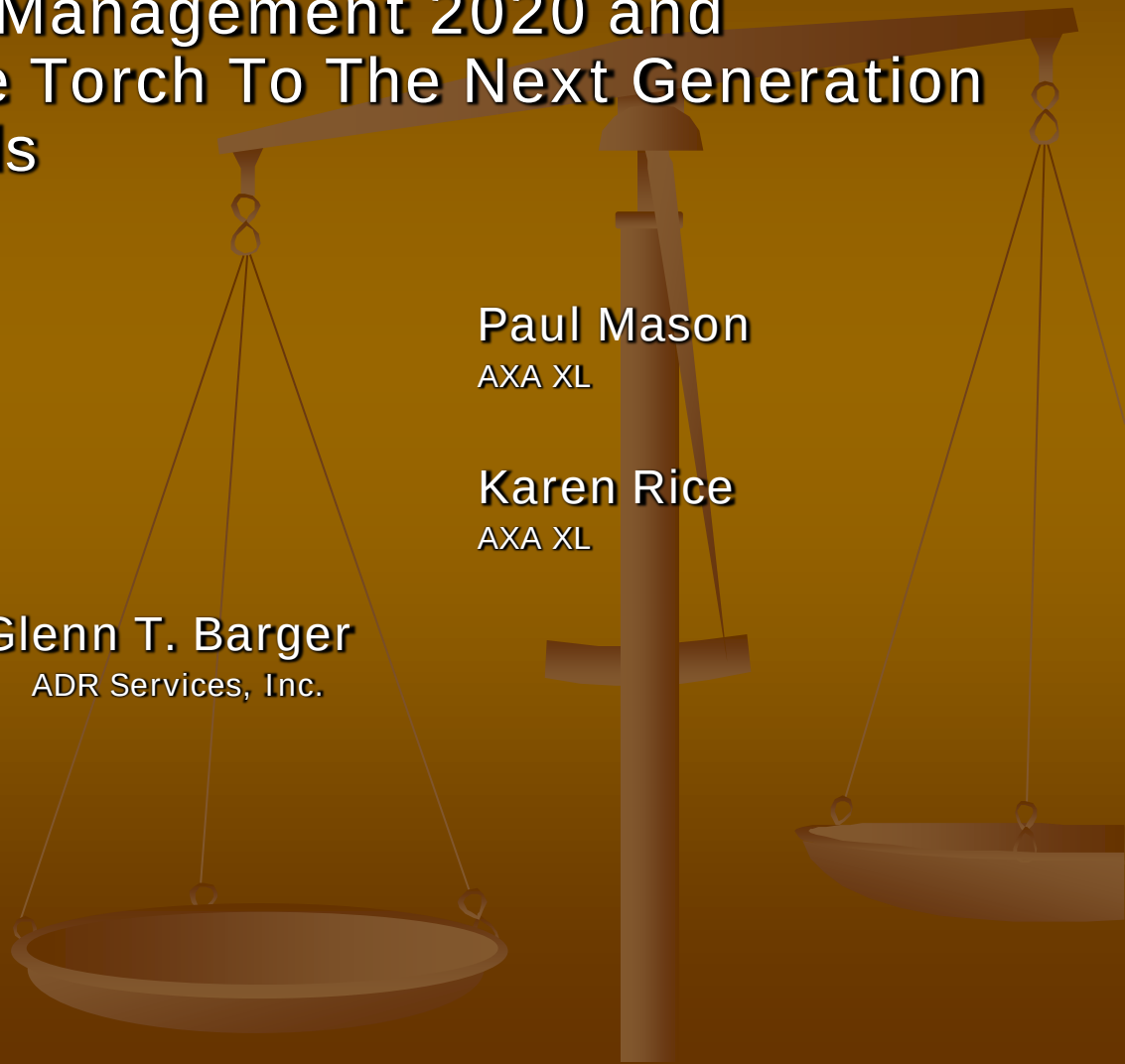
Steve Lokus
The Hartford Global Specialty/Navigators

Paul Mason
AXA XL

Phyllis A. Modlin
Markel

Karen Rice
AXA XL

Glenn T. Barger
ADR Services, Inc.



Construction Claims Management in 2020 and Beyond—Passing The Torch To The Next Generation

- Introduction
  - The Claims Industry Is Reaching A Critical Point
  - Younger Claims Professionals Need To Move Up To Management
  - Round Table Discussion Discussing Facing The Challenges of Training and Equipping The New Generation of Claims Professionals
  - Expectations Of Claims Professionals
  - Developing Talent
  - What Role Does Counsel Play In This Industry Challenge

Construction Claims Management in 2020 and Beyond—Passing The Torch To The Next Generation

- Introduction
  - Getting Hired
  - Internal and External Training
  - Technology
  - Performance Review
  - Working With Counsel
  - Moving Up The Ladder
  - Aging Workforce and Impact On The Industry

Getting Hired

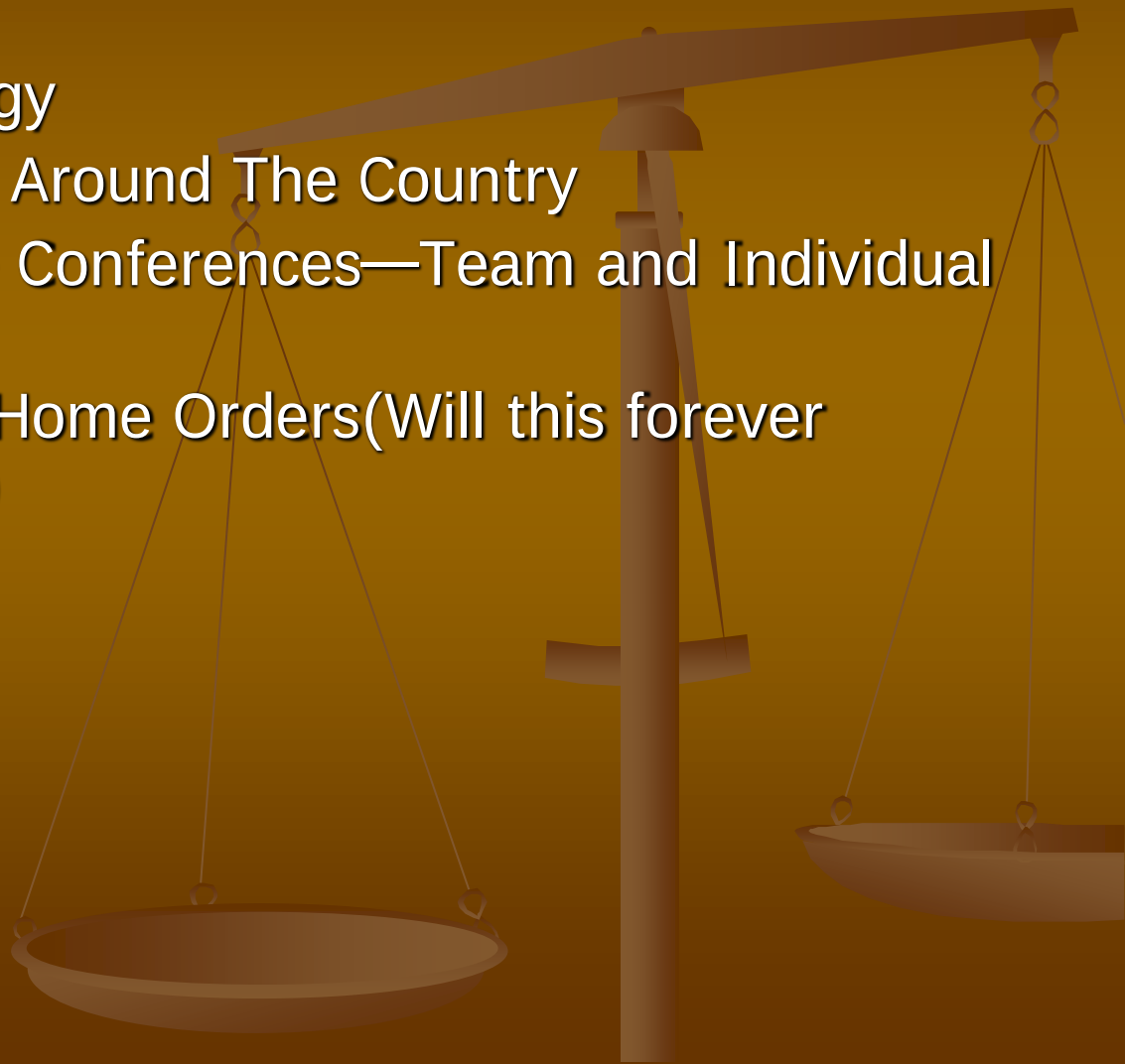
- Job Application
- Job Requirements
- Looking For Talent
- Pendulum Shifts—Attorneys?
- Types of Skills Desired
  - Ability to Process Content
  - Communication Skills

Internal and External Training

- Mandatory Training
- Availability of Internal Training
- Outside Seminars
- How Panel Counsel Can Help
- Expense Issues
- Getting Experience
- Mentorship—Reaching Out

Technology

- Metrics
- Changes in Technology
- Working With People Around The Country
- Video and Telephone Conferences—Team and Individual Meetings
- COVID -19, Safer At Home Orders(Will this forever change the business)
- Collaboration

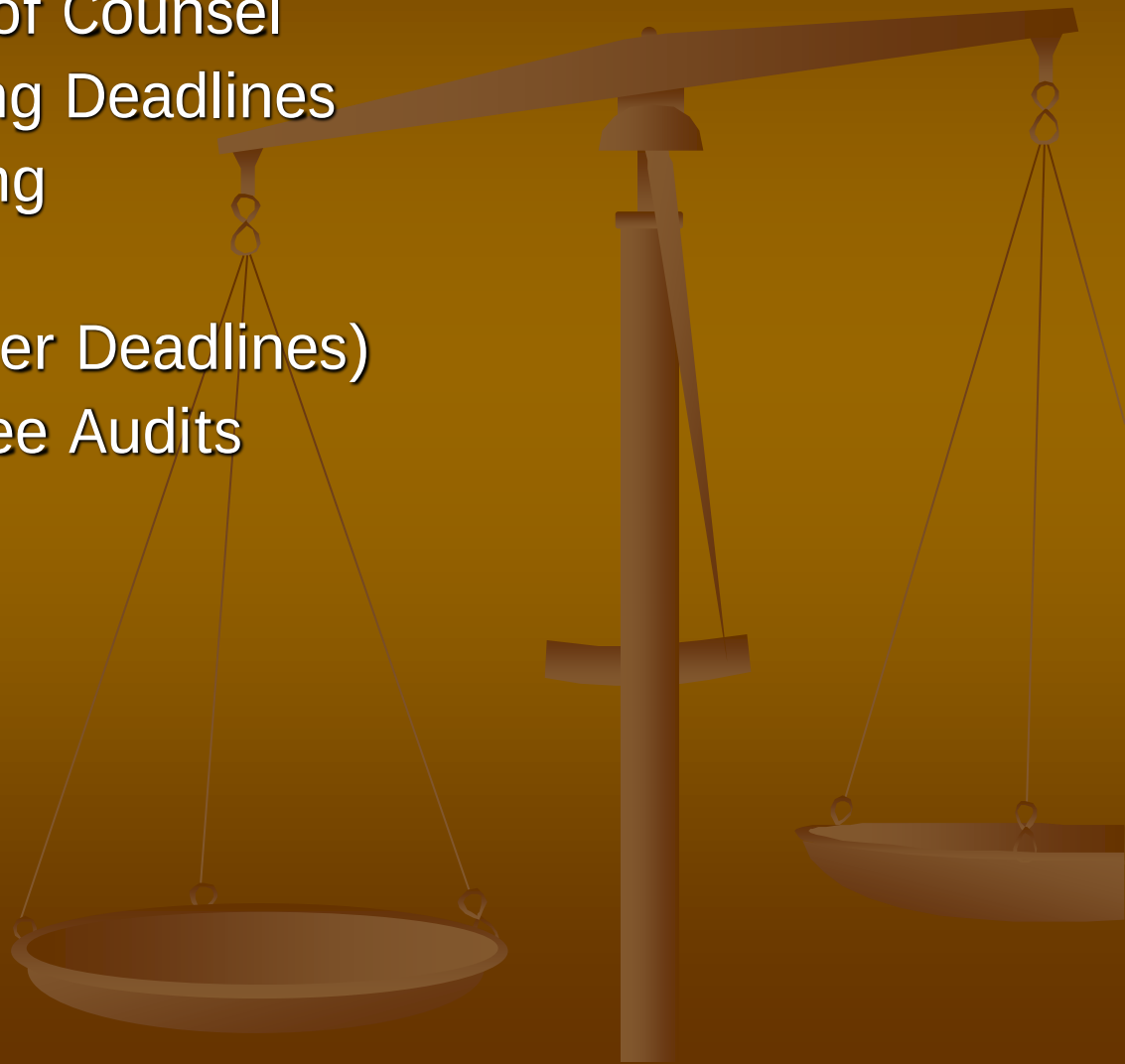


Performance Review

- Technical Skills
- Spotting Issues
- Coming Up With Solutions
- Willingness To Volunteer
- Meeting Deadlines
- Ability to Plan
- Documenting The File
- Decision Making Skills
- Compensation

Working With Counsel

- Carrier Expectations of Counsel
- Importance of Meeting Deadlines
- Assisting With Training
- Reporting
- Mediation/Trial (Carrier Deadlines)
- Case Handling and Fee Audits
- Getting Business



Moving Up The Ladder—Strategies For Growing Career

- Let It Be Known
- Getting Noticed
- Long Term Plan
- Taking on Responsibilities
- Making Entire Claims Team Successful
- Ability to Communicate

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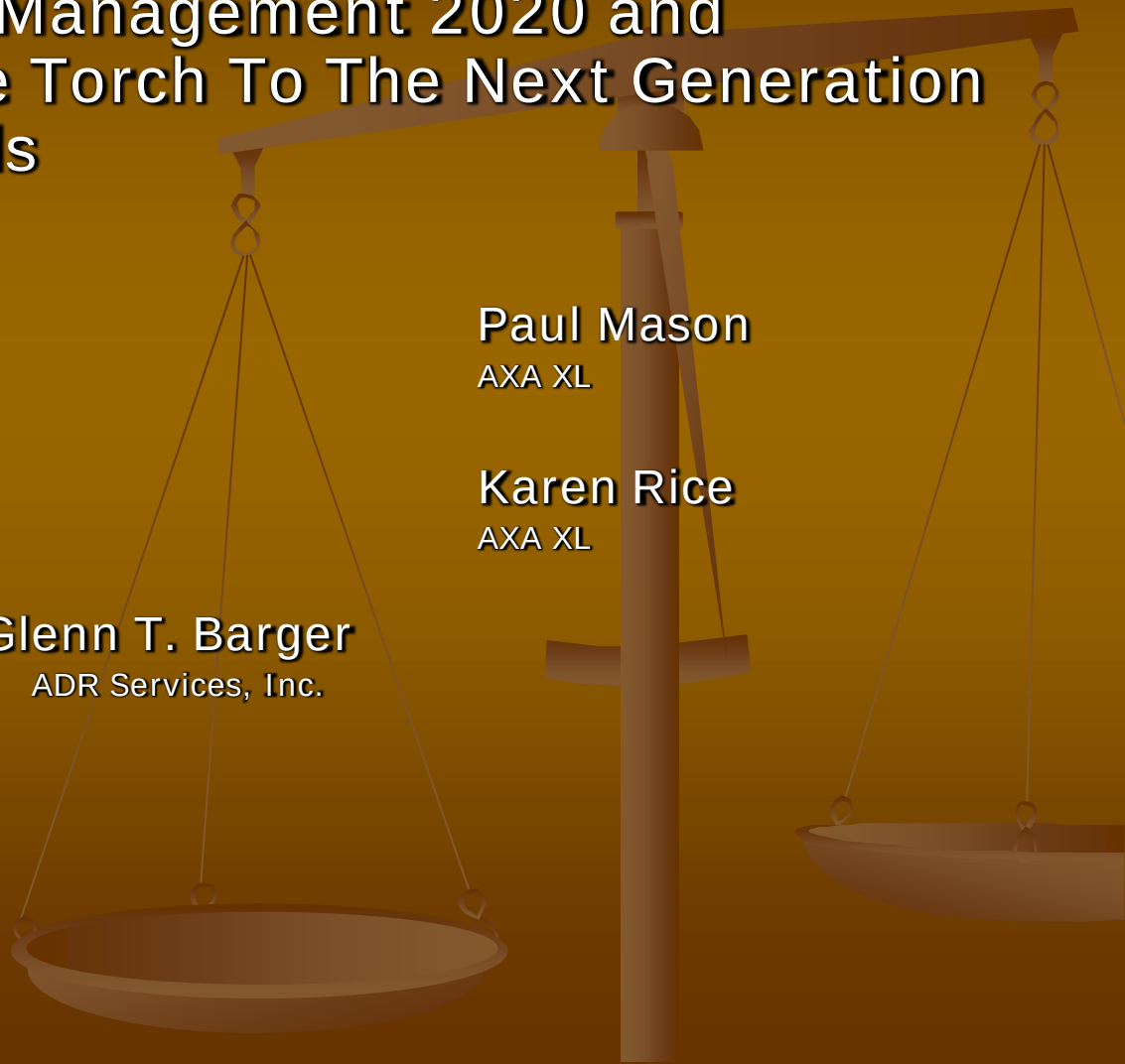

Insurance BUSINESS AMERICA

Talent is the ‘secret sauce’ to insurance’s makeover

by Bethan Moorcraft 13 Feb 2020

The insurance industry is struggling to attract the right talent. It’s a universally acknowledged problem – and one that needs solving fast if the industry wants to stay relevant in an increasingly digital world.

According to the EY Insurance Outlook 2020, talent is the “secret sauce” that will enable insurers to maximize returns on investments in technology, digital transformation and new business models. It’s the key to unlocking the industry’s necessary transformation.

So far, that so-called “secret sauce” has been hard to come by.

“It’s a fight,” said Ed J. Majkowski, EY Americas insurance sector and advisory leader. “The generation coming out of school these days are all excited about working for some of the largest technology firms in the world. When they have to choose between working for a technology firm, a bank, or an insurance company, insurance almost always comes last.

“There has been a real push to try to recruit people and get younger generations of people excited about the insurance industry. My personal feeling is that insurance is probably more fun that any other industry right now because it’s transforming. It has fallen so far behind that there are now huge amounts of energy and investment being pumped into change. When there’s so much disruption and change going on, where else would you want to be?”

EY’s stance is that insurers either need to reposition themselves as technology firms or do much better at proactively communicating why the industry matters, what value it brings to society and the overall appeal of an insurance career. As insurers go through this transformational journey, they not only need to attract and retain the right talent, but they also need to retrain the existing workforce so that they have new technology skills that compliment the deep insurance skills they already have.

The talent challenge is particularly acute in the independent brokerage and agency channel – a distribution stream Majkowski describes as “absolutely critical” to the insurance industry. Once again, this links back to innovation, technology and transformation in the distribution channel. According to Majkowski, if independent brokerages and agencies want to attract and retain the best talent, they have to “operate faster in a digital environment,” get products to market faster using digital capabilities, and “partner with insurance companies who invest in the agent experience.”

The issue is also exacerbated by the fact that the distribution force is largely dominated by the Baby Boomer generation, many of whom are approaching retirement age. Majkowski told *Insurance Business:* “If you’re a Mom & Pop shop and you inherited your brokerage or your agency from your parents, it’s becoming more difficult to hand that business down to the next generation because they’re just not interested. Kids today really don’t want to run an insurance agency.

“Every year, I follow the statistics around agency and brokerage consolidation, and every year I think we must hit our peak. And yet, the consolidation of agents and brokers in the Americas continues to be at an all-time high, and it’s been like this for the last seven years or so. It’s hard for the average insurance brokerage or agency to attract talent, and so what do they do? They consolidate.”

Related stories:

- Desperate insurance firms ‘stealing each other’s talent’
- Everything you need to know about poaching top talent

Original Article found at: https://www.insurancebusinessmag.com/us/news/breaking-news/talent-is-the-secret-sauce-to-insurances-makeover-213644.aspx

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RICHARD D. SEELY
RSEELY@TYSONMENDES.COM

ARIZONA
CALIFORNIA
COLORADO
FLORIDA
NEVADA
NEW YORK
WASHINGTON

Civility, Civility, Wherefore Art Thou?

Once More Unto The Breach (of Cooperation)!

Hon. William Bedsworth: Associate Justice, California Fourth District Court of Appeal
Richard D. Seely, Esq.: Senior Counsel, Tyson & Mendes
Courtney Winzeler, Esq.: Partner, Kahana & Feld LLP
Christopher Day, Esq.: Mediator, Day Resolutions
Sheila Totorp, Esq.: Technical Claims Specialist Team Lead, Argo Group

The main title of this presentation is a reference to, of course, Romeo & Juliet. Recall that Juliet is out on her famous balcony, calling out for Romeo. In reality, the "wherefore art thou Romeo" line is actually asking "WHY are you Romeo? What makes you who you are? "Wherefore," as used during Shakespeare's career, was not a "where you at?" thing, it was a "why you gotta be like that?" thing.

For this discussion, the "why" is key. Why be Civil? Seems rhetorical, yet time and again, reminders are needed. At previous presentations for WCC's construction defect seminar, Rick Seely always ends his panels with another Shakespeare quote:

"And do as adversaries do in law, strive mightily,

But eat and drink as friends."

This quote seems so simple. At the end of the day, we're all just like the sheepdog and wolf in the old "Looney Tunes" cartoons: clock in, do the job. Clock out, family time. We know that both sides are doing a job, so as Taylor Swift sings "Why you gotta be so mean?" Civility goes a long way in getting things done and enjoying the journey.

A recent 2019 Appellate Court opinion, *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, again calls for Civility within the legal profession. This opinion, penned by Justice William Bedsworth, contains a history of previous appellate decisions which, for over 30 years have said, in essence, "Come on people now, smile on your brother. Let's get together, try to love one another right now."

The opinion also presents a new approach to being civil: It's not just an ethical duty to get along: it's codified in the law, under Code of Civil Procedure section 583.130.

This article is a humble reminder that there are several legal reminders which beseech us all to get along. It will help you; it will help the process; and it will help your clients.

LEGAL BASIS FOR CIVILITY

With *Lasalle* in mind, it is important to recall or recognize a few written rules which already exist and tell us "why" Civility is important.

1. C.C.P section 583.130: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that **all parties shall cooperate in bringing the action to trial** or other disposition." This Code section, around for over 35 years, shines anew in the *Lasalle* opinion, discussed below. The usual focus of section 583.130 is on the "reasonable diligence" necessary in litigation, making sure that justice is not delayed. Just as important, according to *Lasalle,* is the need for cooperation.

2. California Rule of Court 9.7: "In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.'" The attorney oath contains the mandate to act with dignity, etc., since 2014. It was ABOTA's way to flatten the curve of rising incivility. Just because it has "only" been around for 6 years does not mean it should only apply to "new" attorneys. **"Wisdom too often never comes, and so one ought not to reject it merely because it comes late."** *Henslee v. Union Planters Nat. Bank & Trust Co.* (1949) 335 U.S. 595, 600 (Frankfurter, J, dissenting).

Cal-ABOTA championed this addendum to the attorney oath. We provide ABOTA principles with this written submission, as it is important to note that the promotion of Civility on both sides is something Cal-ABOTA always strives for.

3. Rules of Professional Conduct 3.1 (a)(1): "A lawyer shall not bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person." This ethical construct is a great reminder that asserting positions or defenses that are without merit/cause is not a good way to go through life. Strive mightily, but remember to focus the litigation and streamline the process.

4. Rules of Professional Conduct 3.3: "A lawyer shall not offer false statements, or withhold legal authority directly adverse to the position of the client and not disclosed by opposing counsel, or offer false evidence." Again: an ethical "mandate" to act accordingly. Strive mightily, but ethically.

APPELLATE CASES PROMOTING CIVILITY

While the above combination of codes and rules mandates that we all get along in the sandbox, there are constant examples over the years of less than desirable conduct. Hence the reference to "Once more unto the *breach*." This is another Shakespeare reference, twisted to suggest a break in cooperation. The "breach" referenced in Shakespeare's *Henry V* is an actual gap in a wall around the French city of Harfleur. The English army held this city under siege at a crucial point during one of the wars between England and France. Shakespeare gave King Henry several quotes with staying power ("We few, we happy few, we band of brothers"), including his "once more" cry. It is rallying his men to keep on keeping on.

Similarly, the argument FOR Civility has been ongoing, and appellate decisions every so often need to attack the breaches of cooperation and fight the good fight for the Civility side.

In the recent *Lasalle* opinion, Justice Bedsworth does a great job of reminding us "we told you this stuff, already!" He references several opinions that ask for Civility. Three specific ones are discussed below:

1. Lossing v. Superior Court (1989) 207 Cal.App.3rd 635

"We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel…the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." *Lossing*, 207 Cal.App.3rd at 641

This was a 1989 opinion. This opinion was published during the time when Generation X kids were enjoying college and law school. The first Millennials were barely being born. The Beastie Boys' beautiful and sample heavy album Paul's Boutique just hit the record stores. Emails as we know them didn't exist. So, when you hear that the lack of Civility is due to "these pesky emails," remember that even

with simple dot matrix printers, Xeroxes and tethered telephones, attorneys in 1989 were not getting along then just as easily as they are not now.

2. DeRose v. Heurlin (2002) 100 Cal.App.4th 158

By 2002, a decade plus after *Lossing*, there's still a need for Appellate courts to address Civility. In 2002, most lawyers are operating with emails, electronic service of documents, courtcall, and Napster. And yet *Heurlin* has to throw cuss words into the published opinion in order to scold us to grow up. To quote *Lasalle* directly:

> "By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case…would get the bar's attention. It didn't."
>
> *Lasalle*, 36 Cal.App. 5th at 133.

Truly, *Heurlin* is a great of example of "really?" The opinion of *Heurlin* called out egregious conduct, told everyone they need to get along and work well with others, and punished an attorney for not doing so. The *Lasalle* opinion laments the necessity to bring this up, again.

The odd twist about the *Heurlin* opinion is the intended target of Mr. Heurlin's remark: this panel's contributor, Chris Day. Chris is an OCBA Chair for Annual Symposium on *Professionalism and Ethics*. He's a former Cal-ABOTA President, and a regular ethics lecturer for CEB. Chris teaches ethics; lobbies for ABOTA principles (including the modified attorney oath); and penned the "introduction" letter attached to this presentation. Yet whatever cooperation HE was trying to foster, the other side wasn't having it. It goes to show: you never can tell.

3. Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267

By 2011, the arguments about the need for Civility are still occurring. In the *Kim* opinion, the Appellate Court actually sanctioned counsel $10,000.00 this time.

"Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.

"We do not come to this conclusion lightly. Judges are lawyers, too. And while we have taken on a different role in the system, we have not lost sight of how difficult it is to practice law. Indeed, at the appellate level, we are reminded daily how complex and recondite the issues that confront practitioners daily can be.

"So we are loath to act in any way that would seem to encourage courts to impose sanctions for mistakes or missteps. But for serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary. We will step onto the slippery slope and trust our colleagues on the trial court bench to tread carefully along with us. It is time to make it clear that there is a price to pay for cynical practices.

"If this be quixotic, so be it. Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes." *Kim*, 201 Cal.App.4th at 294

Just to round this out before talking about *Lasalle*, we would be remiss if we didn't alert you that the author of *Kim* is also Justice Bedsworth. This is his quest: to make us all better people, even if we happen to be lawyers.

4. Lasalle v. Vogel (2019) 36 Cal.App.5th 127

Lasalle comes thirty (30!) years after *Lossing*. The novelty of the Lasalle is use of a codified mandate. The underlying facts deal with the overturning of a default judgment, but the reason for the opinion is summed up in the first paragraph:

"Here is what Code of Civil Procedure1 section 583.130 says: 'It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition.' That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of nonlawyers. The policy of the state is that the parties to a lawsuit 'shall cooperate.' Period. Full stop." *Lasalle*, 36 Cal.App.5th at 130

The opinion, in essence, states that being civil isn't just an ethics mandate, it's codified. Courts continue to urge counsel to turn down the heat on their inability to get along when dignity, courtesy, and integrity are conspicuously lacking. As such, the appellate courts feel the need to expose all those "Exhibit A" letters and emails that show us how not to act. There are, unfortunately, lots of examples.

As stated in *Lasalle*, any attempt to not cooperate cannot be readily be sloughed aside as an ethical breach. Since C.C.P. section 583.130 has been "on the books" since 1984, the breach of an ethical obligation (say, to warn opposing counsel of an intent to take a default) can also be non-compliance with a statutory policy that forces all parties to "cooperate in bringing the action to trial or other disposition." Given our current state, cooperation and communication are key.

CIVILITY IN PRACTICE

The panel intended to discuss the below issues in person, and regale you all with wit, wisdom and charm. Instead, pardon "the flat unraised spirits that have dared on this unworthy scaffold to bring forth so great an object." (Henry V, Prologue) We ask for your patience while you read and (kindly) judge our thoughts in written form.

1. Starting Out Correctly.

Over the years, Chris Day has presented different courses on Ethics. Prior to devoting all his time to mediation, in his litigation practice, he would routinely serve the first volley regarding cooperation. In his initial letter to counsel (a copy of which is attached with the materials), he was congenially blunt with his intentions. His letter basically states "Hi, I'm Chris, I want to cooperate with you, do things as informally as possible, and, if you have a problem with me or my staff, give me a call to figure things out." This letter goes a long way in diffusing matters from the outset, and shines an example of how we can act in order to work together (It is still odd to know that Mr. Huerlin disagreed). Try it out, and see where it takes you.

2. Actually Talking to Each Other.

Electronic and telephonic communications are constantly in a fight for supremacy. To paraphrase the *Lasalle* opinion: "e-mails are a lousy medium with which to warn opposing counsel [about anything related to imminent drastic actions]." Whether it is a default, or a motion to compel, or ex parte notice, truly by law e-mails are insufficient to serve notices on counsel unless prior agreement and written confirmation by counsel exist, pursuant to Code of Civil Procedure sections 1013(e) and 1010.6(a)(2)(A)(ii).

If attorneys cannot get on the phone to discuss the matters in which they'll be embroiled for at least a year, how is anything supposed to resolve between the parties? Call opposing counsel. Inquire about how that person is doing. It is information gathering, for sure, but it is also placing a trust between the parties that there will be attempts to strive mightily but still eat and drink as friends: whether remotely, through Zoom meetings, or in actuality.

To relate this to the newest reality, a recent article from the New York Times hailed the comeback of the phone call during the COVID lockdowns as, get this: a way to communicate with one another. As a perspective, currently Verizon said it was now handling an average of 800 million wireless calls **a day** during the week, more than double the number made on Mother's Day, historically one of the busiest call days of the year. We're now realizing that the phone is, on a daily basis, an effective way to "call your mother" and all the other people out there.

3. Exchange of Information.

In Construction Defect actions, there is a sense of cooperation, generally, among most of the litigation participants. Usually, the investigation of defects and the costs associated with the defects is defined, tweaked and argued. There are outliers, for sure, regarding inflated defects and costs, and these tend to get disciplined in the courts of public opinion and future retentions. Obviously the need to listen and process the information is even more necessary now. Was it ever less necessary?

From a carrier's perspective, the setting of reserves, the resolution of claims, and the willingness to close files will be better served if it is known that all parties, or at least the two parties in dispute (claimant and insured) are working together toward an acceptable end. Of course, money is always the issue. If there is a concerted effort to agree on the issues, carrier representatives can be comfortable with a decision to close the matter, knowing that cooperation and Civility achieved a correct result.

4. Bad Apples Still Exist.

A brief mention of Christopher Hook, an attorney who sent a string of vulgar, profane, and homophobic emails in 2019, and claimed "zealous representation." That's a mild description. If typical cooperation breaches are "Exhibit A" on how not to act, Mr. Hook's conduct was Exhibit "NSFW," for sure.

In a well-publicized hearing before U.S. District Judge Otis Wright in December, 2019, Judge Wright was asked to decide whether Mr. Hook's clients'

case would be dismissed because of threats and insults Mr. Hook hurled at opposing counsel. At the hearing, Mr. Hook arrived late to the hearing; argued that his incriminating emails could not be authenticated; and asserted that the emails were only designed to get an insurance company to discuss a settlement. Judge Wright had none of it: "This is not the day to be cute. And I am not the guy."

Judge Wright didn't buy any of it. He told Hook that he had threatened people and behaved like a gangster; declared that the legal profession didn't need lawyers like him; and told Mr. Hook to resign from the Bar. That did not occur. This type of conduct is not a good look for anyone in litigation.

5. Discovery Disputes.

One can argue (well, Rick will argue) that C.C.P section 583.130 can also be applied in proactive ways. Of course, *Lasalle* asks us to cooperate, and that's admirable across the board. To this end, section 583.130 might be helpful in motions to compel or motions for sanctions (monetary or terminating), to shine a light on the lack of cooperation. What could it possibly hurt to remind the court of the mandates set forth in section 583.130.? Since there are mandates to move the case along AND cooperate, mentioning section 583.130 in a discovery motion may help with the request for sanctions.

Courts are willing to listen. Rick won a rare terminating sanction against counsel who was not doing anything to move the case along. A litany of discovery motions resulted in the production of a tardy response, so the court initially claimed "no harm, no foul." The final motion for terminating sanctions included the language of section 583.130. This provided the court a base upon which to recognize that continued lack of cooperation allowed the court to terminate the litigation.

6. Deposition Attendance

Civility in depositions is, of course, also a good thing. Whether in person, or, now, videoconferencing, we've all been in a heated deposition, where the initial courtesies regarding "one at a time" devolve into a wrestling battle royale. Again, we should all be reminded of the codified mandates to cooperate. Objections, frustrations and annoyances aside, what makes a tedious and laborious deposition even more so are the arguments, on or off the record, about how tedious and laborious the deposition is. Of course, "the record needs to be preserved," but just think how C.C.P section 583.130 could influence you the next time this happens.

Additionally, videoconferencing should have another side effect of more cooperation. Really, the need for "one at a time" is prevalent. The video cameras are

all voice activated. If everyone starts talking over each other, nothing can get accomplished, since there's no ability, much like a court transcript, to have a cohesive record of who, what and where.

7. Being Civil Cannot Hurt.

Think about the arbitrators and mediators, and their main reason for being here: resolution of this matter. Lawyers, for the most part, know how to conduct themselves within the confines of a courtroom, where both the black robe and the guy with the handcuffs are relatively close to the action. The courtesy of cooperation should exist in the less formal settings, as well. It should not be a thought that the lack of handcuffs allows for more egregious behavior.

Remember that EVERYONE is a potential juror, client, adversary or mediator. Everyone associated with litigation has that list in their head of "not gonna do it" when it comes to the selections of paid mediators, based on their actions or remarks on the bench, or as a practicing attorney, or as a prior mediator. Acting as though your future check relied on your current conduct helps the process.

CONCLUSION

To be sure, promoting a new approach to Civility takes the same effort, patience and open water needed to turn around an aircraft carrier: we will go miles before we get it headed in the direction we want.

But we've made a start. Attorneys are addressing the problem, trial courts are becoming more willing to intercede, and published opinions are providing tools for attorneys and trial courts to use as remedies.

Justice Bedsworth reminds us that the profession belongs to the people in it, and this profession will be that which we are willing to make it, so long as the requisite work is completed. Now is the time to start that work. As such, please remember:

"Do as adversaries do in law, strive mightily;

But eat and drink as friends."

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Marjorie W. Day, Esq.
Christopher J. Day, Esq.
Wilbur A. Day, Esq.
Alan C. Brown, Esq.

Of Counsel,
Mark S. Rader, Esq.

February 17, 1999

Re:

Dear _____:

This office represents _____ in the above-captioned matter.

It is my custom to work on an informal basis with counsel. In that respect, to the extent we have a reciprocal understanding, I am not one to stand on the dictates of the Code of Civil Procedure at every instance in the litigation. Instead, I will work with you informally to set dates, times and locations for depositions, provide you with information which you might need, and generally seek to be as accommodating as possible while at all times protecting the interests of my client. I will always return your telephone calls as promptly as possible, and I will follow-up your informal requests for information.

Additionally, this office subscribes to the enclosed ABOTA Code of Professionalism, and we will handle this matter in accordance with that Code. If at any time you feel that I or any member of this firm are not acting in accordance with these representations, I want you to please call me personally.

It is our hope that not only will you reciprocate, but that you will encourage others to do likewise. If you need additional copies of the enclosed Code of Professionalism to pass along to others, please feel free to call.

I look forward to working with you.

Regards,

DAY & DAY
Attorneys at Law

_____
CHRISTOPHER J. DAY
Attorney at Law

CJD:lhh

As a member of the American Board of Trial Advocates, I will adhere to the following Principles:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.

2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.

3. Never, without good cause, attribute to other counsel bad motives or improprieties.

4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.

6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.

7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.

8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.

9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.

10. Never use any form of discovery scheduling as a means of harassment.

11. Make good faith efforts to resolve disputes concerning pleadings and discovery.

12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.

13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.

15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.

16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously-reserved time for other matters.

17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.

18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client

19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.

20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.

21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.

23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.

24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.

25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.

27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.

28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.

29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

West's Annotated California Codes
California Rules of **Court** (Refs & Annos)
Title 9. Rules on Law Practice, Attorneys, and Judges (Refs & Annos)
Division 2. Attorney Admission and Disciplinary Proceedings and Review of State Bar Proceedings (Refs & Annos)
Chapter 2. Attorney Admissions (Refs & Annos)

Cal.Rules of **Court**, Rule 9.7
Formerly cited as CA ST PRACTICE Rule 9.4

Rule 9.7. Oath required when admitted to practice law

Currentness

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an **officer** of the **court**, I will **strive** to **conduct** myself at all **times** with **dignity**, **courtesy** and **integrity**."

Credits
(Formerly Rule 9.4, adopted, eff. May 27, 2014. Renumbered Rule 9.7, eff. Jan. 1, 2018.)

Cal. Rules of **Court**, Rule 9.7, CA ST PRACTICE Rule 9.7
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through December 15, 2019. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through December 15, 2019.

End of Document

West's Ann.Cal.C.C.P. § 583.130

§ 583.130. Plaintiff to proceed with reasonable diligence; stipulations and disposition of action on merits favored

Currentness

It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter.

Credits

(Added by Stats.1984, c. 1705, § 5.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1984 Addition

Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, e.g., Hocharian v. Superior Court, 28 Cal.3d 714, 621 P.2d 829, 170 Cal.Rptr. 790 (1981); General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal.Rptr. 745 (1975); Denham v. Superior Court, 2 Cal.3d 557, 468 P.2d 193, 86 Cal.Rptr. 65 (1970); Weeks v. Roberts, 68 Cal.2d 802, 442 P.2d 361, 69 Cal.Rptr. 305 (1968). [17 Cal.L.Rev.Comm. Reports 905 (1984)].

Relevant Additional Resources

Additional Resources listed below contain your search terms.

CROSS REFERENCES

Action defined for purposes of this Chapter, see Code of Civil Procedure § 583.110.
Court defined for purposes of this Chapter, see Code of Civil Procedure § 583.110.
Plaintiff defined for purposes of this Chapter, see Code of Civil Procedure § 583.110.

RESEARCH REFERENCES

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 3. Advocate

Prof.Conduct, Rule 3.1
Formerly cited as CA ST RPC Rule 3-200

Rule 3.1. Meritorious Claims and Contentions

Currentness

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; * or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

Credits
(Adopted, eff. Nov. 1, 2018.)

Notes of Decisions (28)

Footnotes
* An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 3.1, CA ST RPC Rule 3.1
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through December 15, 2019. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through December 15, 2019.

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California **Rules** of **Professional Conduct** (Refs & Annos)
Chapter 3. Advocate

Prof.Conduct, **Rule 3.3**
Formerly cited as CA ST RPC **Rule** 5-200

Rule 3.3. Candor Toward The Tribunal [1]

Currentness

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and **Professions** Code section 6068, subdivision (e) and **rule** 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* **conduct** related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and **Professions** Code section 6068, subdivision (e) and **rule** 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client

Credits
(Adopted, eff. Nov. 1, 2018. As amended, eff. Nov. 1, 2018.)

Editors' Notes

COMMENT

[1] This **rule** governs the **conduct** of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition **conducted** pursuant to a tribunal's* authority. See **rule** 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of **conduct** and the lawyer has sought permission from the court to withdraw as required by **rule** 1.16. (See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33].) The obligations of a lawyer under these **rules** and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these **rules** and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* (See, e.g., **rules** 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this **rule** and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of **rule** 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and **Professions** Code section 6068, subdivision (e) and **rule** 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this **rule** when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have obligations that go beyond the scope of this **rule**. (See, e.g., **rule** 3.8(f) and (g).)

Ex Parte Communications

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.*

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this **rule** does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by **rule** 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this **rule** results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these **rules**. A lawyer must comply with Business and **Professions** Code section 6068, subdivision (e) and **rule** 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this **rule**, lawyers remain bound by Business and **Professions** Code sections 6068, subdivision (d) and 6106.

Relevant Additional Resources

Additional Resources listed below contain your search terms.

HISTORICAL NOTES

Derivation

Former **Rule** 5-200, adopted, eff. May 27, 1989.

Former **Rule** 7-105, approved, eff. Jan. 1, 1975.

Former **Rule** 17, adopted 1928, as amended to July 1973.

RESEARCH REFERENCES

Treatises and Practice Aids

California Practice Guide: **Professional** Responsibility Ch. 7-B, Duty to Maintain Client Confidence and Secrets Under State Bar Act.
California Practice Guide: **Professional** Responsibility Ch. 8-A, Duties to Administration of Justice--In General.
California Practice Guide: **Professional** Responsibility Ch. 8-C, Restrictions on Advocacy in Court Proceedings.
California Practice Guide: **Professional** Responsibility Ch. 8-D, Restrictions on Speech and Behavior Outside Courtroom.
California Practice Guide: **Professional** Responsibility Ch. 11-A, Grounds for Discipline.

Notes of Decisions containing your search terms (0)

View all 2

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology **rule**, **rule** 1.0.1.

Prof. **Conduct**, **Rule** 3.3, CA ST RPC **Rule** 3.3

California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through December 15, 2019. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through December 15, 2019.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gaines v. AT&T Mobility Services, LLC, S.D.Cal., December 10, 2019

36 Cal.App.5th 127
Court of Appeal, Fourth District, Division 3, California.

Angele LASALLE, Plaintiff and Respondent,
v.
Joanna T. VOGEL, Defendant and Appellant.

G055381
|
Filed 6/11/2019

Synopsis

Background: In legal malpractice action, the Superior Court, Orange County, Randall J. Sherman, J., entered default judgment against attorney following attorney's failure to timely answer and subsequently denied attorney's motion to set aside the judgment. Attorney appealed.

[Holding:] The Court of Appeal, Bedsworth, Acting P.J., held that attorney's neglect in failing to answer was excusable.

Reversed.

West Headnotes (12)

[1] **Attorneys and Legal Services** Character and Conduct in General

Judges In general; constitutional and statutory provisions

Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle. Cal. Civ. Proc. Code § 583.130.

[2] **Attorneys and Legal Services** Attorney as officer of court

The term "officer of the court," with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance in maintaining standards of professionalism. Cal. Civ. Proc. Code § 583.130.

[3] **Appeal and Error** Judgment by default or decree pro confesso

An order denying a motion to set aside a default is appealable from the ensuing default judgment. Cal. Civ. Proc. Code § 473.

1 Cases that cite this headnote

[4] **Appeal and Error** Setting Aside Verdict; New Trial

The standard of review for an order denying a set aside motion is abuse of discretion. Cal. Civ. Proc. Code § 473.

[5] **Action** Course of procedure in general

The law favors judgments based on the merits, not procedural missteps.

[6] **Appeal and Error** Relief from default judgment

A trial court order denying relief from default judgment is scrutinized more carefully than an order permitting trial on the merits.

1 Cases that cite this headnote

[7] **Attorneys and Legal Services** Conduct as to Adverse Parties and Counsel

An attorney has an ethical obligation to warn opposing counsel that the attorney is about to take an adversary's default.

1 Cases that cite this headnote

[8] **Judgment** Want or insufficiency of notice of proceedings

Attorney's neglect in failing to answer malpractice complaint, regarding representation in matter dissolving registered domestic partnership, was excusable, and thus attorney was entitled set aside default judgment entered

against her, where attorney received notice of default via unreliable e-mail, deadline provided to attorney was unreasonably short, and no prejudice resulted from set-aside. Cal. Civ. Proc. Code §§ 473, 583.130.

2 Cases that cite this headnote

[9] **Constitutional Law** Notice

Due process requires not just notice, but notice reasonably calculated to reach the object of the notice. U.S. Const. Amend. 14.

[10] **Judgment** Right to Relief in General

Judgment Prejudice from judgment

When evaluating a motion to set aside a default judgment on equitable grounds, the court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party. Cal. Civ. Proc. Code § 473.

1 Cases that cite this headnote

[11] **Evidence** Character or Reputation

Judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. Cal. Evid. Code § 1101.

[12] **Judgment** Negligence in suffering default

Judgment Prejudice from judgment

Where there would have been no real prejudice had a set-aside motion been granted, the rule is that a party's negligence in allowing a default judgment to be taken in the first place will be excused on a weak showing. Cal. Civ. Proc. Code § 473.

Witkin Library Reference: 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 191 [Order Denying Relief; Order Reversed.]

****264** Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Attorneys and Law Firms

Law Offices of Dorie A. Rogers, Dorie A. Rogers and Lisa R. McCall, Orange, for Defendant and Appellant.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiff and Respondent.

OPINION

BEDSWORTH, ACTING P. J.

***130** Here is what Code of Civil Procedure [1] section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other ****265** disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.

Yet the principle the section dictates has somehow become the *Marie Celeste* of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance." [2] In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

***131** FACTS

From 2011 to 2015, Appellant Attorney Joanna T. Vogel (Vogel) represented plaintiff/respondent Angele Lasalle (Lasalle) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. Lasalle repeatedly failed to provide discovery in that case, and the court defaulted her as a terminating sanction. She said her failure to provide

discovery was caused by Vogel not keeping her informed of discovery orders, so she sued Vogel for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, Lasalle's attorney sent Vogel a letter and an email – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against Vogel unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the email was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching Vogel in Friday's post except to say it was slim.

Counsel did not receive any response from Vogel by 3 p.m. the following Monday, April 11. He filed a request for entry of default and emailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she emailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an attorney by Friday April 15th, [3] and that attorney had a motion to set aside the default on file a week later. We quote the entirety of Lasalle's declaration in support of the set aside motion in the margin. [4]

****266** ***132** Vogel's set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial court's discretion in cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an attorney confesses fault.

In opposing relief, respondent's counsel asked the trial court to take judicial notice of state bar disciplinary proceedings against Vogel stemming from two unrelated cases, which had resulted in a stayed suspension of Vogel's license to practice. The court denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of Vogel's prior discipline. A year later, a default judgment was entered against Vogel for $ 1 million. She has appealed from both that judgment and the order refusing to set aside the default.

We sympathize with the court below and opposing counsel. We have all encountered dilatory tactics and know how frustrating they can be. But we cannot see this as such a situation, and cannot countenance the way this default was taken, so we reverse the judgment.

DISCUSSION

[1] Three decades ago, our colleagues in the First District, dealing with a case they attributed to a "fit of pique between counsel," addressed this entreaty to California attorneys, "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641, 255 Cal.Rptr. 18.)

***133** In 1994, the Second District lambasted attorneys who were cluttering up the courts with what were essentially personal spats. In the words of a clearly exasperated Justice Gilbert, "If this case is an example, the term 'civil procedure' is an oxymoron." (*Green v. GTE California* (1994) 29 Cal.App.4th 407, 408, 34 Cal.Rptr.2d 517.)

In 1997, another appellate court urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17, 62 Cal.Rptr.2d 422.)

****267** By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $ 6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case, which they

did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 122 Cal.Rptr.2d 630, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, 125 Cal.Rptr.3d 292, the First District tried again. They said, "We close this discussion with a reminder to counsel – all counsel, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth,' nor does it mean lack of civility. [Citations.] Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

Six months later, our court said this, "Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned counsel $ 10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293, 133 Cal.Rptr.3d 774 (*Kim*).)

This is not an exhaustive catalogue. Were we writing a compendium rather than an opinion, we could include keening from every state, because, ***134** "Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement.* Since 2014, new attorneys have been required to vow to treat opposing counsel with "dignity, courtesy, and integrity."

That was not done here. Dignity, courtesy, and integrity were conspicuously lacking.

We are reluctant to come down too hard on respondent's counsel or the trial court because we think the problem is not so much a personal failure as systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law is *not* a business. It is a profession. And those who practice it carry a concomitantly ****268** greater responsibility than businesspeople.

[2] So what we review in this case is not so much a failure of court and counsel as an insidious decline in the standards of the profession that must be addressed. "The term 'officer of the court,' with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance." (*Kim, supra*, at p. 292, 133 Cal.Rptr.3d 774.) We reverse the order in this case because that significance was overlooked.

[3] **[4]** **[5]** **[6]** An order denying a motion to set aside a default is appealable from the ensuing default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981, 35 Cal.Rptr.2d 669, 884 P.2d 126 (*Rappleyea*).) We acknowledge the standard of review for an order denying a set aside motion is abuse of discretion. (*Ibid.*) But there is an important distinction in the way that discretion is measured in section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme Court has repeatedly reminded us that in this area doubts must be resolved *in favor of relief*, with an order denying relief scrutinized more carefully that an order granting it. As ***135** Justice Mosk put it in *Rappleyea*, "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 [211 Cal.Rptr. 416, 695 P.2d 713]; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136 [17 Cal.Rptr.2d 408].)" (*Id.* at p. 980, 35 Cal.Rptr.2d 669, 884 P.2d 126.) [5]

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both

apropos to our case and indicative of how law ought to be practiced, said, "The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500, 284 P.2d 194 (*Bookbinders*).) [6]

[7] In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702, 84 Cal.Rptr.3d 351 (*Fasuyi*), quoting section 15 of the California Attorney Guidelines of Civility and Professionalism (2007).) Accordingly, it is now well-acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default. (*Id.* at pp. 701-702, 84 Cal.Rptr.3d 351.)

In that regard we heartily endorse the related admonition found in The Rutter Group practice guide, and we note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a ****269** lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19 (rev. #1, 2008) as quoted in *Fasuyi, supra*, 167 Cal.App.4th at p. 702, 84 Cal.Rptr.3d 351.)

***136** To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038, 198 Cal.Rptr. 389 (*Bellm*). Indeed, it was the most recent case cited by the trial court's minute order denying Vogel's set aside motion.

Bellm was written at a time when incivility was surfacing as a problem in the legal profession. [7] "Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors and John McEnroe." (Gee & Garner, *The Uncivil Lawyer:* (1996) 15 Rev. Litig. 177, 190.) Thus the majority opinion in *Bellm* lamented the "lack of professional courtesy" in counsel's taking a default without warning (See *Bellm, supra*, 150 Cal.App.3d at p. 1038, 198 Cal.Rptr. 389 ["we decry this lack of professional courtesy"]) but deemed it an ethical issue rather than a legal one and affirmed the trial court's denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm, supra*, 150 Cal.App.3d at p. 1040, 198 Cal.Rptr. 389 (dis. opn. of Haning J.).)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* court did not have the benefit of the statute. The statute was passed to curb what the Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the Law Revision Commission phrased it:

"Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal. In 1969, an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal. In 1970, the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continued to the early 1980's. The judicial attitude in the latter time was stated by the Supreme Court: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on ***137** procedural grounds.' " (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, 238 Cal.Rptr. 885, quoting ****270** *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193; see also *Hocharian v. Superior Court* (1981) 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. The ethical obligation to warn opposing counsel of an intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to

trial or other disposition." (§ 583.130.) Quiet speed and unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the courts.

We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive. First, it has led to increased litigation. Unintended defaults inevitably result in motions to overturn them (this case, exemplary in no other way, demonstrates well the resources consumed by such motions) or lawsuits against the defaulted party's attorney (who thought enough of his client's position to agree to represent him and then bungled it). There are plenty of demands on our legal resources without adding such matters.

But worse than that, it forces practitioners to sail between Scylla and Charybdis. They are torn between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their client as effectively as possible. We ask too much of people with families and mortgages – not to mention ex-spouses who fail to make tax and mortgage payments – when we ask them to choose "dignity, courtesy, and integrity" over easy "fish in a barrel" victories that are perceived to have statutory support. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

[8] With that in mind, we conclude that by standards now applicable to such motions, the trial judge here abused his discretion in not setting aside the default. Several factors combine to convince us of that.

The first is the use of email to give "warning." Email has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, email is ill-suited for a communication on which a million ***138** dollar lawsuit may hinge.[8] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a "delete" command can result in a speedy communication being merely a failed one.

[9] We all learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318, 70 S.Ct. 652, 94 L.Ed. 865.) While there is no due process problem in the case before us now (Vogel has not complained she wasn't actually served), emails are a lousy medium with which to warn opposing counsel that a default is about to be taken. We find it significant that by law emails are insufficient to serve notices on counsel in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b).)

****271** Indeed, the sheer ephemerality of emails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the merits. While some emails seem to live on for years despite efforts to bleach them out, others have the half-life of a neutrino. We ourselves have learned the hard way that spam filters can ambush important, non-advertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – us. We have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by email got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach us.

The choice of email to announce an impending default seems to us hardly distinguishable from stealth. And since the other course adopted by respondent's trial attorney was mailing a letter on Thursday in which he demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor we consider is the short-fuse deadline given by respondent's counsel. It was *unreasonably* short. It set Vogel up to have her default taken immediately. "[T]he quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy which, under [*Bookbinders*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616, 136 Cal.Rptr. 783 (*Robinson*).)

[10] The third factor is the total absence of prejudice to Lasalle from any set-aside, given the relatively short time between respondent seeking the ***139** default and Vogel asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.' " (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249, 240 Cal.Rptr.3d 900.) Setting aside *this* default would have involved little

wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the unusual nature of the malpractice claim in this case. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751, 33 Cal.Rptr.2d 391 [discussing dynamics bearing on whether a defendant might elect to default a given claim].) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the spectrum.

Because of the facts alleged in the complaint – namely that Vogel had been responsible for losing Lasalle's *entire* dissolution case – Lasalle's damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418, fn. 2, 68 Cal.Rptr.2d 324 ["every item of marital property presents a host of challenging issues"].) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, 135 Cal.Rptr.2d 629, 70 P.3d 1046 [plaintiff must prove that "*but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in ****272** which the malpractice allegedly occurred."].) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the presence of a plainly meritorious defense to at least part of Lasalle's default judgment. That judgment eventually included emotional distress damages of $ 100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, 13 Cal.Rptr.2d 133, this court squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if we were not directing the trial court to set aside the default, we would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

[11] Next, there was the trial court's taking judicial notice of, and reliance on, Vogel's two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 ***140** represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited to criminal cases by its terms, [9] though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176, 214 Cal.Rptr.3d 467 ["The purpose of this evidentiary rule 'is to assure that a defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.]".) Nonetheless, the point is the same: judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. The fact Vogel had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.

And finally, we are disappointed that Vogel's explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex-has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, Vogel's declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As we have noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

[12] In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing*." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740, 216 Cal.Rptr. 300, italics added.) Vogel's declaration crossed that threshold.

We do not hold that every section 473 motion supported by a colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, we can hold only that *this one* should ****273** have been granted. As we have said, Vogel was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on another case* – would have prevented her from meeting it), and ***141** she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson,*

supra, 67 Cal.App.3d at p. 616, 136 Cal.Rptr. 783 [noting short period of time to respond, press of business, limited office hours during a holiday period and defense counsel's preoccupation with other litigated matters made failure to timely file an answer "excusable"].) We hope the next attorney in these straits will not have such a compelling set of facts to offer ... and that opposing counsel will act with "dignity, courtesy, and integrity."

CONCLUSION AND DISPOSITION

Supreme Court Chief Justice Warren Burger long ago observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [¶] ... [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215.) In recognition of this fact, section 583.130 says it is the policy of this state that "all parties shall cooperate in bringing the action to trial or other disposition." Attorneys who do not do so are practicing in contravention of the policy of the state and menacing the future of the profession.

The judgment is reversed. Appellant will recover her costs on appeal.

WE CONCUR:

MOORE, J.

IKOLA, J.

All Citations

36 Cal.App.5th 127, 248 Cal.Rptr.3d 263, 19 Cal. Daily Op. Serv. 5414, 2019 Daily Journal D.A.R. 5093

Footnotes

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Hamlet, Act I, Scene 4, ll. 15-16.

3 It took Vogel four days because she initially contacted an attorney who had just decided to represent one of the codefendants – other attorneys who had represented Lasalle, but are not parties to this appeal.

4 "I am an attorney at law, and the defendant in this matter. [¶] When I was served with the summons and complaint, I was in the middle of a number of family law matters in court as the attorney. [¶] I was also involved in my own divorce, wherein I had just discovered my husband had failed to pay the taxes on our property, and it had gone into default. Also he failed to pay the mortgage on the family residence and it went into default. [¶] I received the summons and complaint and the discovery and had met with an attorney to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter. [¶] I therefore, determined to find a new attorney and contacted the plaintiff's attorney to request a brief extension to respond to the complaint. While waiting to hear back and without having the courtesy of the extension, I received the notice of default. [¶] I was served with discovery before I even answered the complaint, and had begun to work on that as well. [¶] I am a single mother and between taking care of the family, the practice of law, and trying to revive [sic] the files of from the plaintiff, I did fail to timely file my answer. [¶] As soon as I could, I contacted [the attorney who filed the motion] and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint. [¶] I have attached hereto my proposed answer. [¶] I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's counsel at the time is not Vogel's appellant's counsel on appeal.

5 Indeed, some cases go so far as to say " 'very slight evidence will be required to justify a court in setting aside the default.' [Citation.]" (*Miller v. City of Hermosa Beach*, supra, at p. 1136, 17 Cal.Rptr.2d 408.) More on this point below.

6 Disapproved on other grounds in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551, 343 P.2d 36.

7 The incivility lamentations we quoted earlier began in 1989, although this case certainly falls into the voice-crying-in-the-desert type of entreaty that grew louder a few years later.

8 The default judgment obtained against Lasalle by respondent was exactly $ 1,000,000.

9 Subdivision (a) of which provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation,

or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." By their terms all four statutory exceptions are limited to criminal actions.

End of Document

207 Cal.App.3d 635, 255 Cal.Rptr. 18

LAWRENCE G. LOSSING, Petitioner,
v.
THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; JENNIFER MASON et al., Real Parties in Interest

No. A043549.
Court of Appeal, First District, Division 5, California.
Jan 27, 1989.

SUMMARY

In an action for malicious prosecution against an attorney who unsuccessfully sought a contempt judgment against adverse parties in a personal injury action he was defending, for their alleged failure to comply with a discovery order, the attorney petitioned for a writ of mandate on the ground his demurrer should have been sustained without leave to amend.

The Court of Appeal issued the writ as prayed, holding that contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution. It held a trial court possesses adequate power to award sanctions as full compensation for any inappropriate conduct of counsel in the underlying action. (Opinion by King, J., with Low, P. J., and Haning, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Malicious Prosecution § 3--Essentials to Maintenance of Action-- Unsuccessful Contempt Proceeding to Enforce Discovery.
In an action for malicious prosecution against an attorney who unsuccessfully sought a contempt judgment against adverse parties in a personal injury action he was defending, for their alleged failure to comply with a discovery order, the trial court erred in failing to sustain the attorney's demurrer without leave to amend. Contempt is one of five sanctions which may be imposed for misuse of the discovery process (Code Civ. Proc., § 2023), and if the contempt proceeding was a bad faith action, sanctions are available under Code Civ. Proc., § 128.5. Thus, given that a statutory remedy is available and malicious prosecution is ***636** a disfavored cause of action, contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution.

[See **Cal.Jur.3d,** Assault and Other Willful Torts, § 321; **Am.Jur.2d,** Malicious Prosecution, § 10.]

COUNSEL
Jess B. Millikan, Andrew B. Downs, Neil E. Olson and Derby, Cook, Quinby & Tweedt for Petitioner.
No appearance for Respondent.
William H. Ahern and Ahern & Mooney for Real Parties in Interest.

KING, J.

In this case we hold that a malicious prosecution action against an attorney will not lie for failing to prevail on an order to show cause re contempt brought to enforce a discovery order in ongoing litigation. If the proceeding was brought in bad faith or for harassment or misuse of the discovery process, the appropriate relief is an award of sanctions against the attorney. [1]

Petitioner Lawrence G. Lossing is a defense attorney in an underlying personal injury action filed on behalf of Jennifer and John Mason by their attorney William H. Ahern, real parties in interest herein. Alleging problems in obtaining the depositions of the Masons, Lossing sought and obtained an order compelling the Masons to appear at a specified time and place to have their depositions taken. Seeking to enforce the discovery order, Lossing filed an order to show cause re contempt against real parties in interest alleging their wilful failure to comply with the court order. After a hearing, the court discharged the order to show cause. [2] ***637**

Thereafter, real parties in interest filed a complaint against Lossing for damages for malicious prosecution and for negligent and intentional infliction of emotional distress. The complaint alleged Lossing did not honestly, reasonably and in good faith believe the Masons to be guilty of contempt and acted maliciously to intimidate the Masons and coerce them to settle their underlying case.

Lossing filed a general demurrer to the complaint. The superior court sustained the demurrer to the causes of action for negligent and intentional infliction of emotional distress without leave to amend, leaving only the causes of action for malicious prosecution. (1) The Masons and Ahern have

not challenged the court's action but Lossing petitioned this court for a writ of mandate contending his demurrer to the causes of action for malicious prosecution should also have been sustained without leave to amend. We agree.

In *Twyford v. Twyford* (1976) 63 Cal.App.3d 916 [134 Cal.Rptr. 145], after a final decree of dissolution, the former wife brought contempt proceedings against her ex-husband for failing to pay attorney fees and spousal support. She served him with a request for an admission that he had forged her endorsement of a joint income tax refund check. Before the hearing, the wife informed the court the amount involved had been paid, and the court ordered the motion re contempt and the request for admissions off calendar. Husband then filed an action for malicious prosecution, contending dismissal of the request for admissions was a termination favorable to him. The appellate court held a request for admissions was not "an ancillary proceeding sufficient to support a malicious prosecution complaint." (*Id*. at p. 922.) "[A] request for admissions is not a separate proceeding and has no independent existence. It will not support a malicious prosecution complaint." (*Ibid*.) Husband did not attempt to state a cause of action for malicious prosecution based on the contempt proceeding itself.

In *Chauncey v. Niems* (1986) 182 Cal.App.3d 967 [227 Cal.Rptr. 718], an ex-husband filed a suit for malicious prosecution against his ex-wife and her attorney for having brought a postjudgment order to show cause re contempt and an order to show cause for modification of visitation and support awards against him. The court held that the voluntary dismissal by the moving party of an order to show cause re contempt and the partial granting of the motion for modification made it impossible for the plaintiff to establish, as he must in a malicious prosecution action, that the proceedings were terminated in his favor. In dicta, the *Chauncey* court said that such proceedings, if terminated favorably to the responding party, could constitute the basis for a malicious prosecution action. As will be seen, we strongly disagree with this dicta and hold that such proceedings, even if terminated ***638** in favor of the responding party, cannot constitute the basis for a malicious prosecution action.

In opposing the instant petition, real parties state the "real issue before this court is whether contempt is a separate proceeding." But classifying contempt as a separate proceeding rather than an ancillary proceeding does not alone determine whether a malicious prosecution action will lie. In *Pace v. Hillcrest Motor Co*. (1980) 101 Cal.App.3d 476 [161 Cal.Rptr. 662], the court, looking to the statutory scheme of which a small claims action is a part, concluded that a cause of action for malicious prosecution cannot be grounded on institution of a small claims proceeding. "To permit an action for malicious prosecution to be grounded on a small claims proceeding would frustrate the intent of the Legislature in adopting an expeditious and informal means of resolving small disputes, would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts." (*Id*. at p. 479.)

Viewing a contempt proceeding in the context of the discovery statutes, we disagree with the dicta in *Chauncey* and conclude a malicious prosecution action cannot be grounded on the institution of a contempt proceeding in an ongoing action, for several reasons. Contempt is one of five sanctions which may be imposed for misuse of the discovery process. (Code Civ. Proc., § 2023.) Although all five sanctions are ancillary to the ongoing action, only contempt bears the indicia of "independence" which real parties contend render it a sufficiently separate proceeding. To permit a malicious prosecution action when a party has chosen contempt over one of the other sanctions would inject into the choice of sanctions an element unrelated to the appropriateness of the sanction. Furthermore, the statutory discovery scheme itself provides a sanction if contempt is chosen without justification. Monetary and contempt sanctions against an attorney are authorized if the attorney engages in conduct that is a misuse of the discovery process. (Code Civ. Proc., § 2023, subd. (b).) Monetary sanctions may also be awarded against "one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both." (Code Civ. Proc., § 2023, subd. (b)(1).) If the contempt proceeding was a bad faith action brought without merit or for harassment, sanctions are also available under Code of Civil Procedure section 128.5. (See *Weisman* v. *Bower* (1987) 193 Cal.App.3d 1231 [238 Cal.Rptr. 756].) Thus the Legislature has provided a specific sanction for ***639** the precise misuse of discovery or bad faith alleged here. [3] As in *Pace* v. *Hillcrest Motor Co., supra*, 101 Cal.App.3d 476, to allow a malicious prosecution action would frustrate the intent of the Legislature to vest the courts with broad power to control proceedings. (Code Civ. Proc., § 128.) Courts should not hesitate to use these powers to curb inappropriate conduct of counsel.

Perhaps even more significant is the effect a malicious prosecution action would have on the ongoing underlying action. It would create a possible conflict of interest between attorney and client probably necessitating a substitution of counsel in the underlying action. Given the specific sanction provided in the discovery statutes, it would also threaten institution of unnecessary litigation. It might require the attorney in the underlying action to disclose the contents of his or her file as a result of discovery in the malicious prosecution action. In *Babb* v. *Superior Court* (1971) 3 Cal.3d 841 [92 Cal.Rptr. 179, 479 P.2d 379], the Supreme Court considered whether a defendant in a civil action could file a cross-complaint seeking a declaratory judgment that the action was being maliciously prosecuted. Concluding the rule of favorable termination should be applied to preclude such a cross-complaint the court reasoned: "Since malicious prosecution is a cause of action not favored by the law [citations], it would be anomalous to sanction a procedural change which not only would encourage more frequent resort to malicious prosecution actions, but would facilitate their use as dilatory and harassing devices." (*Id*. at p. 847.)

Given that a statutory remedy is available and malicious prosecution is a disfavored cause of action, we conclude contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution. The trial court possesses adequate power to award sanctions as full compensation for any inappropriate conduct of counsel in the underlying action.[4] ***640**

Finally, we cannot end this opinion without additional comment. The present proceeding is but one of four similar proceedings now before this Division. Two are malicious prosecution actions brought against opposing counsel in an underlying action for not having prevailed in pursuing statutory remedies to seek enforcement of existing court orders. Attorneys face an impossible dilemma if they are subject to claims of malicious prosecution by opponents in litigation because they vigorously represent their client, yet they are also subject to claims of legal malpractice by their client if they fail to provide the vigorous representation to which the client is entitled. Public policy favors the principle of zealous representation and freedom of access to the courts. (*Grindle* v. *Lorbeer* (1987) 196 Cal.App.3d 1461 [242 Cal.Rptr. 562].) Vigorous representation is to be distinguished from inappropriate conduct, i.e., bad faith, harassment, etc., and we are fully satisfied the trial judges of this state can make that distinction in responding to requests for sanctions.

Our holding in this case is supported by a decision recently issued by our Supreme Court holding that when there is no dispute as to the facts upon which an attorney filed a prior action, it is a question of law for the court whether, as an objective matter, the prior action was legally tenable and thus brought with probable cause negating a subsequent malicious prosecution action. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 [254 Cal.Rptr. 336, 765 P.2d 498].) Language used by the court in that opinion is equally applicable here: "While the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct with that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded. In recent years, the Legislature has taken several steps in this direction, enacting legislation to facilitate the early weeding out of patently meritless claims and to permit the imposition of sanctions in the initial lawsuit - against both litigants and attorneys - for frivolous or delaying conduct. (See, e.g., Code Civ. Proc. §§ 437c, 1038, 128.5, 409.3.) Because these avenues appear to provide the most promising remedies for the general problem of frivolous litigation, we do not believe it advisable to abandon or relax the traditional limitations on malicious prosecution recovery." (*Id*. at pp. 873-874.) Our decision accomplishes the Supreme Court's view of the better means of handling allegedly improper conduct within the initial lawsuits. ***641**

We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle.

It seems clear that this litigation arose from a fit of pique between counsel in the underlying action. Frivolous litigation, or that brought for purposes of harassment, has no place in our overburdened court system. The taxpayers who bear the cost of providing our judicial system should not have to shoulder the burden of providing a forum for frivolous or absurd litigation. [5]

We have acted after full briefing by the parties, who have been notified that we might act by a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180 [203 Cal.Rptr. 626, 681 P.2d 893].)

Let a peremptory writ of mandate issue commanding respondent court to vacate its order of September 8, 1988, insofar as the order overrules the demurrer to the causes of action for malicious prosecution and to issue an order sustaining the demurrer without leave to amend.

Low, P. J., and Haning, J., concurred. ***642**

Footnotes

1 Since the client was not named as a defendant in the malicious prosecution action, we are not called upon to determine if there is any reason why this holding would not be equally applicable to the client on whose behalf the order to show cause was brought.

2 The record before us does not contain a copy of the court's order, only a clerk's notice of ruling.

3 We note that section 128.5 was not enacted until after the trial court's decision in *Chauncey*. In enacting section 128.5 the Legislature intended "to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in Baugess v. Paine (1978) 22 Cal.3d 626." (Stats. 1981, ch. 762, § 2.) We also note that both *Twyford* and *Chauncey* were marital dissolution cases in which passions often run high. The Legislature recently adopted a policy to promote settlement and reduce the costs of litigation in family law litigation by imposing additional attorney fees as a sanction against a party or attorney who frustrates this goal. (See Civ. Code, § 4370.5; *In re Marriage of Norton* (1988) 206 Cal.App.3d 53 [253 Cal.Rptr. 354]; *In re Marriage of Melone* (1987) 193 Cal.App.3d 757 [238 Cal.Rptr. 510].)

4 The trial judge, Demetrios Agretelis, told counsel in this case, "My first reaction to this demurrer was this is preposterous. How can they possibly bring a malicious prosecution suit for contempt citation? .... I read [*Chauncey v. Niems*], reread it. I read it inside out. I don't like it. It doesn't make any sense to me but there it is. [¶] Seems to me it will wreak havoc on courts if every time somebody decides they've been maliciously prosecuted in the course of a proceeding, they can file another action, a separate and independent action." We fully agree with Judge Agretelis.

5 Waste of precious taxpayer dollars and tarnishment of the public's perspective of the legal profession are only two of the adverse results from this kind of litigation. Additionally, every member of the bar suffers financially because such litigation is a substantial reason for skyrocketing premiums for legal malpractice insurance. There is no reason to allow one member of the legal profession who becomes upset with opposing counsel to use a professional license to file needless litigation which financially impacts upon every other member of the profession. We have seen references to insurance industry estimates that as many as one of every ten lawyers in private practice in California will be sued within the next year. If this case is any example, that estimate may be too low.

100 Cal.App.4th 158, 122 Cal.Rptr.2d 630, 02 Cal. Daily Op. Serv. 6366, 2002 Daily Journal D.A.R. 7929

MICHAEL DeROSE, Plaintiff and Respondent,
v.
JOHN M. HEURLIN et al.,
Defendants and Appellants.

No. G028450.
Court of Appeal, Fourth District, Division 3, California.
July 16, 2002.

SUMMARY

The trial court entered an order vacating a judgment in an action arising out of an attorney fee dispute between the attorney and his former client, centering on the attorney's handling of funds he agreed to hold in trust after the client's new attorneys obtained a settlement of a dental malpractice case. The attorney appealed. (Superior Court of Orange County, No. 00CC04673, Eleanor M. Palk, Temporary Judge.[*])

The Court of Appeal dismissed the appeal pursuant to the parties' stipulation and, on its own motion, imposed sanctions (Code Civ. Proc., § 907) of $6,000 on the attorney for filing a frivolous appeal. The court found that the attorney's conduct, statements, and admissions showed that he took all or part of the client trust funds for himself without notice or authority and in breach of both his written promise to hold the funds and his representations to the trial court, and the court found that when the trial court issued its adverse ruling vacating the judgment, the attorney appealed in order to delay the consequences of his deceit and to try to cover up his mishandling of client trust funds. The court held that the amount of sanctions was appropriate considering the high degree of objective frivolousness and delay and the compelling need to discourage similar conduct in the future. (Opinion by Fybel, J., with Sills, P. J., and Rylaarsdam, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Appellate Review § 161.1--Determination and Disposition of Cause--Imposition of Sanctions for Frivolous Appeal--Delay and Deceit--On Court's Own Motion--For Cost of Appeal.
On appeal ***159** by an attorney from an order vacating a judgment in an action arising out of an attorney fee dispute between the attorney and his former client, centering on the attorney's handling of funds he agreed to hold in trust after the client's new attorneys obtained a settlement of a dental malpractice case, the Court of Appeal dismissed the appeal and, on its own motion, imposed sanctions (Code Civ. Proc., § 907) of $6,000 on the attorney for filing a frivolous appeal. The court found that the attorney's conduct, statements, and admissions showed that he took all or part of the client trust funds for himself without notice or authority and in breach of both his written promise to hold the funds and his representations to the trial court, and the court found that when the trial court issued its adverse ruling vacating the judgment, the attorney appealed in order to delay the consequences of his deceit and to try to cover up his mishandling of client trust funds. The court afforded the attorney an opportunity to respond to the charge, held a hearing, and, by its opinion, provided the attorney with a written statement of the reasons for the penalty. The amount of sanctions was appropriate considering the high degree of objective frivolousness and delay and the compelling need to discourage similar conduct in the future.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 831 et seq.; West's Key Number Digest, Costs 260(5).]

(2)
Appellate Review § 161.1--Determination and Disposition of Cause-- Imposition of Sanctions for Frivolous Appeal.
A reviewing court may impose penalties for a frivolous appeal to vindicate the public interest in the orderly administration of justice. Because a frivolous appeal, or one taken for improper reasons, harms the court, not just the respondent, courts may order appellants to pay sanctions directly to the court clerk to compensate the state for the cost of processing such appeals. In deciding the amount of sanctions, courts may consider the degree of objective frivolousness and delay, and the need for discouragement of similar conduct in the future.

COUNSEL
Law Offices of John M. Heurlin, John M. Heurlin; Law Offices of Maria A. Caligiuri and Maria A. Caligiuri for Defendants and Appellants.
Day & Day, Alan C. Brown; Day, Day & Brown and Christopher J. Day for Plaintiff and Respondent. ***160**

FYBEL, J.

Introduction

On our own motion we impose sanctions against Attorney John M. Heurlin and his law firm (Heurlin) for filing and prosecuting a frivolous appeal. We conclude Heurlin had improper motives in seeking (1) to delay the effects of an adverse judgment and (2) to cover up his mishandling of client trust funds and his dishonesty before the trial court. Heurlin compounded the deception at oral argument after notice of this court's consideration of sanctions against him. He was inexcusably unable or unwilling to respond forthrightly to our questions regarding his conduct.

Procedural History

The case arises out of an attorney fees dispute between Heurlin and his former client, Michael DeRose. At the heart of the matter is Heurlin's handling of funds he agreed to hold in trust after DeRose's new attorneys obtained a settlement of a dental malpractice case on DeRose's behalf.

There was a series of motions, hearings, and rulings relating to DeRose's statutory offer to compromise, Heurlin's acceptance, and the parties' attempts to obtain entry of a Code of Civil Procedure section 998 judgment. (All further statutory references are to the Code of Civil Procedure unless otherwise stated.) The court entered a judgment in Heurlin's favor for the face amount of the compromise offer, but modified the judgment by interlineation, staying execution until Heurlin returned to DeRose "all remaining [settlement] funds" held in a client trust account.

The court's modification of the judgment was based on Heurlin's representations in the courtroom that he was holding the settlement monies in an account bearing interest for the State Bar. The court's judgment permitted Heurlin to retain the amount of the section 998 offer if he returned to DeRose the remainder of the trust monies he held. However, when Heurlin was served with notice of the judgment directing him to return the remaining funds, he sent a "gotcha" letter to DeRose's attorneys, advising them there were no funds in the account and he was thus free to execute on the judgment immediately. Heurlin's position was that he would take the money offered in settlement and keep all of the client trust funds to boot.

DeRose's motion for relief followed, as did Heurlin's motion to vacate the judgment and enter a new judgment. The court ultimately found any "agreement" was the result of mutual mistake, vacated the judgment, refused to ***161** enter a new judgment, and sent the parties back to square one to resolve their dispute. Heurlin appealed, seeking to compel entry of a judgment requiring his former client to pay him the amount of the section 998 agreement while allowing him to keep all the money held in his client trust account.

After oral argument and this court's notice that it was considering sanctions against Heurlin, the parties settled and filed a stipulation for dismissal. We will dismiss the case pursuant to the stipulation. Nevertheless, we now describe the factual and procedural history and decide the sanctions issue.

Sanctions

Heurlin followed a path of artifice and deceit with single-minded determination. Heurlin obtained control of his former client's settlement funds by giving his word in writing the money would be maintained in a trust account pending resolution of the fee dispute. In the midst of the controversy over the effect of an offer and acceptance under section 998, Heurlin transferred some or all of those funds to his general office account or elsewhere. Heurlin misled the trial court to conclude the full amount of the disputed money was safe in the client trust account. When his deception resulted in a court order for return of funds to the client, Heurlin attempted to render the order ineffective by advising the former client there were, in fact, no funds left. This indecent turnabout necessitated another round of hearings and a further waste of judicial resources.

Heurlin's conduct has been disgraceful. One hundred and fifty years ago, in notes prepared for a law lecture, Abraham Lincoln cautioned those pursuing a legal career, "Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave." (Lincoln, *Notes on the Practice of Law* in Abraham Lincoln: Speeches and Writings 1832-1858 (Fehrenbacher edit., Library of America 1989) p. 246.) Heurlin's failure to abide by this wisdom has harmed not only the parties to this case, but also those litigants waiting in line with nonfrivolous appeals and the taxpayers of California. For these reasons, as fully discussed below, we assess Heurlin sanctions for the costs of processing the appeal in the amount of $6,000 plus $123 for the court reporter's transcript, payable to the clerk of this court. We publish our opinion because the issue of integrity of lawyers is important to the bench, the bar, and the general public.

Facts

General Background

On October 12, 1998, Michael DeRose retained Heurlin to represent him in a dental malpractice action. After several weeks, DeRose decided to ***162** change attorneys and directed Heurlin to transfer his files to the law firm of Day & Day. Acknowledging the discharge, Heurlin gave his former client notice that, pursuant to the terms of their written agreement, he was retaining a lien on DeRose's case "in the approximate sum of $22,797.00." He warned DeRose he intended to strictly enforce his rights, stating: "We will hold you to the letter of your agreement. We will be notifying [the dentist's] insurer of our lien, and will be sure to direct that our name appears on any settlement draft."

Prelitigation Correspondence

From December 1998 through February 1999, DeRose's new attorney, Christopher Day, repeatedly wrote to Heurlin, requesting him to forward copies of medical records and other documents and an itemization of his services and charges comprising the $22,797 lien. Receiving no response, Day finally suggested Heurlin's lack of cooperation constituted unprofessional conduct. On March 2, Heurlin retorted, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Advising Day to "educate [him]self" about attorney liens and the work product privilege, he closed with, "See you in Court."

Continuing his effort to obtain Heurlin's cooperation, Day wrote, "I do not want your work-product. You told me in our telephone conversation your $20,000 plus lien was incurred obtaining and reviewing medical records. Those records are not work-product. I take it from your letter you do not have any such records. [¶] My client has requested an itemization of your lien, and we again respectfully request that itemization. John, what in the world would prompt you to write a letter like that? All we wanted was the medical records you told me you reviewed. If you don't have any, all you had to do was say so." Heurlin contends that "[o]n December 23, 1998, Phil DeRose, Michael's father, picked up DeRose's file, including medical records.... In roughly April of 1999, Heurlin closed his skeleton file pending settlement and the satisfaction of his lien."

At the end of February 2000, Day wrote to Heurlin, advising him DeRose's case was about to settle, asking again for an itemization of time and charges on the case, and assuring Heurlin that Day & Day would "hold all disputed sums in trust pending resolution of your claim." Day sent yet another such request on March 6. On March 12, Heurlin forwarded his billings and a demand for $12,590.70, not the $22,797 lien amount he had first claimed. Confirming his intention to have his firm's name as a payee on the DeRose settlement check, Heurlin suggested the insurer issue a separate check for $12,590.70 to Heurlin's firm and remit the balance to DeRose and ***163** Day. Heurlin advised Day it would be impossible "to negotiate the [settlement] check without my signature," and cautioned, "All funds will be held pending resolution of any disputed sum."

In his reply, Day stated, "It is unethical and grounds for discipline for you to delay disbursement of a client's money over a fee dispute with another lawyer. We presume that, when the check arrives, you will make arrangements to promptly endorse it as you are ethically required to do. Mr. DeRose's money will be disbursed to him. All *disputed* attorney's fees will be held in my trust account." (Original italics.) Heurlin replied, "[A]ll matters regarding our fee will be settled before Mr. DeRose sees a dime." Noting DeRose had signed an agreement to a lien on the proceeds of any recovery, Heurlin added, "[N]o draft [will] be endorsed by this firm until the precise amount of fees has been agreed-to and a draft payable to this firm tendered."

Day, reminding Heurlin that total attorney fees may not exceed those specified by statute (Bus. & Prof. Code, § 6146 [unconscionable fees]), again suggested the total amount of claimed fees should be placed in the trust account of a "neutral" individual, such as Heurlin's cocounsel, Evan Burge. Heurlin insisted no funds would be released unless his terms were met. His letter to Day stated, "As you, of all people know, I can be unabashedly aggressive in pursuing relief. Of course, then it might take Michael [DeRose] years to see his money." Heurlin also stated he had advised the insurer if it did not issue two checks, one to Heurlin's firm for the full amount of his demand, $12,590.70, and the balance to DeRose and Day, it should "pursue the interpleader option. Period." In closing, he told Day, "It would appear that formal proceedings will be required, so you may as well initiate them."

On March 21, the insurer issued a $75,000 settlement check payable to DeRose and the Heurlin and Day firms. Upon receipt, Day wrote to Heurlin, asking him to come to Day's office to endorse the check so DeRose's portion could be distributed to him. As for the remainder, Day again offered to

hold the disputed attorney fees in trust and advised Heurlin, "[H]olding up Mr. DeRose's distribution over a dispute over fees is an ethical violation." Heurlin responded that, as "a secured lien holder," he would not voluntarily release his lien. He asked Day to provide information regarding the amount of the settlement, observing, "Obviously a settlement [of] $500,000 as opposed to $50,000.00 makes a significant difference in what constitutes a conscionable fee." Heurlin warned that Day was "irresponsibly denying [Heurlin's] reasonable claim for fees" and engaging in "unethical and actionable conduct," and advised Day to "take that admonition to heart." ***164**

On April 7, 2000, Day's partner, Brown, wrote to Heurlin, asking Heurlin once more to come to the law office and endorse the settlement check, and offering to place the disputed fees in Burge's trust account. Heurlin countered, "[M]y signature is not going on the check until we resolve the lien issue. You better get use [*sic*] to the idea that, if everyone wants to get paid, my lien will need to be paid." He concluded, "[C]all me when you have a check drawn for the amount of my fee lien in this case."

Complaint; Cross-complaint; More Correspondence

On April 17, 2000, DeRose filed a complaint against Heurlin. DeRose alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, declaratory relief, and fraud, and raised issues including Heurlin's refusal to release the undisputed funds.

By a letter dated April 24, 2000, to Brown, Heurlin promised: "[Y]ou may execute the check, have Mr. DeRose execute the check, and I will deposit the check in *my* trust account, disbursing those funds to which I have no claim. *I will hold the disputed funds in my account pending a final determination of my rights to fees and costs*. Understand that such withholding must necessarily include collection costs, at least as incurred to the date of delivery of the draft." (Italics added.) Heurlin also gave notice of his intent to file an action for declaratory relief and breach of contract. The alleged amount in controversy was $12,590.70.

Brown, expressing concern about disbursing the funds to Heurlin, wrote, "[W]e will take you at your word that *all* fees and costs will be maintained in your client trust account pending resolution of this matter, and that you will promptly disburse [DeRose's] money. The endorsed draft will follow under separate cover." (Original italics.) On May 11, 2000, Day delivered the endorsed settlement draft with a letter instructing Heurlin, "Pursuant to your written promise, you are to immediately deposit the check in your client trust account, then disburse the sum of $40,408.68 to Mr. DeRose forthwith. You may withhold the amount of your lien for attorney's fees incurred in handling Mr. DeRose's case in the sum of $12,590.70. Please promptly remit the balance to my office."

Upon receiving the funds, Heurlin withheld $16,063.95 rather than $12,590.70 and, on May 11, sent a check for $58,936.05 to DeRose and Day. Eleven days later, Heurlin filed a cross-complaint against DeRose, Day, Brown, and Day & Day for indemnity, contribution, and declaratory relief. He sought noneconomic and punitive damages based on allegations of abuse ***165** of process, tortious interference with contract, and intentional infliction of emotional distress.

Heurlin's handling of the settlement funds did not escape Day's notice. On May 17, he wrote to Heurlin, stating, "You have withheld more than your claimed [$12,590.70] lien on [DeRose's] case. [¶] ... Please immediately return $3,473.25 to this office, as those monies belong to this firm. Your failure to do so will subject you to immediate civil action." The record contains no response from Heurlin.

DeRose's First Statutory Offer to Compromise

On May 24, 2000, DeRose conveyed to Heurlin a written section 998 offer to compromise. The offer stated in relevant part: "DeRose offers to allow judgment to be taken in his favor and against defendant John M. Heurlin for the sum of $5,000.00. Each party to bear their own costs." Heurlin did not respond.

Heurlin's expressions of antagonism toward Day and Brown continued unabated. In late May, he advised them this would not be a "courteous litigation." Brown responded, "[T]his office will remain courteous, reasonable and cooperative." Seeking Heurlin's reciprocating commitment to "a cordial and professional relationship," Brown enclosed in his letter a copy of the Code of Professionalism of the American Board of Trial Advocates (ABOTA), assuring Heurlin that Day & Day would "endeavor in every instance to handle this matter in accordance with that Code," and urging Heurlin to abide by and "hold us to this standard."

Heurlin immediately replied: "Let me ask: from what planet did you just arrive. It is my full intent to take judgment against Mr. DeRose on July 11, 2000 when my motion for summary judgment is heard, move for sanctions against you

and your firm and do all in my power to see that you, and your firm, suffer to [the] full extent possible through a subsequent claim for malicious prosecution and, very likely, a malpractice action by your ex-client Mr. DeRose when he is presented with a fee demand for thousands of dollars." Heurlin concluded, "[Y]ou can take [the] ABOTA Code of Professionalism and shove it-where this case is concerned. When all is said and done, you, Mr. Day and Mr. DeRose will be so very, very sorry this course was pursued."

DeRose's Second Statutory Offer to Compromise

On June 28, 2000, Day sent Heurlin a second written section 998 offer to compromise. The offer stated, "[P]laintiff, Michael DeRose offers to settle ***166** all claims against defendant John M. Heurlin for the sum of $7,000.00 payable to John Heurlin and the Law [O]ffices of John Huerlin [*sic*]. Each party to bear their own costs." In an accompanying letter, Day noted that with the exception of writing a single letter, Heurlin had performed no professional services for DeRose, yet the $7,000 offer constituted one-third of Day's fees. Day alluded to Heurlin's "unauthorized retention of an extra $3,473.25" (over and above Heurlin's disputed claimed fees of $12,590.70).

Heurlin replied the following day, demanding Day reconsider his position. In another stinging attack, he characterized Day as "a frightened Brier [*sic*] Rabbit who is now stuck to a tar baby of a case in which his *client* is on the hook for significant damages, attorney's fees, costs, etc.," and a "scared man looking for any way to avoid significant personal liability." (Original italics.)

Heurlin's Acceptance of DeRose's Section 998 Offer

On July 24, Heurlin mailed a written acceptance of DeRose's section 998 offer and a "proposed judgment filed in this matter." He advised Brown he had dismissed the cross-complaint. He asked Brown to "[p]lease have [DeRose] make his check for $7,000.00 payable to 'The Law Offices of John M. Heurlin,' " and offered to "waive interest on the judgment if payment is received before July 26, 2000." He did not mention or offer to return the $16,063.95 ostensibly retained in the trust account.

Brown immediately objected to Heurlin's "acceptance" of $23,063.95, i.e., $7,000 *plus* $16,063.95. By letter, Brown advised Heurlin that the trust money was DeRose's, not Heurlin's, to retain. He stated, "At present, you have $16,063.95 in your client trust account. You may now deduct the $7,000.00 and have a check delivered to this office for $9,063.95 payable to Day & Day as Trustees for Michael DeRose. If the check is received in our office by 5:00 p.m. on July 26, 2000, we will waive interest."

On July 26, Heurlin served DeRose with notice that judgment had been entered on July 25 against DeRose and in favor of Heurlin in the amount of $7,000. (As noted below, judgment had not been entered.) The next day, Heurlin advised Brown the $16,063.95 was "vested" in Heurlin and that DeRose owed him "a net judgment of $7,000.00," excluding costs. He advised Brown to provide him with a check in that amount lest Heurlin be required "to proceed by means of Writ of Execution and Levy." Incorrectly noting that judgment had been taken against DeRose the previous day, Heurlin opined the one judgment rule and doctrine of merger would bar DeRose from claiming any interest in the trust funds retained by Heurlin. He ***167** taunted Brown, "[T]he action before Commissioner Palk is over. [¶] Deem your bluff called."

Day wrote to Heurlin the same day, stating: "Frankly, we are appalled at your most recent letter. [¶] The funds you hold are *in trust*, and disputed. You are a trustee, and they are not 'vested in you.' If you misinterpreted the C.C.P. § 998 offer, ... just let us know and we'll proceed with arbitration. You may retain $7,000.00 of the money *held in trust*, and return the rest to [DeRose], or you can name five (5) arbitrators and we'll proceed. [¶] You are further advised that your tactics and actions are clearly in bad-faith and frivolous, and we will seek our attorney's fees and costs incurred should you keep this up." (Original italics.) Heurlin did not respond.

On August 1, Brown again wrote to Heurlin, stating that the funds Heurlin held were in trust. Brown repeated his accusation that Heurlin had deliberately misinterpreted the section 998 offer. He stated, "Instead [of deducting $7,000 from the trust account], you took the $16,063.95 and then demanded an additional $7,000.00. This was never part of our offer." Brown again told Heurlin, "[Y]ou may retain $7,000.00 of the money *held in trust*, and return the rest [$9,063.95] to [DeRose], or you can name five (5) arbitrators and we'll proceed with arbitration of the matter at J.A.M.S." (Original italics.) Finally, Brown advised Heurlin that if he declined to return the money or cooperate in their ongoing dispute over whether the case should be arbitrated, Day & Day would "file motions to set aside [Heurlin's] fraudulent documents, with a request for attorney's fees and costs."

DeRose's Motion to Vacate

One week passed with no response from Heurlin. On August 8, 2000, DeRose filed a motion to strike Heurlin's acceptance of the section 998 offer and the notice of entry of judgment and to vacate the judgment. The stated statutory ground for the motion was section 436 (authorizing court to "[s]trike out any irrelevant, false, or improper matter inserted in any pleading"). DeRose argued Heurlin filed a fraudulent acceptance and obtained a fraudulent judgment while knowing full well he was misconstruing the section 998 offer. DeRose specifically noted, "There was no ambiguity about plaintiff's intentions; we sent a letter to Heurlin making it crystal clear we were offering him $7,000.00 of the $16,063.95 held in trust, or 'one-third of our fee.' " DeRose also asserted section 473 (judgment taken against party through his or her mistake) and section 663 (setting aside judgment due to incorrect or erroneous basis, not consistent with or supported by facts) as grounds for relief. ***168**

Heurlin's Petition for Writ of Mandate

Three days after DeRose filed his motion for relief, Heurlin petitioned this court for a writ of mandate. He alleged the trial court had refused to enter judgment pursuant to section 998, instead returning to him his section 998 acceptance with a yellow Post-it note, stating, "It isn't clear if this acceptance settles the complaint and cross-complaint or just the cross-complaint (or part of cross-complaint)." He contended the court had a mandatory, nondiscretionary duty to enter the judgment precisely as submitted, without questioning it, and he asked this court to direct the trial court to perform that supposed duty. The petition for writ was peremptorily denied by order filed August 24. (*Heurlin v. Superior Court* (Aug. 24, 2000, G027753).)

Hearing of August 29

On August 29, 2000, the court explained the judgment had not been entered because Heurlin failed to indicate whether he was dismissing all named parties from his cross-complaint. Heurlin assured the court the other parties had been dismissed and the judgment should be entered. The court inquired whether the section 998 offer was for settlement of the whole case, including the cross-complaint, and Heurlin responded, "It is as to the entire action."

Brown then explained to the court that Heurlin was claiming entitlement to in excess of $23,000, when the statutory offer was for only $7,000. Brown argued that by taking $16,063.95 and demanding an additional $7,000, Heurlin had made a counteroffer rejecting the section 998 offer, there was therefore no agreement to settle, and the matter should proceed to arbitration with a court-appointed arbitrator. Heurlin responded it would be a waste of time and money to arbitrate because he would just "file the offer and acceptance with the arbitrator," giving rise to a "statutory mandatory nondiscretionary duty to issue an award in [Heurlin's] favor in the sum of 7,000 bucks." Heurlin contended DeRose actually owed him more than $48,000, but Heurlin had decided to accept $7,000 plus his "statutory lien" because the case was "too big a pain."

The court indicated its uncertainty about Heurlin's line of reasoning and repeatedly asked him where the $16,000 he was holding fit into the picture. After unsuccessfully attempting to explain his position to the court's satisfaction, Heurlin challenged the court to simply enter the $7,000 judgment and see what happened. He argued, "Enter the judgment that I gave you, and let's find out what the effect of that judgment is. Enter the judgment exactly as it was prepared, exactly as it was offered, and let's find out what the legal effect of that is. [¶] I am absolutely sure and Mr. Brown knows that if you ***169** enter the judgment that was offered, that that 16,000 is *mine*, and Mr. DeRose owes me $7,000." (Italics added.)

The court persisted, telling Heurlin, "I don't see where you get the additional [money] if you're agreeing to accept [$7,000]. That's where you've lost me."

Minute Order of September 5 and Proposed Judgment

On September 5, 2000, the court issued its minute order denying DeRose's motion to strike Heurlin's acceptance of the section 998 offer. In pertinent part, the order further stated: "Heurlin's cross complaint includes a cause of action for declaratory relief as to fees and costs owed to him by DeRose.... Heurlin represented at the hearing ... that the $7,000 would dispose of *both the complaint and the cross complaint*. (The complaint by DeRose addresses settlement funds held by Heurlin.) [¶] ... [¶] Judgment to be entered for John M. Heurlin and Law Offices of John Heurlin and against Michael DeRose in the sum of $7000. Said $7000 is the total sum to be retained by Heurlin for legal services, including costs, rendered by Heurlin. Any and all funds held by Heurlin in excess of the $7000 are to be forwarded to DeRose pursuant to the settlement of the complaint and cross complaint. [¶] Judgment to be prepared by DeRose...." (Original italics.)

DeRose prepared and served the proposed judgment. As relevant here, it stated, "Pursuant to Heurlin's acceptance of DeRose's C.C.P. § 998 Offer, judgment to be entered for John M. Heurlin and against Michael DeRose in the sum of $7,000.00. Said $7,000.00 is the total sum to be retained by Heurlin for legal services, including costs, rendered by Heurlin, and is the total amount due Heurlin on the complaint and cross-complaint. Any and all funds held by Heurlin in excess of the $7,000.00 are to be forwarded to DeRose pursuant to the settlement of the complaint and cross complaint [*a*]*s Heurlin was holding $16,063.95 of disputed funds in his client trust account*. [¶] It Is Ordered that [DeRose] have and recover from defendants John M. Heurlin and Law Offices of John M. Heurlin the sum of $9,063.95, plus interest at the legal rate until paid." (Italics added.)

Heurlin's Objection to Proposed Judgment, Motion to Vacate Judgment and Proposed Judgment

Heurlin objected to the proposed judgment on the grounds it was incorrectly drafted, included language inconsistent with and in addition to the exact words of the offer and acceptance, materially changed the parties' substantive rights under the agreement, and violated Heurlin's rights under ***170** contract and substantive due process. He contended the court had rewritten the compromise offer and acceptance "at a whim." Heurlin moved to vacate the judgment under section 663a (legal basis for the decision not consistent with or supported by the facts). He proposed entry of a judgment pursuant to the section 998 offer and acceptance, "that John M. Heurlin shall have and recover judgment against Michael DeRose in the sum of $7,000.00, each party to bear their own costs of suit herein." Heurlin contended the court was without discretion to refuse to enter a judgment reciting words precisely as stated in the offer and acceptance. He asserted entry of a section 998 judgment is purely a ministerial act and the court exceeded its authority in adjudicating a factual dispute. He argued neither DeRose's offer nor Heurlin's acceptance contained language pertaining to DeRose's recovery of $9,063.95, the court never received or heard evidence or made any finding on the issue, and it could not now do so because the offer and acceptance had been tendered to the court for entry of judgment, leaving the court without discretion in the matter.

Hearing of October 17

On October 17, 2000, the court conducted a hearing on Heurlin's motions and proposed judgment. Heurlin said he specifically advised DeRose's attorney, "All right. You pay me $7,000 over and above what I have [in the trust account] because that was my claim, and that's the end of the case." When the court observed, "[T]hat's not what the acceptance says. It never said anything about over and above the claim," Heurlin responded, "Oh, Your Honor, it's not my duty." He argued, "Now, if the court enters the judgment that I propose, which simply says judgment for Heurlin for the sum of $7,000, which is what was offered and which is what was accepted, we'll go on from there." The court asked, "Okay. What does that mean 'we'll go on from there'?" Heurlin responded, "Your Honor, it means that I'll have a judgment for $7,000 and will act in accordance with that judgment."

The court persisted, asking Heurlin, *"What happens to the remaining money you're holding? I assume you are holding it*." (Italics added.) Heurlin replied: *"Yes; exactly."* (Italics added.) The court then asked, "What happens to them [the funds]?" When Heurlin answered, "It's mine," the court stated, "See, that's the dispute. Seven-thousand is represented as resolving the entire case. You've got extra money in there." Heurlin retorted, "See, I don't. And the reason that I don't is if that were the case, then what the offer should have said is we offer to pay Mr. Heurlin $7,000 out of the [$]16,000 he's holding, and he is to return $9,063.[95] to Michael DeRose. If that's what they meant to say, that's what they should have said, but that wasn't the state of affairs." ***171**

The court noted "the basic problem" under Heurlin's approach was that the section 998 offer and acceptance did *not* settle the entire case. There was still the matter of the disputed trust fund monies, which would generate further litigation. Brown reminded the court the $16,000 "was held in trust. It wasn't [Heurlin's] money to offer to pay or not to pay. He agreed to place it in trust."

The court then addressed Heurlin, asking, "I'm curious. *Is this money accumulating interest?*" Heurlin responded, "*To the State Bar, Your Honor.*" (Italics added.) When Brown interjected that it appeared Heurlin had removed the funds from the client's trust account, Heurlin said, "*That's a lie*. That's neither here nor there.... [*I*]*t's an absolute lie. I* [*'ve*] *got the account records*, but it's not relevant. Let's proceed with the entry of judgment pursuant to 998 which is merely a ministerial act which may be performed by the clerk or the court." (Italics added.) (In his reply brief, Heurlin again attacked the claim that the funds were no longer in his trust account as "demonstrably untrue" and challenged "[t]his Court's Justices ... to call the [800] number and attempt to obtain the information claimed to have been obtained by DeRose.") Heurlin warned the trial court, "I guarantee you

that if you don't follow the law and you don't follow the facts, that this will go to the next level. You know it has to." Noting that would be just fine, the court took the case under submission and adjourned the hearing.

Minute Order of October 25 and Judgment upon Statutory Offer of Compromise

On October 25, 2000, based on Heurlin's representation that the funds were in his client trust account, the court issued its minute order as follows: "That John M. Heurlin shall have and recover judgment against Michael DeRose in the sum of $7,000.00, each party to bear their own costs of suit herein. [Heurlin] may not execute on this judgment until the remaining funds being held by him are returned to DeRose. Judgment signed and filed this date."

The final form of the judgment entered by the court was as proposed by Heurlin, with the exception of the court's handwritten interlineations indicated here in italics: "This action having been commenced by Michael DeRose on April 17, 2000, and John M. Heurlin and The Law Offices of John M. Heurlin having appeared ... and having served a cross-complaint ..., and Michael DeRose having offered in writing served on [Heurlin] on June 28, 2000 ... and [Heurlin] having timely accepted Michael DeRose's offer, and the offer with proof of acceptance having been duly filed with this Court, *and Heurlin's representation at the 8-29-00 and 10-17-00 hearings* ***172** *that this $7000 settles both the complaint and cross-complaint* [¶] It Is Hereby Ordered and Adjudged that John M. Heurlin shall have and recover judgment against Michael DeRose in the sum of $7,000.00, each party to bear their own costs of suit herein. *Heurlin may not execute on this judgment until the remaining funds being held by him are returned to DeRose.*" (Italics added.)

October 25 Postjudgment Correspondence and Motions

On October 27, 2000, two days after the court's entry of judgment, Heurlin sent a letter to Brown, enclosing a copy of the judgment and announcing his intention to flout the court's orders. Heurlin stated: "As I am sure you are aware, all extant orders merge into the final judgment which is the sole dispositive pleading in the case. [¶] I fail to observe any place at which [the judgment] directs me to return $9,063.95 plus interest at the legal rate of 10% per annum. The judgment merely observes that I cannot execute on the $7,000.00 unless '... the remaining funds being held by [me] are returned to DeRose.' *As I have no remaining funds, I suppose I can move directly to execute on the judgment.*" (Italics added.)

Heurlin further stated he would soon file a motion to vacate the judgment and enter a different judgment, adding, "Depending on what the Court does with the Motion to Vacate, we will either move to appeal or execute on the $7,000.00 judgment. I think [it is] in the best interests of the record that we have a final hearing on the judgment. [¶] Have a great day. I have!"

Heurlin filed his second motion under section 663 to vacate the judgment and enter a different judgment. Heurlin essentially reiterated his first motion, but this time he argued he never would have accepted DeRose's offer had he known it meant he would have to give back the client trust fund monies. He asserted, "A clear reading of the offer is that DeRose offered to pay Heurlin $7,000.00 *in new money* to end the litigation." (Italics added.) He argued, "Essentially, [the court] has crammed a whole liability issue down Heurlin's throat that was never agreed-to by him and saddled him with a duty which was never a part of the bargain."

Meanwhile, DeRose moved the court under section 1008 to reconsider its order granting Heurlin a $7,000 judgment. DeRose emphasized that at the October 17 hearing, Heurlin represented that all of the money was in his trust account, but after receiving notice of the court's decision, he had "cleaned out the trust account[, t]hereby circumventing the Court's order." Based on these new facts, DeRose asked the court to reconsider and set aside its order of October 25, direct Heurlin to deposit the $16,063.95 with the ***173** court or in an account requiring the signatures of DeRose and Heurlin, or enter a judgment of $9,063.95 plus interest in DeRose's favor. DeRose also filed a "limited joinder" in Heurlin's motion to vacate, stipulating to set aside acceptance of the section 998 offer, and asking the court to reaffirm a prior order referring the case to arbitration.

Hearing of December 15

The parties' motions were heard on December 15, 2000. The court opened the proceeding by stating, "My initial reaction, frankly, was to deny both motions [.] The more I thought about it, ... I thought we obviously have both sides who don't want this judgment. I mean it doesn't make much sense to keep it the way you feel about it. [¶] So I'm going to grant both motions, but I'm not entering another [judgment]. I think we're going to have to unwind this thing at some point. [¶] My problem is I'm not sure how far back we can unwind it." Finding it apparent "there was a total misunderstanding as to what was going on," the court observed even Heurlin had

conceded as much in his declaration by stating that if he had been aware of the meaning attached to the offer by DeRose and the court, he never would have accepted it.

After listening to further argument by Heurlin, the court stated, "Well, you both want the judgment vacated; that, I will do. But I'm not entering the judgment that either of you want. What we're going to have to do is go back to some point. [¶] So what I'm going to do is have you start basically at ground zero. If you [DeRose] want to make that offer, you [Heurlin] want to accept it, fine. If you want to go to arbitration, that's fine with me, too.... [¶] I don't care how you resolve it. It's really up to the two of you." The court then granted the motions to vacate the judgment, denied the motions to enter a new judgment, and issued an order setting aside Heurlin's acceptance of the section 998 offer.

Order of December 29

The court's formal order filed December 29, 2000 stated, "Good cause appearing, It Is Hereby Ordered that [DeRose's] and [Heurlin's] Motions to Vacate this Court's prior judgment are granted. On the court's own motion, [Heurlin's] Notice of Acceptance of [DeRose's] C.C.P. § 998 Offer is hereby ordered set aside, based on declarations of both parties of mistake re the offer and acceptance." Heurlin appealed, contending the court had a duty to enter judgment awarding him $7,000 under the section 998 agreement.

Oral Argument on Appeal and Notice Regarding Sanctions

Heurlin did not appear personally at the scheduled April 16, 2002 oral argument. In his stead, he sent an attorney with no personal knowledge of ***174** the facts necessary to respond to our questions. It appears this was no accident: An association of counsel was filed on April 12, 2002; a disassociation of counsel was filed on April 16, 2002, after oral argument. Both the association and disassociation were dated April 5, 2002. (We do not intend in this opinion to criticize Attorney Caligiuri or her law office or to sanction them.)

At the end of the hearing on April 16, the parties were given oral notice that argument would be continued to the following month and the court was considering imposing sanctions on Heurlin. On April 18, we issued a written order directing Heurlin to appear personally at the continued oral argument on May 22. The order stated the court was "considering imposing sanctions payable to the court, or such damages as may be just payable as costs to respondent, or both, in a total amount not to exceed $50,000 against John M. Heurlin and Law Offices of John M. Heurlin, individually as parties, and John M. Heurlin, as counsel, on the ground the appeal is frivolous, and taken and maintained solely for purposes of delay, ... and for possible attorney misconduct affecting the orderly administration of justice." We advised Heurlin he could file written opposition by a date certain and argue the sanctions issue at the May 22 hearing.

The Parties' Settlement and Stipulation for Dismissal

On April 24, 2002, DeRose's counsel advised this court in writing the parties had settled the underlying case. We again ordered Heurlin in writing to appear at the continued oral argument.

On May 3, we received a "Stipulation for Dismissal of Appeal and [Proposed] Order of Entry of Dismissal" signed by Heurlin and Day. We advised the parties in writing we would decide whether to dismiss the appeal after the May 22 hearing, and reiterated our order for Heurlin to appear at the hearing.

Heurlin's Opposition to Sanctions and the May 22 Hearing

In his written opposition to sanctions and his cover letter filed on May 7, 2002, Heurlin contended settlement of the case had obviated any possible basis for sanctions. He explained he had settled only because of "the implicit threat to Appellant's family and Appellant's limited financial resources" posed by "the draconian nature of the sanctions placed at issue." He stated that although no basis for sanctions had ever existed, "[t]he matter settled because, metaphorically, this Court held a gun to Appellant's head, in the form of a $50,000.00 sanction notice, and Appellant could not run the risk ***175** that a Court that would even issue such an order might not, in fact, follow through with its threat," resulting in "further abuse." He maintained his appeal was neither substantively without merit nor prosecuted for improper purposes. He claimed the court's notice regarding sanctions was untimely and otherwise inadequate in that it set forth only general statutory language as grounds for sanctions. He asked the panel to disqualify itself because DeRose and Day had disclosed the amount of the settlement to the court. Heurlin attached a copy of the settlement agreement to his opposition papers, but redacted the amount paid.

At oral argument on May 22, 2002, the court denied Heurlin's request for disqualification. Heurlin made an oral presentation, essentially repeating arguments made in his letter and opposition papers. Heurlin expressed his belief he had done nothing improper throughout the litigation.

Justice Rylaarsdam asked Heurlin a number of specific questions about his conduct vis-a-vis his former client. In a summarizing general query, Justice Rylaarsdam asked, "Do you feel, sir, that the way you conducted yourself in this litigation is appropriate? ... I want that question answered 'yes' or 'no.' " Heurlin responded, "Yes."

The panel asked Heurlin questions directed at his handling of the client trust funds. We inquired about the basis for Heurlin's representations to the trial court on October 17, 2000, statements in his letter of October 27, 2000, and his positions on appeal. Heurlin's responses to questions concerning (1) whether on October 17 he had the funds in a client trust account as represented to the court and (2) whether there were "no remaining funds" in that trust account on October 27 were, as follows:

"Justice Fybel: ... [¶] So my question to you, sir, is: On October 17th, 2000, was the $16,063.95 in your trust account?

"Mr. Heurlin: No. $16,093.63 [*sic*] was not in my trust account. But that was not-

"Justice Fybel: Were any of the funds that the judge was referring to on October 17th, 2000, in your trust account at that time?

"Mr. Heurlin: Yes, Justice Fybel.

"Justice Fybel: How much[?]

"Mr. Heurlin: As I recall-as I recall, it was [$]9,063 and change. ***176**

"Justice Fybel: Where was the remaining [$]7,000?

"Mr. Heurlin: That was in my general account.

"Justice Fybel: On October 25th, 2000, ... the court issued an order stating that you ... shall have and recover judgment against Michael DeRose in the sum of $7,000; each party to bear their own costs of suit herein; Heurlin may not execute on this judgment until the remaining funds being held by him are returned to DeRose; judgment signed and filed this date, ... and the date is October 25th, 2000.... [¶] Then, ... you state that, quote, 'As I have no remaining funds, I suppose I can move directly to execute on the judgment.'

"Mr. Heurlin: That was-

"Justice Fybel: ... [¶] The first question is: On October 27th, 2000, when you wrote this letter, did you have the $9,063.95 in your trust account?

"Mr. Heurlin: I do not know.

"Justice Fybel: On October 27th, 2000, did you have any of the money that was originally placed in your trust account with regard to the DeRose matter still in the trust account?

"Mr. Heurlin: On that specific date, I do not know.

"Justice Fybel: Well, when you wrote, 'As I have no remaining funds, I suppose I can move directly to execute on the judgment,' when you were referring to 'remaining funds,' what were you referring to?

"Mr. Heurlin: If the court will continue to read in that letter, it will see that the purpose of that letter was to advise him that I was making a motion to vacate judgment and enter a different judgment.

"Justice Fybel: ... [P]lease answer my question if you can.

"Mr. Heurlin: Understand.

"Justice Fybel: When you were referring to remaining funds in that letter, what were you referring to?

"Mr. Heurlin: I don't remember.

"Justice Fybel: Are there any documents that could refresh your recollection .... [¶] ... [¶] [a]s to where ... either the $9,063.95 or the $7,000 were on October 27, 2000? ***177**

"Mr. Heurlin: I don't know.

"Justice Fybel: ... [¶] Was it a true statement on October 27th, 2000, that you have no remaining funds?

"Mr. Heurlin: My balance on that date, I believe, was about $108,000. So, to answer-

"Justice Fybel: Mr. Heurlin, please answer my question. [¶] Was it a true statement, when you wrote on October 27th, 2000, that you had no remaining funds?

"Mr. Heurlin: I don't know.

"Justice Fybel: When was the $7,000 removed into your general account?

"Mr. Heurlin: On or about the end of May or, let's see-yes, it would have been the end of May of 2000.

"Justice Fybel: Why?

"Mr. Heurlin: Because Mr. Day wrote me a letter ... which indicated that I was permitted to retain $12,590.70 as my fees in handling the ... DeRose matter.

"Justice Fybel: ... I'm going to ask this again just to make sure we have a clear record. [¶] With regard to the $9,063.95 that you say was in your trust account at some point in time, when was that removed?

"Mr. Heurlin: I don't know. But it was-

"Justice Fybel: Can you approximate when it was?

"Mr. Heurlin: It would have been towards the end of October, I believe.

"Justice Fybel: Of 2000?

"Mr. Heurlin: Yes. Although there was always $3,347.25 in the account.

"Justice Fybel: In which account?

"Mr. Heurlin: Trust account. If the court-

"Justice Fybel: Always until when? ***178**

"Mr. Heurlin: Until I paid it over to Mr. DeRose and Day ... on April 24th.

"Justice Fybel: Of 2002?

"Mr. Heurlin: Correct.

"Justice Fybel: So is it your position now that there were in excess of $3,000 of remaining funds as of October 27th, 2000?

"Mr. Heurlin: I believe so.

"Justice Fybel: So ..., just so we understand, now your position is that as of October 27th, 2000, there were, in fact, over $3,000 in remaining funds; so your statement that you had no remaining funds was not true?

"Mr. Heurlin: I don't know what the state was as of October 27th of 2000, Justice Fybel. I have no idea.

"Justice Fybel: But I thought you just said that at all times the $3,000-plus [was] sitting in the trust account.

"Mr. Heurlin: I never took that money out. So my assumption is, is that it was there.

"Justice Fybel: Well, then, with regard to any money that was taken out of the trust account during this period of time, who took it out?

"Mr. Heurlin: I would have taken it out.

"Justice Fybel: And the money went from the trust account into the ... Heurlin general account?

"Mr. Heurlin: General account.

"Justice Fybel: That's the general account for your law office?

"Mr. Heurlin: Correct.

"Justice Fybel: That's the account used to pay your bills?

"Mr. Heurlin: Correct."

At the conclusion of the hearing, when asked whether he had anything further, Heurlin responded, "Nothing further." Presiding Justice Sills then ***179** offered Heurlin an opportunity to "answer the questions on the account that were posed by Justice Fybel at a later time." Heurlin declined this offer to respond.

Discussion

Throughout the proceedings both in the trial court and on appeal, Heurlin has argued the court had a mandatory duty to

enter a section 998 judgment because an offer and acceptance were filed. According to Heurlin, the trial court was without discretion to *decline* to enter the judgment, even though it knew (1) the parties disagreed as to the meaning of the offer and acceptance, and (2) Heurlin did not intend to return the trust funds to his former client. We find this proposition untenable. Were we to reach the merits, we would decide that the court could have and should have refused to enter the judgment. This decision is consistent with the analysis of section 998 in the recent unanimous decision of our Supreme Court in *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249 [121 Cal.Rptr.2d 187, 47 P.3d 1056]. (See also *T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 [204 Cal.Rptr. 143, 682 P.2d 338] [general contract law principles apply to § 998 offers and acceptances where they neither conflict with the statute nor defeat its purpose].) In addition, the court properly vacated the judgment that was based on Heurlin's false representations that he held the disputed funds in his trust account.

Turning to the issue of sanctions, this court's notice filed April 18, 2002, tracked the language of Code of Civil Procedure section 907 (permitting costs when an appeal is "frivolous or taken solely for delay") and rule 26(a)(2) of the California Rules of Court (permitting imposition of penalties, including costs "[i]f the appeal is frivolous or taken solely for the purpose of delay"). Our Supreme Court's definition of "frivolous" in this context was set forth 20 years ago in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [183 Cal.Rptr. 508, 646 P.2d 179]: "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive-to harass the respondent or delay the effect of an adverse judgment-*or* when it indisputably has no merit-when any reasonable attorney would agree that the appeal is totally and completely without merit." (Italics added.) At the hearing on May 22, 2002, Heurlin agreed that this is the correct standard to determine whether sanctions should be assessed.

(1a) We conclude Heurlin filed and prosecuted a frivolous appeal within the meaning of section 907, California Rules of Court, rule 26(a)(2), and *In re Marriage of Flaherty, supra,* 31 Cal.3d 637, 650. We reach this conclusion because Heurlin filed and maintained the appeal for improper motives-to ***180** delay the effect of an adverse judgment and to cover up his mishandling of client trust funds and his dishonesty before the trial court. We do not reach the question of whether Heurlin's appeal also indisputably had no merit.

On April 24, 2000, Heurlin promised in writing to retain the client trust funds until the fee dispute with DeRose was resolved. Heurlin's October 17 representations to the trial judge (that he held the client trust funds) led to an October 25 judgment that was based on the judge's understanding Heurlin was holding client trust funds. The court fashioned the judgment to award Heurlin the sum of $7,000 under the section 998 offer, but delay execution until Heurlin returned the "remaining" client trust funds he represented to the court he was holding. Upon reading the judgment, Heurlin announced he could take $7,000 and keep an additional $16,063.95 because "there are no remaining funds." This change of position by Heurlin was the basis for the order vacating the judgment, which judgment was originally based on Heurlin's representation. The December 29 orders vacating the judgment and refusing to enter a different judgment were proper.

Did Heurlin actually have client DeRose's funds in a trust account on October 17, 2000, as he represented to the court? At the hearing on May 22, 2002, Heurlin admitted that on October 17, 2000, he only had $9,063.95 and that he took the other $7,000 for himself months earlier in May 2000.

Did Heurlin really have DeRose client trust funds to return on October 27 or had he already taken them for himself? On October 27, after receipt of the court's judgment, he asserted there were "no remaining funds." True? On appeal, Heurlin has taken at least five different positions as to whether or not there were any remaining funds on October 27, 2000:

(1) In his opening brief, Heurlin acknowledged, "As this Court has probably concluded, the nuts and bolts of the dispute revolve around the character of the $16,063.[95] held by Heurlin from DeRose's settlement proceeds." Did Heurlin actually hold these proceeds? In his reply brief, Heurlin characterized the claims that the DeRose client trust funds were no longer in his trust account as "demonstrably untrue.... As a matter of fact, Heurlin's balance was between $23,670 and $267,000 during the operative period. Heurlin never 'stole' anything, but again the issue is relevance."

(2) Heurlin's lawyer at oral argument on April 16, 2002, acknowledged the letter dated October 27, 2000, stated there were "no remaining funds" on that date and stated she had no further knowledge of the relevant facts.

(3) As of May 22, 2002, Heurlin did not know if the so-called remaining funds (that he identified to us as the sum of

$9,063.95 existing in the account on Oct. 17, 2000) were still in his trust account on October 27, 2000. ***181**

(4) On May 22, 2002, Heurlin told us there was $3,347.25 in the trust account at all times until April 24, 2002, including on October 27, 2000.

(5) Later on May 22, 2002, Heurlin advised us he did not know the amount in his trust account on October 27, 2000.

Heurlin admitted that to the extent the funds were taken out, he took the money and it went into his general account to pay his bills.

Heurlin's conduct, statements and admissions show that he took all or part of the client trust funds for himself without notice or authority and in breach of both his written promise to hold the funds and his representations to the court. When the court issued its adverse ruling vacating the judgment, Heurlin appealed. We conclude from all the evidence that he did so to delay the consequences of his deceit and to try to cover up his mishandling of client trust funds.

In his opposition to our order notifying him we were considering sanctions, Heurlin complained of inadequate notice. The Supreme Court in *In re Marriage of Flaherty, supra,* 31 Cal.3d at page 654, held "the rudiments of fair play include notice, an opportunity to respond, and a hearing." We agree. We gave "fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing." (*Ibid.*) By this opinion, we are providing the attorney with a "written statement of the reasons for the penalty." (*Ibid.*) Heurlin also complained notice by the court was untimely, but the notice provided by our April 18 order complied with California Rules of Court, rule 26(e).

The April 18, 2002, order advised Heurlin of the grounds and legal authority for possible sanctions; Heurlin was permitted to, and did, respond in writing by filing a 25-page brief and a substantive cover letter; he was given a hearing; at the end of the hearing, he stated he had nothing further to add and he declined the opportunity to provide any further responses in writing to the court's questions. The record cited above contains an abundance of statements by Heurlin himself that he knew the key issue (or "nuts and bolts" as he described it) in the case was his handling of the client trust funds. Questions we asked at the May 22 hearing regarding the client trust funds were also asked of Heurlin's lawyer at the April 16 hearing. Heurlin's claim to be in the dark about the court's concerns is belied by the record.

(2) A reviewing court may impose penalties for a frivolous appeal to vindicate the public interest in the orderly administration of justice. "Because a frivolous appeal, or one taken for improper reasons, harms the court, ***182** not just the respondent, a growing number of courts are ordering appellants to pay sanctions directly to the court clerk to compensate the state for the cost of processing such appeals. [Citations.]" (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 35 [96 Cal.Rptr.2d 553].)

In deciding the amount of sanctions, courts may consider "the degree of objective frivolousness and delay[,] and the need for discouragement of like conduct in the future." (*Pierotti v. Torian, supra,* 81 Cal.App.4th at pp. 33-34.) (1b) Here, the degree of objective frivolousness and delay is high and the need to discourage like conduct in the future is compelling. (See *Keitel v. Heubel* (2002) 98 Cal.App.4th 678, 693-694 [120 Cal.Rptr.2d 216].) Heurlin took this appeal for the improper purposes of delay and to try to cover up his mishandling of client trust funds and his dishonesty before the trial court.

The *Pierotti* court found the sum of $6,000 a conservative measure of sanctions, noting that approximate amount had been estimated as the cost of processing the average civil appeal in 1992. (*Pierotti v. Torian, supra,* 81 Cal.App.4th at p. 36.) More recently, in *Keitel v. Heubel, supra,* 98 Cal.App.4th 678, 693-694, the sum of $6,000 was again imposed as sanctions for processing a frivolous appeal. We suspect the real cost of processing the average civil appeal has risen sharply in the past 10 years. Nonetheless, we follow the *Pierotti* court's cautious approach and sanction Heurlin in the amount of $6,000 plus the cost of the reporter's transcript of the hearings of April 16 and May 22, 2002, payable to the clerk of this court.

Disposition

The appeal is dismissed pursuant to the parties' stipulation.

As sanctions for bringing and maintaining this frivolous appeal, John M. Heurlin and the Law Offices of John M. Heurlin are jointly and severally liable to pay $6,000 plus $123 (the cost of the reporter's transcript) to the clerk of this court. The clerk of this court is directed to deposit said sums in the general fund. All sanctions shall be paid no later than 30 days after the date the remittitur is filed.

Pursuant to Business and Professions Code section 6086.7, subdivision (c), the clerk of this court is ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. Pursuant to Business and Professions Code section 6068, subdivision (*o*)(3), Heurlin is ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. ***183**

Each party to bear its own costs on appeal, pursuant to the parties' stipulation.

Sills, P. J., and Rylaarsdam, J., concurred. ***184**

Footnotes

* Pursuant to California Constitution, article VI, section 21.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Welco Electronics, Inc. v. Mora, Cal.App. 2 Dist., January 23, 2014

201 Cal.App.4th 267
Court of Appeal, Fourth District, Division 3, California.

Gil KIM, Plaintiff and Respondent,
v.
WESTMOORE PARTNERS, INC., et al., Defendants and Appellants.

No. G044216.
|
Nov. 29, 2011.
|
Review Denied March 14, 2012.

Synopsis

Background: Lender brought action against businessmen and their companies for breach of contract, negligent misrepresentation, professional negligence, conversion, and unfair business practices. The Superior Court, Orange County, No. 30–2009–00120560, John C. Gastelum, J., entered default judgment for lender and awarded $5,000,000 in damages, along with costs of suit. Defendants appealed.

Holdings: The Court of Appeal, Bedsworth, Acting P.J., held that:

[1] declaration was insufficient to support motion to set aside defaults;

[2] complaint failed to state a cause of action for breach of contract;

[3] complaint was insufficient to state cause of action for negligent misrepresentation;

[4] terms of promissory note contradicted professional negligence allegations;

[5] alleged failure to pay money owed under promissory notes did not constitute conversion;

[6] complaint against defendants did not support any award of damages;

[7] lender failed to provide sufficient evidence to "prove-up" his entitlement to any damages; and

[8] counsel's violation of rules of court warranted $10,000 sanction.

Reversed and remanded with directions.

West Headnotes (41)

[1] Attorneys and Legal Services Impartiality and decorum of tribunal

Those who practice before the Court of Appeal are expected to comport themselves honestly, ethically, professionally and with courtesy toward opposing counsel.

3 Cases that cite this headnote

[2] Damages Notice to defendant

It is perfectly proper to serve a statement of damages on one date, but not file it with the court until much later, when a default judgment is actually sought. West's Ann.Cal.C.C.P. § 585.

[3] Judgment Requisites and sufficiency in general

Judgment Weight and sufficiency of evidence

Defendant's declaration was insufficient to support motion to set aside defaults; declaration did not support assertion that defendants had not received notice of the entry of default until plaintiff filed his request for entry of judgment, and declaration contained no evidentiary facts to support conclusory assertion that "anxiety, depression, and financial hardships" caused defendants to be dilatory in answering lawsuit.

3 Cases that cite this headnote

[4] Judgment Matters admitted

Substantively, judgment by default is said to confess the material facts alleged by the plaintiff,

or the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint; the "well-pleaded allegations of a complaint" refer to all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.

28 Cases that cite this headnote

[5] **Judgment** Matters admitted

Judgment Presumptions and burden of proof

Because default confesses properly pleaded facts, plaintiff has no responsibility to provide the court with sufficient evidence to prove them, as they are treated as true for purposes of obtaining a default judgment; but that is all the default does.

15 Cases that cite this headnote

[6] **Pleading** Necessity for defense

There is no penalty for defaulting.

1 Cases that cite this headnote

[7] **Pleading** Necessity for defense

A defendant has the right to elect not to answer the complaint.

2 Cases that cite this headnote

[8] **Pleading** Necessity for defense

A defendant's election not to answer a complaint is a permissible tactic.

1 Cases that cite this headnote

[9] **Judgment** Pleadings to Sustain Judgment

If the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in plaintiff's favor cannot stand.

31 Cases that cite this headnote

[10] **Appeal and Error** Judgment by default

On appeal from a default judgment, an objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered.

11 Cases that cite this headnote

[11] **Appeal and Error** Judgment by default

When considering the legal effect of facts on appeal of a default judgment, the Court of Appeal disregards any erroneous or confusing labels employed by the plaintiff.

1 Cases that cite this headnote

[12] **Bills and Notes** Setting out, annexing, filing, or production of instrument, and profert and oyer

Pleading Variance between pleading and instrument annexed, filed, or referred to

Lender's complaint failed to allege any facts establishing that any defendant had breached the terms of any of the promissory notes attached to his complaint, and thus complaint failed to state a cause of action for breach of contract; while lender alleged that defendants promised substantial returns but then breached their repayment obligations within the year prior to the filing of the complaint, six of the seven promissory notes attached to the complaint contained maturity dates which were between three and six years prior to the filing of the complaint, and, while seventh note only required payment of principal and interest in the past year if restaurant was sold or had the cash available to do so, complaint did not allege that restaurant was ever sold or ever had cash available to make interest payments or arrearages.

[13] **Pleading** Variance between pleading and instrument annexed, filed, or referred to

When plaintiff attaches a written agreement to his complaint, and incorporates it by reference into his cause of action, the terms of that written agreement take precedence over any contradictory allegations in the body of the complaint.

8 Cases that cite this headnote

[14] **Pleading** Variance between pleading and instrument annexed, filed, or referred to

If facts appearing in the exhibits contradict those alleged in the complaint, the facts in the exhibits take precedence.

8 Cases that cite this headnote

[15] **Bills and Notes** Setting out, annexing, filing, or production of instrument, and profert and oyer

Pleading Variance between pleading and instrument annexed, filed, or referred to

Lender's allegation in complaint that, in exchange for loan, defendants promised to make lender's loan payments on a commercial property, was entirely inconsistent with terms of promissory note attached to the complaint, which stated that it superseded all prior agreements and understandings and could not be amended except by signed written agreement, and thus court would disregard that allegation as basis for defendant's alleged breach of contract arising out of the promissory note.

[16] **Fraud** Statements recklessly made; negligent misrepresentation

Fraud Relations and means of knowledge of parties

Lender's complaint, which alleged that borrower defendants "advised him on what to do and how to proceed" and "recommend[ed] investments and loan strategies," and that they breached their duty of due care "by failing to properly advise him," was insufficient to state cause of action for negligent misrepresentation absent any allegations as to what factual representations were made to him, or any facts suggesting that a reasonable person in defendants' position should have known those representations were untrue at the time they made them.

1 Cases that cite this headnote

[17] **Brokers** Who are brokers

Terms of promissory notes incorporated into lender's complaint contradicted allegation that defendants were acting as investment brokers "[a]t all times herein," and thus precluded professional negligence claim based on that allegation; promissory notes made clear that defendants were not "brokering" any investments but unambiguously established that the relationship between lender and defendants was simply one of creditor-debtor.

1 Cases that cite this headnote

[18] **Conversion and Civil Theft** Money and commercial paper; debt

Defendants' alleged failure to pay money owed under promissory notes did not constitute conversion absent a claim that they interfered with lender's possession of a specific, identifiable sum of money.

20 Cases that cite this headnote

[19] **Conversion and Civil Theft** Money and commercial paper; debt

A cause of action for conversion of money can be stated only where defendant interferes with plaintiff's possessory interest in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him.

25 Cases that cite this headnote

[20] **Conversion and Civil Theft** Money and commercial paper; debt

Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.

20 Cases that cite this headnote

[21] **Conversion and Civil Theft** Money and commercial paper; debt

A generalized claim for money is not actionable as conversion.

13 Cases that cite this headnote

[22] **Antitrust and Trade Regulation** Particular cases

Allegation in complaint that "[d]efendants are licensed investment brokers" and "have violated Business [and] Professions Code section 17200" did not state a cause of action for unfair business practices, as the cited statute did not actually prohibit any conduct but was merely definitional. West's Ann.Cal.Bus. & Prof.Code § 17200.

[23] **Judgment** Conformity to pleadings

Lender's complaint against defendants did not support any award of damages, despite defendants' default; only damages numbers included in the complaint were in connection with defendants' alleged default on an obligation to make monthly payments on lender's commercial property, but complaint stated no valid claim for breach of that purported obligation.

[24] **Judgment** Amount of recovery

The entry of a default judgment in an amount in excess of that demanded in the complaint is prohibited. West's Ann.Cal.C.C.P. § 580.

2 Cases that cite this headnote

[25] **Damages** Notice to defendant

Death Damages

A statement of damages cannot be relied upon to establish plaintiff's monetary damages, except in cases of personal injury or wrongful death.

1 Cases that cite this headnote

[26] **Damages** Notice to defendant

Death Damages

Judgment Amount of recovery

Statements of damages are used only in personal injury and wrongful death; in all other cases, when recovering damages in a default judgment, the plaintiff is limited to the damages specified in the complaint.

8 Cases that cite this headnote

[27] **Appeal and Error** Modification as to Amount or Extent of Recovery

Ordinarily when a judgment is vacated on the ground the damages awarded exceeded those pled, the appropriate action is to modify the judgment to the maximum amount warranted by the complaint.

2 Cases that cite this headnote

[28] **Damages** Nature and form of proceeding

Lender who obtained default judgment against defendants failed to provide sufficient evidence to "prove-up" his entitlement to any damages; lender's prove-up evidence consisted of nothing more than his own conclusory demand for $5 million dollars from each defendant, which bore absolutely no relationship to the allegations of his complaint, and unintelligible sheaf of documents offered by lender's counsel, who claimed to have earlier transmitted the documents to defendants' counsel, were unsupported by any foundation suggesting how, when, or by whom they were created and consequently were useless as evidence. West's Ann.Cal.C.C.P. § 585.

3 Cases that cite this headnote

[29] **Judgment** Amount of recovery

Judgment Entry of judgment in general

Where the plaintiff's complaint seeks compensatory damages only, in a sum certain which is readily ascertainable from the allegations of the complaint or statement of damages, the clerk may enter the default judgment for that amount. West's Ann.Cal.C.C.P. § 585.

3 Cases that cite this headnote

[30] **Judgment** Entry of judgment in general

A clerk's judgment is appropriate in a default judgment action only in cases where the determination of damages is a purely ministerial act, or where there is some definite, fixed amount of damages or where such may be ascertained by computation made by the clerk; if evidence must be taken to establish the amount due, the clerk may not render judgment. West's Ann.Cal.C.C.P. § 585.

3 Cases that cite this headnote

[31] **Judgment** Entry of judgment in general

If the relief requested in the complaint consists of either nonmonetary relief or monetary relief in amounts which require either an accounting, additional evidence, or the exercise of judgment to ascertain, such as emotional distress damages, pain and suffering, or punitive damages, the plaintiff must request entry of judgment by the court, rather than by the clerk, following a default; in such cases, the plaintiff must affirmatively establish his entitlement to the specific judgment requested. West's Ann.Cal.C.C.P. § 585.

3 Cases that cite this headnote

[32] **Appeal and Error** Judgment by default

On appeal, a defendant may challenge the sufficiency of the evidence offered to support the default judgment. West's Ann.Cal.C.C.P. § 585.

6 Cases that cite this headnote

[33] **Damages** Nature and form of proceeding

Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed. West's Ann.Cal.C.C.P. § 585.

9 Cases that cite this headnote

[34] **Appeal and Error** Judgment by default

Appeal and Error Damages in General

The general rule that sufficiency of the evidence tendered in a default proceeding cannot be reviewed on an appeal from a default judgment applies only as to matters for which no proof is required by virtue of the admission by default of the allegations of the complaint; as to damages which, despite default, require proof, the general rule does not apply.

8 Cases that cite this headnote

[35] **New Trial** Verdict Contrary to Evidence

New Trial Power and duty of court in general

When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence.

8 Cases that cite this headnote

[36] **Appeal and Error** Directing Judgment in Lower Court

Where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper.

7 Cases that cite this headnote

[37] **Evidence** Records and decisions in other actions or proceedings

Court of Appeal would take judicial notice of earlier brief filed by appellee's counsel in a different action when considering sanctions for counsel's request of extension of time to file his respondent's brief in current appeal.

3 Cases that cite this headnote

[38] **Attorneys and Legal Services** Grounds for Imposition

Not every violation of the rules governing requests for extension of time rises to the level of sanctionable conduct. California Rules of Court, Rules 8.63, 8.212(b)(3).

[39] **Attorneys and Legal Services** Other particular conduct

Counsel's request for extension of time to file respondent's brief on appeal was unreasonable and warranted sanctions against counsel; counsel subsequently filed what was essentially a copy of a brief he filed in an earlier case, and brief did not address any of the "complex" issues actually raised on appeal, such that its preparation could not have claimed any significant amount of his time. California Rules of Court, Rules 8.63(b)(4), 8.212(b)(3)(A).

3 Cases that cite this headnote

[40] **Appeal and Error** Form and requisites in general

Respondent's brief violated Rule of Court specifying the required contents of the brief; brief, which was nearly word-for-word copied from a brief filed in another action, included a separately-captioned argument asserting that the appeal was frivolous and seeking sanctions, but did not discuss either the facts of the case or the law pertaining to sanctions, brief included a separately-captioned argument asserting that appellants had "falsely argue[d] the case" but did not include any meaningful analysis to justify that accusation, and comparison of two brief indicated that counsel constructed that argument by simply redacting the facts recited in the earlier brief, and reproducing the rhetoric without any reference to anything that actually happened in the current action. Cal.Rules of Court, Rule 8.204(a)(1).

[41] **Attorneys and Legal Services** Monetary sanctions; costs

Respondent's counsel's violation of Rules of Court regarding extension of time to file a respondent's brief and the contents of that brief warranted $10,000 sanction against counsel, where counsel requested extension of time due to the "complex" issues involved on appeal, but then filed brief which was nearly identical to an earlier brief filed in another action, and brief did not include any meaningful analysis or discussion of why the appeal was frivolous but rather contained mere boilerplate language. California Rules of Court, Rules 8.63(b)(4), 8.204(a)(1), 8.212(b)(3)(A).

See Cal. Jur. 3d, Appellate Review, § 494; Cal. Civil Practice (Thomson Reuters 2011) Procedure, §§ 35:25, 40:4, 40:15; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 9:161 (CACIVAPP Ch. 9-C); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 714, 715.

3 Cases that cite this headnote

Attorneys and Law Firms

****778** Murphy, Pearson, Bradley & Feeney, San Francisco, Aaron K. McClellan, James F. Monagle and Tanis J. Leuthold for Defendants and Appellants.

Law Offices of Timothy J. Donahue, Irvine, and Timothy J. Donahue; John Park Yasuda, for Plaintiff and Respondent.

OPINION

BEDSWORTH, Acting P.J.

***271** We reluctantly return in this case to the question of default judgments with a cautionary ****779** tale—well, three actually. The first is a tale for plaintiff's attorneys, who may assume a defendant's default is an unalloyed gift: an opportunity to obtain a big judgment with no significant effort. It is not. Instead, when a defendant fails to timely respond to the complaint, the first thing plaintiff's counsel should do (after offering an extension of time to respond) [1] is review the complaint with care, to ascertain whether it supports the specific judgment the client seeks. If not, a motion to ***272** amend is in order. In this case, counsel for plaintiff Gil Kim failed to do that. Instead, he simply asked the court to enter defendants' defaults on the complaint as initially

alleged. Unfortunately for Kim, the factual allegations of that complaint do not support any judgment in his favor.

And even when the allegations of a complaint do support the judgment a plaintiff seeks, he is not automatically entitled to entry of that judgment by the court, simply because the defendant defaulted. Instead, it is incumbent upon the plaintiff to *prove up* his damages, with actual evidence. It is wholly insufficient to simply declare, as Kim did here, that defendants' breach of one or more promissory notes "caused [him] tremendous financial loss," and that a judgment of "$5 million against each defendant, for a total of $30 million ... would be a reasonable sum." That evidence may establish the amount Kim *feels* entitled to recover, but it fails utterly to demonstrate what he is *legally* entitled to recover. Kim's failure to offer any significant evidence to support his damage claims precludes any monetary judgment in his favor.

We consequently reverse the default judgment entered in Kim's favor, and remand the case to the trial court with directions to enter judgment in defendants' favor.

The second cautionary tale is for trial courts. And it is not the first time we have told this tale. As we previously explained in *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695, "[i]t is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. That role requires the court to analyze the complaint for itself—with guidance from counsel if necessary—ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another. The court must then compare the properly pled damages for each defaulting party with the evidence offered in the prove-up." Unfortunately, the trial court in this case seems not to have done that, and instead simply gave Kim what he asked for—which in this case was $30 million. Even more unfortunately, this trial court is certainly not alone in doing so, even since *Heidary* was published. (See, e.g., *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 36 Cal.Rptr.3d 663 [$8 million in compensatory damages awarded on a complaint alleging ****780** $50,000 in damages].) We need to shore this up. The ***273** court's role in the process of entering a default judgment is a serious, substantive, and often complicated one, and it must be treated as such.

[1] And third, this case is a cautionary tale for appellate counsel. Those who practice before this court are expected to comport themselves honestly, ethically, professionally and with courtesy toward opposing counsel. The fact a respondent has no obligation to file a brief at all, in no way excuses his counsel's misconduct if he chooses to do so. The conduct of Timothy J. Donahue, Kim's counsel herein, which included seeking an extension of time to file his brief under false pretenses, and then filing a brief which was not just boilerplate, but a virtual copy of a brief for another case—including a *boilerplate accusation of misconduct* against appellants' counsel and a *boilerplate request for sanctions* based on a purportedly "frivolous" appeal—will not be countenanced. Donahue's response to this court's notice, informing him that we were contemplating the imposition of sanctions on our own motion, was both truculent and dismissive, going so far as to assert that we must have issued the notice in error. We did not. Nor did we appreciate him responding to our order that he appear to address possible sanctions against him by sending in his stead an attorney who had not been informed sanctions were being considered, and knew nothing about our order. Donahue's conduct on appeal was inappropriate in nearly every respect, and we hereby sanction him in the amount of $10,000.

FACTS

Gil Kim's unverified complaint, filed March 25, 2009, alleges defendants Matt Jennings and Rob Jennings are "sophisticated businessmen, licensed investment brokers and/or experienced in selling investments to the general public." It further alleges that "[o]ver the last several years," the Messrs. Jennings "opened up and formed several companies and businesses," including Westmoore Partners, Inc., Honolulu Harry's, Inc., Westmoore Capital, Inc., and Temecula Harry's Pacific Grill, LLC,each of which is also named as a defendant.

According to the complaint, the two Jenningses "would mix, mingle and shuffle money between the different companies, close one and open another one. This was designed to hide assets and evade potential creditors."

All six defendants were allegedly "jointly involved in, owned and operated a global multi-level marketing business, and ... sought investment money from plaintiff." Although Kim

initially thought defendants were "honest, reputable and forthright," he learned only "within the last year," after defendants had "taken" his money, that this was untrue.

***274** Allegedly, defendants initially borrowed only "a little bit of money" from Kim, and promised a substantial return. And in fact, Kim acknowledges that "[i]n the beginning, defendants paid a substantial return," although he asserts they did so "as bait, to entice [him] to loan more money." This alleged enticement was apparently effective, as Kim asserts he did loan defendants more money, again relying upon their promise "to repay the loans with a substantial return."

Defendants then allegedly enticed Kim to once again lend them even more money, "by informing [him] that they really didn't need his money." Then, in August of 2006, Matt and Rob Jennings, acting on behalf of the other defendants, allegedly promised to make monthly payments, in the amount of $13,020.85, on an office building owned by Kim, in exchange for ****781** Kim's investment of $1.25 million. However, according to Kim, defendants "had no intention of repaying the loan."

Kim attaches to his complaint, and incorporates by reference, seven promissory notes which reflect defendants' alleged indebtedness to him. He asserts that within the last year, defendants have each "acknowledged responsibility to pay on the seven notes, and have promised to pay [him]." However, "defendants have never followed through on [the] promises and the money remains outstanding."

The first promissory note reflects that on February 28, 2003, Westmoore Partners, Inc., promised to pay Kim $25,000, on the maturity date of March 28, 2003—only 30 days later. Interest payments of $750 per month were due on the 28th of each month, starting on February 28, 2003. It provides that a default occurs if Westmoore Partners fails to pay the principal and interest on the maturity date.

The second promissory note reflects that on May 29, 2003, Westmoore Partners, Inc., promised to pay Kim $25,000, on the maturity date of December 29, 2003—only seven months later. Interest payments of $750 were due on the 29th of each month, "starting February 28, 2003."[2] It provides that a default occurs if Westmoore Partners fails to pay the principal and interest on the maturity date.

The third promissory note reflects that on June 10, 2003, Honolulu Harry's, Inc., promised to pay Kim $50,000, on the maturity date of August 10, 2003—two months later. Interest payments of $1,500 per month were due on the 10th of each month, starting on July 10, 2003. It provides that a default occurs if Honolulu Harry's, Inc., fails to pay the principal and interest on the maturity date.

***275** The fourth promissory note reflects that on August 6, 2003, Matt Jennings promised to pay Kim $78,750, on or before October 6, 2003—two months later. The note further specifies that the funds are "immediately due and payable" upon sale of a specified piece of real property owned by Matt Jennings. This note does not specify an interest rate, but includes "closing costs" of 5 percent as part of the principal amount due, and provides for interest of 19 percent per annum in the event of default in the payment of principal when due.

The fifth promissory note reflects that on July 27, 2005, Westmoore Capital, Inc., promised to pay Kim $60,000, on the maturity date of July 27, 2006—one year later. Interest payments of $2,000 were due on the 27th of each month, starting on July 27, 2005.[3] It provides that a default occurs if Westmoore Capital fails to pay the principal and interest on the maturity date.

The sixth promissory note reflects that on July 27, 2005, Westmoore Capital, Inc., *also* promised to pay Kim $100,000, on the maturity date of July 27, 2006—again, one year later. Interest payments of $2,000 were due on the 27th of each month, starting on July 27, 2005. It provides that a ****782** default occurs if Westmoore Capital fails to pay the principal and interest on the maturity date.

Nowhere does Kim allege that the maturity dates of any of these first six promissory notes were ever extended, either orally or in writing. By their terms, each required full payment of the indebtedness on dates between March of 2003 and July of 2006, inclusive—meaning the latest note was to be fully performed nearly three years prior to the filing of Kim's complaint.

The seventh promissory note reflects that on August 16, 2006, Temecula Harry's Pacific Grill, LLC, promised to pay Kim $1.25 million on the "maturity date," which is defined as being "at such time as Harry's Pacific Grill restaurant located in Temecula, CA and owned and operated by [Temecula Harry's Pacific Grill] is sold or substantially all of its assets are transferred, except for any transfer or sale to Westmoore Capital Group, LLC or any other Westmoore affiliated entity." Pending the maturity date, Temecula Harry's is obligated to

pay interest at a rate of 12.5 percent per annum on the 15th of each month, but—remarkably—only so long as it has the "cash available" to do so. ***276** Also of note, any interest which is not paid when due "shall accrue and will be payable at such time as the Company has sufficient funds to pay any interest which is in arrears."

As additional consideration for this seventh promissory note, Kim was also entitled to "a prorated portion of 80% of the annual net income from the operation of the Temecula restaurant ... in excess of $470,000," until such time as either Kim converted some or all of his loan into "membership interests" in Temecula Harry's Pacific Grill, or the loan principal was repaid. Finally, this seventh promissory note includes a provision specifying that it reflects the entire agreement between the parties with respect to the subject matter, supersedes all prior agreements and understandings, and cannot be amended except by signed written agreement.

While it is somewhat inconsistent with the conclusory allegation that defendants had no intention of repaying him, Kim also alleges that until approximately one year prior to the filing of the complaint (i.e., until Mar. of 2008), defendants did comply with their loan obligations. However, they allegedly stopped doing so "within the last year." With respect to defendants' alleged obligation to make monthly payments of $13,020.85, on an office building he owned, Kim specifically asserts that "as of January 2009, defendants were behind, by more than $78,125," a number which equates to six months of arrearages. Finally, Kim alleges that although he requested defendants disclose "where the investments were placed," they refused to specify, and refused to account for the money.

Kim's first cause of action is for breach of contract. In support of this claim, he incorporates all of his factual allegations, and further alleges that defendants "by their actions, payments, statements and signatures," became obligated to perform under the promissory notes attached as exhibit No. 1, and that "[a]fter making some payments, and agreeing to make further payments, defendants breached the contract ... and said breach occurred within the last one year." As a result of the breach, he "suffered loss and harm."

Kim's second cause of action is for negligent misrepresentation and, in support of that cause of action, he incorporates all prior allegations, and further alleges "[d]efendants had a special relationship with [him]" and they undertook a duty to exercise due and reasonable care in "advising and speaking to [him]." Defendants allegedly ****783** breached that duty by "unreasonably and improperly fail[ing] to warn [him]" and "improperly advis[ing him.]" Kim alleges that he was harmed by these breaches and "reserves the right to perform discovery, and prove the extent and amount of damages caused by defendants."

***277** Kim's third cause of action is for professional negligence and, in support of that cause of action, he incorporates all prior allegations, and further alleges that at all relevant times, defendants were "acting as investment brokers," and made numerous representations to him that he relied upon. He also alleges defendants "concealed material facts and material information from [him]," despite having "the ability to disclose true information." He asserts defendants acted unreasonably in failing to disclose true information. He alleges that he was "misled and relied upon the lack of full disclosure," and suffered consequent "loss and harm." He again reserves the right to "perform discovery, and present evidence of the full extent of loss and harm."

Kim's fourth cause of action is for conversion, and states, without explanation, that it is alleged "in the alternative." In support of that claim, Kim incorporates all prior allegations, and alleges additionally that "[i]nstead of using [Kim's] money as agreed for business purposes, defendants took the money, squandered the money, enjoyed the money and used the money for their own personal pleasure." Kim asserts defendants "formed the intent to misuse the money and to spend it, [and they] knew that their use of [his] money ... was improper, unauthorized and unlawful." He alleges that defendants' conduct was "willful, wanton, malicious, oppressive and fraudulent," and claims an entitlement to punitive damages. Conversion is the only cause of action for which Kim seeks punitive damages.

Kim's final cause of action is for "unfair business practices."[4] In addition to incorporating all prior allegations, it is supported with additional allegations that defendants "are licensed investment brokers" and he is a "consumer and member of the general public." Defendants are alleged to "have violated Business and Professions Code section 17200," and to have "taken [his] money and wasted it, spent it and enjoyed it, for their own personal benefit." He alleges defendants "took advantage of [him], tricked [him] and fooled [him.]"

[2] Kim's complaint specifies no amount of damages or harm caused to him by defendants' alleged actions, other than

the failure to pay $13,020.85 per month, starting sometime in 2008, which amounted to an alleged debt of "more than $78,125" by January of 2009. However, when Kim served defendants with the complaint, on May 11, 2009, he also served each with a formal "Statement of Damages," which recites that it is for "personal injury or wrongful death," and which claims that Kim had suffered special damages consisting of "property damage" of $500,000, "unpaid fees" of $1.5 million, and "loan payments" of $2 million. Only the "loan payments" claim is ***278** consistent with the facts pleaded by Kim in his complaint.[5] ****784** The complaint includes no allegation of either property damage or unpaid fees of any kind. The statements also reflected that Kim reserved the right to seek punitive damages of $5 million against each defendant.[6]

Defendants did not timely respond to Kim's complaint. Kim requested and obtained entry of their defaults on August 13, 2009.

On November 19, 2009, defendants Westmoore Partners, Inc., Westmoore Capital, Inc., and Matt Jennings moved to set aside the defaults entered against them.[7] In support of their motions, these defendants asserted that at the time Kim commenced his lawsuit, Matt Jennings—who was also the president of both Westmoore entities, "was undergoing incredible financial and emotional hardships due to the current economic downturn ... [and] was in near financial ruin and on the verge of filing for bankruptcy." The "extreme personal stress" this imposed on Jennings "caused him to be dilatory in engaging in [Kim's] lawsuit," and made dealing with it "an overwhelming impossibility, especially because at the time that [Kim] filed his Complaint, Jennings did not have the resources to hire legal counsel." However, these defendants asserted that "[i]n recent months," Jennings's health and financial outlook had "drastically improved," such that he had been able to hire legal counsel, and wished to defend the lawsuit.

Kim opposed the motion to vacate, and the court denied it. In its ruling, the court explained that the motion failed to cite a statutory basis for the relief, but it appeared relief could be available only on the basis of excusable neglect. The court felt Matt Jennings's declaration did "not sufficiently establish that [he] was ill, or even under a doctor's care at any point, such that he could not have avoided default through the exercise of ordinary care."

***279** Kim thereafter filed two separate requests for entry of a default judgment, each of which was rejected by the clerk due to inconsistent or incomplete paperwork. However, Kim's third attempt to secure a default judgment from the court was successful.

In support of that third attempt, Kim provided the court with the six statements of damages he served on defendants along with the complaint. Although each of those statements of damages set forth claims totaling $9 million, including punitive damages, Kim requested a judgment of only $5 million against each defendant, "for a total of $30 million." Kim made no effort to correlate that amount to any particular claim or promissory note, or even to explain the extent to which it represented compensatory and punitive damages. Instead, Kim's declaration simply stated that "[c]onsistent with the statement of ****785** damages, each defendant owes me at least $5 million." He goes on to explain that a judgment of $5 million against each defendant, for a total of $30 million, "would not be an excessive sum. [It] would be a reasonable sum, if they ever paid it. It would compensate me for some of the devastation caused by these defendants." And that is all it says. Otherwise, Kim merely states that "[his] attorney Mr. Donahue submits a declaration with Exhibit 1, dated October 26, 2009" and that he "concur[s] with that declaration and its contents are incorporate[d] herein by reference as those [*sic*] set forth at length."

Donahue's declaration, in turn, explains nothing about the damages incurred by Kim. Instead, it merely references the attached "Exhibit 1," which Donahue describes as "documentation regarding the damages" and "information" he "e-mailed to [defendants' counsel] on September 23, 2009."[8] Those documents consist of several pages of accounts, some of which consist solely of numbers, and others of which list dates and monetary sums, with references to "Maplewood," "Gil Kim" "Judy Kim," "LV Waterford Castle," and "Brigadoon rent." None of those references seems to correlate to any of the promissory notes appended to the complaint, and none of them is explained in any declaration. We have no evidence demonstrating who prepared the accounts, or when. In short, these documents are entirely unintelligible, and useless as evidence.

Kim filed this third prove-up package with the court on June 25, 2010. On July 19, the matter was assigned to a new judge. On July 21, that judge signed the judgment proposed by Kim, without any changes. The document states that "[j]udgment is hereby ordered in favor of plaintiff Gil Kim, and against each

individual defendant listed below, in the single sum of ***280** $5,000,000, plus costs of suit in the amount of $804.40, for the total sum of $5,000,804.40." It then lists the names of all six defendants. [9]

I

[3] Appellants Matt Jennings, Westmoore Partners, Inc., and Westmoore Capital, Inc. (collectively "the Westmoore defendants"), first challenge the court's denial of their motion to set aside the defaults entered against them. They rely upon the public policy favoring disposition of cases on their merits, and argue the court abused its discretion in ****786** denying them relief in this case. The Westmoore defendants argue because they moved for relief from the default promptly, and offered sufficient evidence of a reasonable excuse to justify that relief, the court was obligated to grant it.

We are not persuaded. First, as to the issue of promptness, the Westmoore defendants argue their motion was filed "within three weeks" of learning about the default, "as [they] did not receive Notice of Entry of Default from Plaintiff and it wasn't until Plaintiff filed his request for entry of judgment on October 26, 2009 ... that [they] were made aware that default had been entered." But that claim, whether accurate or not, is not supported by the record. The declaration of Matt Jennings, which was the sole evidentiary support for the motion to set aside the defaults, contains no assertion that he did not receive notice of the entry of default. The trial court was consequently free to presume the Westmoore defendants actually received the notice of entry of default in August of 2009 and waited over three months (rather than three weeks) to do anything about it. While such a delay does not preclude relief, neither does it demonstrate particular promptness.

More significantly, Jennings's declaration, notable primarily for its brevity, amounts to nothing more than a conclusory assertion his "anxiety, ***281** depression, and financial hardships" caused the Westmoore defendants to be "dilatory in answering [the] lawsuit." He offers no *evidentiary* facts about either his emotional or financial state, which the court might have been able to assess in determining whether his failure to respond was actually excusable in the circumstances. As such, the declaration was insufficient to support relief. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1018, 118 Cal.Rptr.3d 834 [a declaration consisting of only a recitation of legal conclusions and ultimate facts, without any evidentiary facts, was insufficient to establish a triable issue of fact to defeat summary judgment]; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 640, 222 Cal.Rptr. 293 [declarations containing "general and vague charges" do not qualify as "competent or credible evidence."].)

The trial court focused on this very issue in its order denying relief, noting that "[t]he declaration does not sufficiently establish that [Matt Jennings] was ill, or even under a doctor's care at any point, such that he could not have avoided default through the exercise of ordinary care." On the record before us, we cannot say the trial court erred in that conclusion.

II

Next, all six appellants argue that even if the entry of their defaults was valid, the default judgment must nonetheless be reversed. On this point, they fare substantially better.

[4] We begin with the basic guidelines for analyzing the legal effect of a default. "Substantively, '[t]he *judgment by default* is said to "confess" the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of *the matters well pleaded in the complaint.*" (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823, 59 Cal.Rptr.3d 1, second italics added.) The "well-pleaded allegations" of a complaint refer to " ' "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." ' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, 40 Cal.Rptr.3d 205, 129 P.3d 394, quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 487 P.2d 1241.)

****787** **[5]** **[6]** **[7]** **[8]** Because the default *confesses* those properly pleaded facts, a plaintiff has no responsibility to provide the court with sufficient evidence to prove them —they are treated as true for purposes of obtaining a default judgment. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1746, 33 Cal.Rptr.2d 391.) But that is all the default does. There is no penalty for defaulting. "A defendant has the right to elect not to answer the complaint. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829 [231 Cal.Rptr. 220, 726 P.2d 1295].) ***282** Although this may have been a tactical move by defendant, it is a permissible tactic." (*Stein v.York* (2010) 181 Cal.App.4th 320, 325, 105 Cal.Rptr.3d 1.)

[9] **[10]** **[11]** And if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff's favor cannot stand. On appeal from the default judgment, "[a]n objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered." see (*Martin v. Lawrence* (1909) 156 Cal. 191, 103 P. 913; *Bristol Convalescent Hosp. v. Stone* (1968) 258 Cal.App.2d 848, 859, 66 Cal.Rptr. 404.) Moreover, "[w]hen considering the legal effect of those facts, we disregard any erroneous or confusing labels employed by the plaintiff." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 564, 71 Cal.Rptr.2d 625, citing *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908, 274 Cal.Rptr. 186.)

[12] In this case, a review of Kim's complaint reveals it does not set forth any valid cause of action. Although Kim purports to state several different causes of action, the gravamen of his complaint is breach of contract. He alleges defendants, acting in concert, entered into various agreements with him to borrow increasing sums of money over a period of time, promising him substantial returns, but then breached their repayment obligations within the year prior to the filing of his complaint.

[13] **[14]** In support of that claim, Kim incorporates by reference seven written promissory notes which reflect defendants' alleged indebtedness to him. And that is where the trouble begins. When a plaintiff attaches a written agreement to his complaint, and incorporates it by reference into his cause of action, the terms of that written agreement take precedence over any contradictory allegations in the body of the complaint. "If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447, 104 Cal.Rptr.2d 239, citing *Mead v. Sanwa Bank California, supra,* 61 Cal.App.4th 561, 567–568, 71 Cal.Rptr.2d 625.)

Here, the first six of the seven promissory notes Kim incorporated into his complaint specify that defendants were obligated to repay the subject debt, in full, on dates *between three and six years prior to the date he filed his complaint,* and nowhere does Kim allege that the maturity dates for any of those obligations were ever extended. Consequently, those first six promissory notes could not, by their terms, have been breached within a year prior to Kim's filing of the complaint. They were breached—if at all—years earlier. The complaint therefore states no cause of action for breach of those first six promissory notes.

***283** The seventh promissory note, in the amount of $1.25 million, fares no better as a basis for Kim's breach of contract claim. Although that agreement *could* have been breached within the year prior to Kim's filing of his complaint, he alleges no facts demonstrating that it actually was. By its terms, the seventh promissory note requires ****788** payment of the principal amount only when "Harry's Pacific Grill restaurant located in Temecula, CA and owned and operated by [Temecula Harry's Pacific Grill] is sold or substantially all of its assets are transferred...." Kim does not allege that ever happened.

Pending that maturity date, the seventh promissory note required payment of interest at a rate of 12.5 percent per annum on the 15th of each month, *but only so long as defendant Temecula Harry's Pacific Grill had the "cash available" to do so.* And any interest which is not paid when due would "accrue and will be payable at such time as [Temecula Harry's Pacific Grill] has sufficient funds to pay any interest which is in arrears." Kim did not allege that Temecula Harry's ever had the "cash available" to make those interest payments or "sufficient funds" to pay interest arrearages. Consequently, he had not alleged any facts demonstrating a breach of this promissory note.

[15] What Kim does allege is that, in exchange for his loan of $1.25 million, defendants promised to make his loan payments on a commercial property. He claims they breached the agreement when they stopped making those loan payments. That allegation, being entirely inconsistent with the terms of the seventh promissory note, must be disregarded as a basis for establishing its breach, especially given that the promissory note includes a provision specifying that it reflects the entire agreement between the parties with respect to the subject matter, that it supersedes all prior agreements and understandings, and that it cannot be amended except by signed written agreement.

In short, Kim has alleged no facts establishing any defendant breached the terms of any of the promissory notes he attaches to his complaint, and his complaint thus fails to state a cause of action for breach of contract.

[16] Kim's next cause of action is for negligent misrepresentation, stated in terms which are entirely conclusory. Kim alleges that defendants "advised him on what to do and how to proceed," and "recommend[ed] investments and loan strategies to [him.]" They allegedly breached their

duty of due care "in addressing, advising and speaking to [him] ... [¶] ... by failing to properly advise him." If we ignore the " ' "contentions, deductions or conclusions of fact or law ... [citation] " ' " contained in this purported cause of action (*Evans v. City of Berkeley, supra,* 38 Cal.4th at p. 6, 40 Cal.Rptr.3d 205, 129 P.3d 394), there is simply nothing left. Specifically, Kim fails to allege what factual representations were made to him or any facts suggesting that reasonable persons in ***284** defendants' position should have known those representations were untrue at the time they made them. Consequently, no cause of action is stated.

[17] Kim's third cause of action, for "professional negligence" fails because its key allegation—that "[a]t all times herein, defendants were acting as investment brokers"—is squarely contradicted by the terms of the promissory notes he incorporated into the complaint. Those promissory notes make clear that defendants were not "brokering" any investments. (See *UFITEC, S.A. v. Carter* (1977) 20 Cal.3d 238, 244, 142 Cal.Rptr. 279, 571 P.2d 990, italics added [noting the definition of a securities broker is a "person engaged in the business of effecting transactions in securities *for the account of others*"]; Bus. & Prof.Code, § 10131, italics added [defining a real estate broker as one who "does or negotiates to do one or more ... acts *for another or others.*"].) Instead, the promissory notes unambiguously establish that the relationship between Kim and defendants ****789** was simply one of creditor-debtors.

[18] **[19]** **[20]** **[21]** Kim's fourth cause of action for conversion, fails because the simple failure to pay money owed does not constitute conversion. A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him. " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]' (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491 [49 Cal.Rptr.3d 227]; see *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681 [117 P.2d 331]; *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072–1074 [58 Cal.Rptr.2d 213] [sales agent liable for conversion of proceeds from consignment sale of farm products]; *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 485 [56 Cal.Rptr.2d 756] ['money cannot be the subject of a conversion action unless a specific sum capable of identification is involved.'].) A 'generalized claim for money [is] not actionable as conversion.' (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235 [68 Cal.Rptr.2d 31]; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 703, pp. 1026–1027.) [¶] ... [¶] California cases permitting an action for conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others. (See, e.g., *Haigler v. Donnelly, supra,* 18 Cal.2d at p. 681 [117 P.2d 331] [real estate broker]; *Fischer v. Machado, supra,* 50 Cal.App.4th at pp. 1072–1074 [58 Cal.Rptr.2d 213] [sales agent for consigned farm products]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [124 Cal.Rptr. 297] [attorney's claim for $6,750 fees from proceeds of settlement subject to lien]; *Watson v. Stockton Morris Plan Co.* (1939) 34 Cal.App.2d 393, 403 [93 P.2d 855] [savings and loan issued duplicate passbook and delivered funds to third party].)" (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395–396, 58 Cal.Rptr.3d 516; see also, *Software Design & Application, Ltd. v. Hoefer & Arnett,* ***285** *Inc., supra,* 49 Cal.App.4th at p. 485, 56 Cal.Rptr.2d 756 [no claim for conversion is stated where money was allegedly misappropriated "over time, in various sums, without any indication that it was held in trust for" plaintiff]; *McKell v. Washington Mutual, Inc., supra,* 142 Cal.App.4th at pp. 1491–1492, 49 Cal.Rptr.3d 227 [bank's practice of overcharging customers for third-party fees, and retaining the difference, did not constitute a conversion of customers' funds, since the bank had not violated any duty to distribute the disputed funds to the third parties].)

In this case, Kim did not allege he entrusted funds to defendants for a specific purpose, and the promissory notes he incorporated into the complaint demonstrate beyond dispute that this case actually involves a simple creditor-debtor relationship, in which defendants are alleged to have violated their obligations to repay the subject debts. Those facts do not constitute a claim defendants interfered with Kim's possession of a specific, identifiable sum of money. Thus, no cause of action for conversion was stated.

[22] Finally, Kim has also failed to state a valid cause of action for "unfair business practices." What he asserts as the basis of this purported claim is that "[d]efendants are licensed investment brokers" and "have violated Business [and] Professions Code section 17200." However, ****790** Business and Professions Code section 17200 does not actually prohibit any conduct. It is merely definitional. [10] No cause of action can be stated for violating a statutory

definition. An action for unfair competition must refer to one of the sections *following* Business and Professions Code section 17200.

Kim alleges that defendants "have engaged in wrongful, improper, illegal and unreasonable business practices," have "taken [his] money and wasted it, spent it and enjoyed it, for their own personal benefit," and have "[taken] advantage of [him]," "tricked [him]," and "fooled [him.]" These allegations are entirely vague, conclusory, and do not amount to any cognizable claim. Moreover, Kim alleged no facts which would support his implied assertion defendants were prohibited from doing whatever they wanted with the money he loaned them. Their only obligation, as set forth in the promissory notes, was to pay the money back in accordance with the terms of those notes. Their alleged failure to do that does not qualify as an "unfair business practice."

***286** Because Kim's complaint does not state any cognizable cause of action against defendants, it does not support any judgment in his favor.

III

[23] **[24]** But Kim's problems do not end there, because his complaint also fails to set forth any clear demand for damages, let alone one which would support the enormous judgment he obtained from the trial court. As this court has iterated and then reiterated, Code of Civil Procedure section 580 prohibits the entry of a default judgment in an amount in excess of that demanded in the complaint. (*Stein v. York* (2010) 181 Cal.App.4th 320, 105 Cal.Rptr.3d 1; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1173, 36 Cal.Rptr.3d 663; *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 206, fn. 4, 26 Cal.Rptr.3d 823.)

[25] **[26]** Moreover, we have also made it clear that a statement of damages cannot be relied upon to establish a plaintiff's monetary damages, except in cases of personal injury or wrongful death. "Statements of damages are used only in personal injury and wrongful death.... [Citation.] In all other cases, when recovering damages in a default judgment, the plaintiff is limited to the damages specified in the complaint. [Citations.]" (*Sole Energy Co. v. Hodges, supra,* 128 Cal.App.4th at p. 206, fn. 4, 26 Cal.Rptr.3d 823; see *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1173, 36 Cal.Rptr.3d 663; see also *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136–1137, 52 Cal.Rptr.3d 197.)

Here, the only damage numbers included in Kim's complaint are found in his allegation defendants defaulted on their obligations to make monthly payments on his commercial property, in consideration of his agreement to loan them $1.25 million. Kim alleges defendant's failure to do that caused him damages of "more than $78,125." However, as we have already explained, Kim's complaint states no valid claim for breach of that purported obligation, since it is inconsistent with the terms of the promissory note he incorporated into the complaint, which governs ****791** that particular loan. Consequently, Kim's complaint supports no award of damages at all.

[27] As explained in *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1743, 33 Cal.Rptr.2d 391, "Ordinarily when a judgment is vacated on the ground the damages awarded exceeded those pled, the appropriate action is to modify the judgment to the maximum amount warranted by the complaint." (See also *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 3 Cal.Rptr.3d 604.) In this case, that maximum is zero.

IV

[28] And finally, even if Kim's complaint were sufficient to support a judgment in his favor, he would still be facing reversal of that judgment on appeal, ***287** because he failed to provide the court with sufficient evidence to "prove up" his entitlement to any damages.

[29] **[30]** Code of Civil Procedure section 585 sets forth the two options for obtaining a default judgment. First, where the plaintiff's complaint seeks compensatory damages only, in a sum certain which is readily ascertainable from the allegations of the complaint or statement of damages, the clerk may enter the default judgment for that amount. (Code Civ. Proc., § 585, subd. (a).) A clerk's judgment is appropriate only in cases where the determination of damages is a purely ministerial act, i.e., where there is "some definite, fixed amount of damages or where such may be ascertained by computation made by the clerk. If evidence must be taken to establish the amount due ..., the clerk may not render judgment." (*Ford v. Superior Court* (1973) 34 Cal.App.3d 338, 342, 109 Cal.Rptr. 844.)

[31] However, if the relief requested in the complaint is more complicated than that, consisting of either nonmonetary relief, or monetary relief in amounts which require either an accounting, additional evidence, or the exercise of judgment to ascertain (such as emotional distress damages, pain and suffering, or punitive damages), the plaintiff must request entry of judgment by the court. (Code Civ. Proc., § 585, subd. (b).) In such cases, the plaintiff must affirmatively establish his entitlement to the specific judgment requested. "The court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, *as appears by the evidence to be just.* If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. If the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved, by a reference as above provided." (*Ibid.,* italics added.)

And while Code of Civil Procedure section 585 does give the court discretion to "permit the use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in those cases," it specifically requires that "[t]he facts stated in the affidavit or affidavits shall be within the personal knowledge of the affiant and *shall be set forth with particularity,* and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." (Code Civ. Proc., § 585, subd. (d), italics added.)

****792** In this case, that did not happen. Instead, as we have already explained, Kim's prove-up evidence consisted of nothing more than his own conclusory ***288** demand for $5 million dollars from each defendant—a demand that bore absolutely no relationship to the allegations of his complaint. Additionally, Kim's counsel offered the court a sheaf of documents which he claimed to have transmitted to opposing counsel at some earlier point. Those documents were not only unintelligible, but also unsupported by any foundation suggesting how, when, or by whom they were created. They were consequently useless as evidence.

[32] **[33]** On appeal, defendant may challenge the sufficiency of the evidence offered to support the default judgment. "Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed." (*Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302, 232 Cal.Rptr. 758, citing Code Civ. Proc., § 585; *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560, 33 Cal.Rptr. 415.)

[34] Although some cases have recited a "general rule that sufficiency of the evidence [tendered in a default proceeding] cannot be reviewed on an appeal from a default judgment" (e.g., *Uva v. Evans* (1978) 83 Cal.App.3d 356, 363, 147 Cal.Rptr. 795), that rule applies only "as to matters for which no proof is required by virtue of the admission by default of the allegations of the complaint." (*Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.) "However, as to damages which, despite default, require proof the general rule does not apply." (*Ibid.*)

Indeed, the *Uva* court itself departs from the so-called general rule in concluding that defendants can challenge the sufficiency of the evidence to support the damage award in that case. As explained by the court, such a challenge is proper because "the right to appellate review flows logically from the fact that damages must be proved in the trial court before the default judgment may be entered. ([Code Civ. Proc.,] § 585, subd. 2.) The requirement of proof of damages is meaningless if it can be fulfilled by any evidence, even evidence which results in a judgment prompted by 'passion, prejudice or corruption.' Yet without appellate review, such a judgment would stand.... While the role of the appellate court in reviewing damages is much more limited than that of the trial court reviewing a jury verdict, the policies which sanction such review are not dissimilar: just as the trial court need not sit idly by and watch injustice be done through an improper award by the jury, we know of no statutory or constitutional barrier which requires an appellate court to ignore gross injustice in the award of damages simply because the judgment was procured by way of default." (*Uva v. Evans, supra,* 83 Cal.App.3d at p. 364, 147 Cal.Rptr. 795, italics omitted; see also *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1150, 131 Cal.Rptr.2d 393 ["the issue of speculative damages is subject to review where, as here, the damages ***289** awarded are unsupported by sufficient evidence."]; *Finney v. Gomez, supra,* 111 Cal.App.4th at p. 547, 3 Cal.Rptr.3d 604.) [11]

****793** Appellants here have challenged the sufficiency of the evidence to support the damages awarded to Kim, and they were right to do so. Kim's effort to prove up his damages was

wholly insufficient to sustain any award of damages in his favor.

[35] **[36]** " 'When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence.... Certainly, where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper.' " (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919, 52 Cal.Rptr.3d 126, quoting *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661, 278 Cal.Rptr. 596; accord, *Avalon Pacific–Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 122 Cal.Rptr.3d 417; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833, 57 Cal.Rptr.3d 430.)

Based upon the foregoing authorities, appellants are entitled to entry of judgment in their favor.

V

After appellants' counsel filed their opening brief, Kim's counsel, Timothy J. Donahue, requested an extension of time to file his respondent's brief. In that request for extension, Donahue explained—under penalty of perjury—that additional time was required to file the brief because of the many "complex issues raised" by appellants and his "[n]eed [for] more time to research cases & finalize brief...." He also cited "other time commitments of counsel." The extension was granted.

[37] ***290** However, when Donahue filed his brief, it belied his claim that he had been engaged in any significant research in connection with this appeal, as well as his claim of needing any significant time to "finalize" his brief. In fact, Donahue's brief proved to be an almost verbatim duplicate of another brief he filed with this court in September of 2009, in the case of *Nguyen v. Castillo* (May 12, 2010, G041494) (nonpub. opn.). [12]

The earlier brief was filed in a case in which the appellant argued only that he had not received proper notice of the lawsuit, and sought relief from the default, and the ensuing judgment, solely on that basis. Unlike this appeal, the earlier one raised no objections to the substance of the judgment entered, or the sufficiency of the evidence to support it. Nonetheless, every case cited in Donahue's current brief was cited in that earlier brief. The lack of attention Donahue paid to his brief in this case can perhaps best be illustrated by two things: First, Donahue includes the assertion that "[t]he defendants in this case got more than actual notice. The defendants were personally familiar with the events *and the accident.*" This case, of course— ****794** unlike Donahue's earlier case—involved no "accident." And second, Donahue's signature on the brief in this case reflects he is acting on behalf of "Plaintiff/Respondent PABLO CASTILLO"—his client in the earlier case.

Equally disturbing, both briefs contain an *identical* accusation that appellants' counsel is guilty of "false[ly] arguing the case." In this case, that assertion—which seemingly amounts to an accusation that appellants' counsel engaged in professional misconduct, is backed up by precisely nothing. The six sentences which comprise the "false argument" section of the brief do not identify even one alleged falsehood.

Both briefs also contain an identical—and we mean *word-for-word identical*—assertion that the appeal is frivolous, and a request for sanctions in the amount of $20,000. [13] This assertion is utterly inconsistent with Donahue's prior contention, in his request for extension of time, that the issues raised by appellants in this case were "complex," and required significant time to research. *Frivolous* claims, by their nature, do not require significant research to rebut.

***291** After Donahue filed the boilerplate brief, appellants filed their request that this court take judicial notice of the earlier brief in the *Nguyen v. Castillo* case. After review of that brief, we issued a notice pursuant to California Rules of Court, rule 8.276, informing Donahue that we were considering the imposition of sanctions against him, for unreasonable violations of the California Rules of Court, rules 8.63 and 8.212(b)(3) (hereinafter "rule 8.63" and "rule 8.212(b)(3)," respectively), which govern requests for extensions of time, and rule 8.204(a)(1) (hereinafter "rule 8.204(a)(1)"), which governs the contents of briefs. [14]

Donahue filed a letter brief in response to our notice. In conclusory terms, he simply denied violating "any provision" cited in our notice. He then used the letter as a further opportunity to argue for sanctions *against appellants,* asserting that "[t]he appeal was obviously filed as a delay tactic," and inaccurately criticizing appellants' counsel for making "several mistakes in their brief." [15]

Donahue defended his decision to simply copy his brief from the earlier case, stating, "I have the right to modify my own work product," and summarizing his strategy as "[s]ame issue, same brief, should be the same ruling."

In closing, Donahue asserted that our sanctions notice must have been erroneous, that it was probably intended to target " 'appellants' counsel,' instead of respondents," since "[i]t was respondents who requested sanctions against appellants, not the other way around." He again characterized the appeal as "frivolous," and as having "no merit."

****795** When the time came for hearing on the possible sanctions, not only did Donahue not appear, he sent counsel who was unaware that sanctions were being considered against Donahue. That attorney informed us he had not been told sanctions were being considered, and he was prepared only to submit the matter on Donahue's briefing of the merits. We had to issue a second order to get Donahue to appear personally on the sanctions issue.

Rule 8.63 sets forth the policies applicable to requests for extensions of time in the appellate courts, and contains a list of factors to be considered in determining whether "good cause" for an extension of time has been shown. Rule 8.63(b)(4) requires that an extension request based upon the ***292** "number and complexity of the issues raised" "must specify the issues." Rule 8.63(b)(9) requires that an extension request based upon counsel's time constraints cannot be based on "[m]ere conclusory statements that more time is needed because of other pressing business...."

Rule 8.212(b)(3)(A) sets forth the procedural requirements for obtaining an extension of time, specifying that a party applying for an initial extension of time must show the court that he "was unable to obtain—or it would have been futile to seek—the extension by stipulation...."

Both of those rules were violated in Donahue's extension request in this case. He failed to specify the complex issues he claimed required additional time to research; he failed to make more than a conclusory assertion that he had "other time commitments," and he failed to demonstrate any effort to obtain a stipulation to the extension request.

[38] Donahue is certainly not the only counsel to stint on detail in support of a request for extension of time. As this case exemplifies, we try to accommodate such requests, even when the technical requirements of the request are not fully satisfied, especially when the opposing party registers no objection. It is simply more efficient, and generally more fair to the parties, for us to do so. Consequently, not every violation of these rules rises to the level of sanctionable conduct. (See *Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1162, 86 Cal.Rptr.3d 187 ["To be sure, not every violation of a procedural rule is properly sanctionable, as some may be the result of excusable inadvertence or exigent circumstances and/or relatively inconsequential."].)

[39] However, what distinguishes this case from the run-of-the-mill violation, is that Donahue's subsequent filing of what is essentially a copy of a brief he filed in an earlier case—and one which does not, in fact, address any of the "complex" issues actually raised in this appeal—demonstrates that the justifications offered for his extension request were not merely cursory, but prevaricative. The brief Donahue ultimately filed herein did not reflect *any* research of complex issues, and its preparation simply could not have claimed *any* significant amount of his time. His conclusory claims to the contrary, in support of his extension request, were—not to put too fine a point on it—untrue.

We cannot overlook such conduct. It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only "little" lies, we feel the distinction between little lies and big ones is ***293** difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible. Donahue's violations ****796** of the requirements set forth in the California Rules of Court governing extension requests meet the standard of unreasonableness, and warrant the imposition of sanctions.

[40] The same conclusion applies to Donahue's violation of California Rules of Court, rule 8.204(a)(1), which specifies the required content of a brief. Among other things, it requires that briefs must "support each point by argument and, if possible, by citation of authority...." (Cal. Rules of Court, rule 8.204(a)(1)(B).) In this case, Donahue's brief fails to meet that standard in significant ways. First, it includes a separately-captioned argument asserting this appeal is frivolous and seeking an award of sanctions, but without including therein any discussion of either the facts of the case, or the law pertaining to sanctions. And second, the brief includes a

separately-captioned argument asserting that appellants have "falsely argue[d] the case," again without including any meaningful analysis—either factual or legal—to justify that accusation in the context of this case. And what makes these violations *unreasonable* is the clear evidence that Donahue simply copied these arguments from the earlier brief he submitted in the *Nguyen v. Castillo* case. The circumstances suggest he did not even pause to consider whether they were appropriate points to make in response to this appeal.

In fact, a comparison of his "falsely argue[d]" section in the two briefs reveals that Donahue constructed the argument in this case by simply *redacting the facts* recited in the earlier brief, and reproducing the bellicose rhetoric without any reference to anything that actually happened here. In other words, Donahue reduced this misconduct accusation to boilerplate.

It is difficult for us to express how wrong that is. Sanctions are serious business. They deserve more thought than the choice of a salad dressing. "I'll have the sanctions, please. No, on second thought, bring me the balsamic; I'm trying to lose a few pounds." A request for sanctions can *never* be so lightly considered as to be copied word for word from another brief —much less copied in reliance on facts from another case that do not obtain in the present one. A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic.

Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.

***294** We do not come to this conclusion lightly. Judges are lawyers, too. And while we have taken on a different role in the system, we have not lost sight of how difficult it is to practice law. Indeed, at the appellate level, we are reminded daily how complex and recondite the issues that confront practitioners daily can be.

So we are loath to act in any way that would seem to encourage courts to impose sanctions for mistakes or missteps. But for serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary. We will step onto the slippery slope and trust our colleagues on the trial court bench to tread carefully along with us. It is time to make it clear that there is a price to pay for cynical practices.

If this be quixotic, so be it. Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes.

****797 [41]** We sanction Mr. Donahue in the amount of $10,000. In arriving at that amount, we have struggled with the absence of precedent. "How much do you sanction an attorney who lies to the court, seeks unwarranted sanctions, bullies opposing counsel, shows no remorse, and effectively vows to continue such tactics by endorsing his conduct when challenged on it?" does not seem to have been a question yet addressed by other courts.

The appellate sanctions we have found involving sanctions paid to the court rather than opposing counsel [16] have ranged of late from $6,000 to $12,500. These are mostly sanctions for frivolous appeals, based in part on the cost to the court of processing a frivolous appeal (see, e.g., *Foust v. San Jose Construction Company* (2011) 198 Cal.App.4th 181, 129 Cal.Rptr.3d 421; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 96 Cal.Rptr.2d 553). Those cases, however, did not involve the added elements of dishonesty and lack of remorse we have here. And they did not require additional settings to bring the offending attorney before the court. The only case we have found that included those elements is, lamentably, from our own district, *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 122 Cal.Rptr.2d 630.

In *DeRose,* a different panel of this court took into consideration its difficulty in getting counsel into court and his complete lack of compunction about his horrifying conduct in assessing what it termed a "conservative" sanction of $6,000. Given the passage of time, the out-and-out deceit, and the similar level of defiance involved in this case, we consider the amount we have chosen appropriate. Counsel's conduct clearly rises to the level of an ***295** unreasonable violation of California Rules of Court, rule 8.204(a)(1), and for this and the other violations outlined above, we impose monetary sanctions against him in the amount of $10,000, payable to this court within 90 days.

The judgment is reversed, and the case is remanded to the trial court with instructions to enter judgment in favor of appellants. Appellants are to recover their costs on appeal.

The court having found that Timothy J. Donahue, State Bar No. 110501, has violated court rules in such a degree as to require sanctions in the amount of $10,000, the clerk of this court is ordered, pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), to forward a copy of this opinion to the State Bar upon return of the remittitur, and to notify Mr. Donahue that the matter has been referred to the State Bar.

WE CONCUR: MOORE, and FYBEL, JJ.

All Citations

201 Cal.App.4th 267, 133 Cal.Rptr.3d 774, 11 Cal. Daily Op. Serv. 14,406, 2011 Daily Journal D.A.R. 17,112

Footnotes

1 When we say counsel "should" offer an extension of time to respond, we do not mean to imply any legal obligation to do so—merely a standard of professionalism. "While as a matter of professional courtesy counsel should have given notice of the impending default, and we decry this lack of professional courtesy [citation], counsel was under no legal obligation to do so. [Citations.]" (*Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038, 198 Cal.Rptr. 389.)

2 That date is not a typo—at least not ours. This promissory note, dated May of 2003, provides for interest payments to have commenced three months prior to the date of the note.

3 The terms of this promissory note are internally inconsistent with respect to the amount of interest to be paid, because it also states that interest "shall accrue at a rate per month equal to Two percent (2%.)" Two percent of $60,000 is $1,200 per month, not $2,000 per month. This discrepancy might be explained by the fact that the promissory note originally specified a principal obligation of $100,000, but was revised to reflect the lower amount of $60,000. The monthly interest payments, which would have correlated to 2 percent of $100,000, were not revised. They are thus inconsistent with the specified rate.

4 Kim's purported fifth and sixth causes of action, for "Recision" (*sic*) and "Imposition of Constructive Trust," respectively, are both *remedies,* not causes of action.

5 The closest reference to "unpaid fees" we can find in the complaint is in the terms of the fourth promissory note, which specifies that $3,750 of "closing costs" are to be added to the principal amount of the loan. However, we cannot fathom how that single item of "closing costs" might correlate to the $1.5 million in "unpaid fees" set forth in the statement of damages. As for the alleged $500,000 in "property damage," there is simply nothing in the complaint which even arguably supports such a claim.

6 Defendants assert in their opening brief that the statements of damages "were not properly served," and suggest that Kim may have acted inappropriately by "attach[ing] the proof of service of summons for the original complaint (Dated May 21, 2009) to Plaintiff's statements of damages which [were] filed more than a year later on June 25, 2010." But there was no impropriety in doing so. The proofs of service in question actually reflect that each defendant was served with both the complaint and the statement of damages (along with other documents) on May 11, 2009. And the statement of damages form states, on its face, that it should not be filed with the court "unless you are applying for a default judgment under Code of Civil Procedure § 585." Thus, it is perfectly proper to serve a statement of damages on one date, but not file it with the court until much later, when a default judgment is actually sought.

7 The other three named defendants, Rob Jennings, Temecula Harry's Pacific Grill, LLC, and Honolulu Harry's, Inc., did not move to set aside their defaults.

8 Donahue's claim to have e-mailed exhibit No. 1 to opposing counsel on September 23, 2009, cannot be reconciled with Kim's characterization of the exhibit as being "dated October 26, 2009."

9 Because the judgment was prepared by Kim, and it is clear from his declaration that he is seeking a total judgment of $30 million, we presume that is what is intended by the judgment. However, in our view, the language of the judgment is ambiguous. It specifies that judgment is entered against "each individual" defendant, but in the "single" sum of $5 million. Removing the words "each individual" would make it clear that the total liability is $5 million, assessed jointly and severally against all defendants; and removing the word "single" would make it clear that the total liability is $30 million—consisting of $5 million assessed against each defendant severally. However, including both words in the same sentence makes it unclear. Moreover, the judgment's treatment of costs exacerbates the confusion. The total amount of costs claimed by Kim in this case was $804.40, and the judgment adds those costs to the "single sum" of $5 million, for a "total sum of $5,000,804.40." If that "total sum" is assessed against *each defendant separately*—consistent with

the $30 million in damages requested by Kim—that means Kim would be entitled to recover his costs six times over. That is clearly inappropriate. We need not resolve this ambiguity, however, because, as we have already indicated, the judgment must be reversed in any case.

10 Business and Professions Code section 17200 states: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

11 We found the "general rule" prohibiting review of the sufficiency of the evidence to support a default judgment cited in two modern cases. The first, *In re Matthew S.* (1988) 201 Cal.App.3d 315, 320, 247 Cal.Rptr. 100, is a juvenile dependency case, which relies on *Uva v. Evans, supra,* 83 Cal.App.3d 356, 363, 147 Cal.Rptr. 795, as authority for that general rule, without acknowledging the fact that *Uva* itself actually allows such a challenge relating to damages. *In re Matthew S., supra,* 201 Cal.App.3d 315, 247 Cal.Rptr. 100, is then cited, in turn, for the same proposition by *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 24 Cal.Rptr.3d 780, a case involving an appeal from a trial court order denying a motion to vacate a default judgment. The *Sporn* court goes on to acknowledge, however, that various courts have allowed a challenge to the sufficiency of the evidence in a *direct appeal* from a default judgment, and then simply distinguishes that situation from the one before it, in which the defendant forfeited any direct appeal. Neither of these cases constitutes persuasive authority precluding review of the sufficiency of the evidence to support the damage award in this case.

12 Appellants assert the two briefs differ in only 15 words. We have not undertaken such an analysis, but appellants' estimate is not outside the ballpark. The two are virtually identical. Appellant's request that we take judicial notice of that earlier brief is granted.

13 The only difference in the sanction requests is a technical one. While both briefs assert "[a]ll parties have been put on notice of the pending request for sanctions, as a result of frivolous appeal," the earlier brief in the *Nguyen v. Castillo* case actually references a letter sent by Donahue to opposing counsel providing such a notice. Apparently, Donahue sent no such letter to opposing counsel in this case, an omission which did not deter him from making the identical assertion of "notice."

14 California Rules of Court, rule 8.276 provides that the court may, on its own motion, impose sanctions on a party for "[f]iling a frivolous motion" or "[c]ommitting any other unreasonable violation of these rules."

15 In making this assertion, Donahue relies on a "notice of errata" filed by appellants, which acknowledges *one* clerical error in the brief, and corrects it.

16 Sanctions payable to opposing counsel typically involve amounts much higher than sanctions payable to the court. Appellant here did not request sanctions.

So Many Defects, So Little Coverage
A practical guide to handling SB800 Claims & "Work" and "Product" Exclusions

Panel Leader: Larry Kent

PowerPoint by
Law Offices of Jim Kurkhill

Panelists

Larry Kent, Panel Leader	**Plaintiff's counsel**
Matt Argue	**Mediator**
Lisa Cappelluti	**Developer/GC & Wraps**
Jennifer Kalvestran	**Insurance coverage**
Jim Kurkhill	**Complex construction disputes**
Todd Schweitzer	**Carrier perspective**

Key Points

- ✓ When do SB800 violations trigger coverage ?
- ✓ Assessing coverage on a case by case basis
- ✓ Pleading & mediation strategies

SB 800 Coverage Triggers
By the numbers

Larry Kent

Analyzing SB800 for Triggering Language

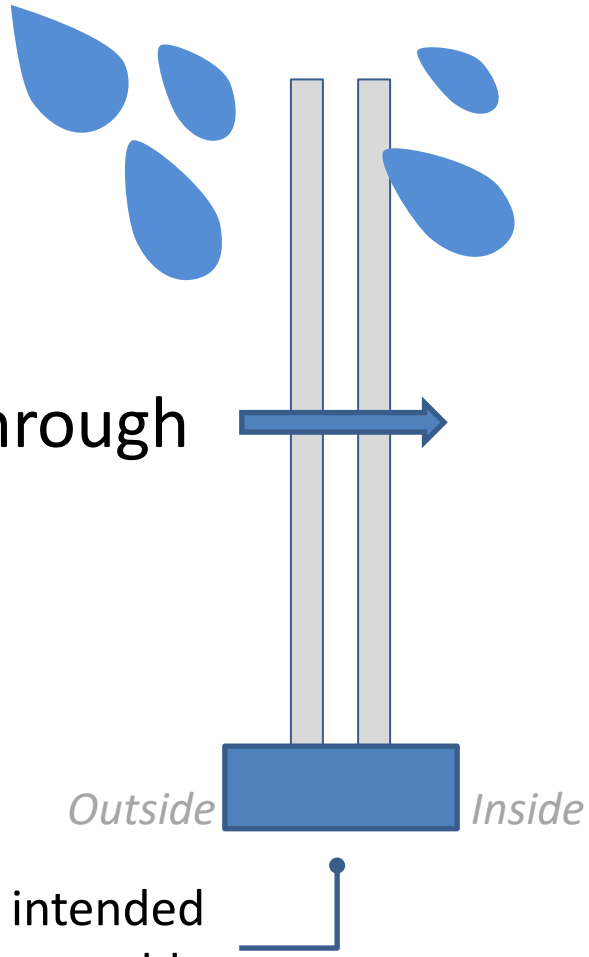
- ✓ SB 800 language is not uniform
- ✓ Caution: must read each section carefully
- ✓ Look for express language e.g. “pass into adjacent structure” or “cause damage to another building component”

Larry Kent

SB 800 Word Salad

Unintended water
(or vapor or condensation)

Pass beyond, around, through



Actual or designed or intended
water barrier or system or assembly

> Pass into adjacent structure

> Come into contact with

> Enter the structure

> and cause damage

> So as to cause damage

> Cause damage to another building component

Todd Schweitzer

Carrier's Perspective

- Carriers must analyze and communicate covered vs. uncovered analysis to their insureds as soon as possible.

- Coverage position letters need to be timely and updated as facts develop

Jennifer Kalvestran

Analyzing Resultant Damage (R/D) in SB 800 Claims

896(a) (1) A door shall not allow unintended water **to pass beyond, around, or through** the door or its designed or actual moisture barriers, if any.

Resultant Damage Analysis:

- By its terms, this statute does not require resultant damage (R/D) to be actionable
- However, R/D may be inferred on a case by case basis

Civil Code § 896(a) ➡ Water Issues

Component	R/D Required?	Triggering Language
Doors 896(a)(1)	No	beyond, around, through
Windows, patio doors, deck doors 896(a)(2)	No	beyond, around, through
Excessive condensation 896(a)(3)	Yes	enter the structure and cause damage
Roofs 896(a)(4)	Maybe	enter the structure or to pass beyond, around, through the designed or actual moisture barrier
Decks, balconies 896(a)(5)	Maybe	allow water to pass into the adjacent structure
Decks, balconies 896(a)(6)	Maybe	allow unintended water to pass within the systems themselves and cause damage to the systems

Civil Code § 896(a) ⇨ Water Issues

Component	R/D Required?	Triggering Language
Foundation systems 896(a)(7)	Yes	allow water or vapor … so as to cause damage to another component
Foundation (floor) 896(a)(8)	No	so as to limit the installation of … flooring materials
Hardscape 896(a)(9)	Yes	to cause water or soil erosion to enter or come into contact with the structure so as to cause damage to another building component
Stucco (water) 896(a)(10)	Maybe	beyond, around, through designed or actual moisture barrier of the system including internal barriers w/in the system itself
Stucco (condensation) 896(a)(11)	Yes	allow excessive condensation to enter the structure and cause damage to another component

Civil Code § 896(a) ⇨ Water Issues

Component	R/D Required?	Triggering Language
Retaining & site walls 896(a)(12)	Yes	Unintended water to pass beyond, around, or through its designed or actual moisture barriers including, without limitation, any internal barriers, so as to cause damage
Retaining & site walls 896(a)(13)	No	shall only allow water to flow beyond, around or through the areas designated by design
Plumbing, sewer lines 896(a)(14)	Maybe	shall not leak
Plumbing, sewer lines 896(a)(15)	No	shall not corrode so as to impede the useful life of the systems
Sewer systems 896(a)(16)	No	installed to allow designated amount of sewage to flow
Shower and bath 896(a)(17)	Maybe	shall not leak water into the interior of walls, flooring systems, or the interior of other components
Ceramic tile 896(a)(18)	Yes	shall not allow water into the interior of walls, flooring systems or other components so as to cause damage

Civil Code § 896(b) ➡ Structural Issues

Component	R/D Required?	Triggering Language
Foundations, load bearing components & slabs 896(b)(1)	No	shall not contain significant cracks or significant vertical displacement
Foundations, load bearing components & slabs 896(b)(2)	No	shall not cause the structure, in whole or in part, to be structurally unsafe
Foundations, load bearing components, slabs and underlying soils 896(b)(3)	No	constructed to materially comply with the design criteria set by applicable government building codes, regulations, and ordinances for chemical deterioration or corrosion resistance in effect at the time of original construction

Civil Code § 896(c) ➡ Soils Issues

Component	R/D Required?	Triggering Language
Soils and engineered retaining walls 896(c)(1)	Yes	shall not cause, in whole or in part, damage to the structure built upon the soil or engineered retaining wall.
Soils and engineered retaining walls 896(c)(2)	No	shall not cause the structure, in whole or in part, to be structurally unsafe.
Soils shall not cause, in whole or in part 896(c)(3)	No	the land upon which no structure is built to become unusable for the purpose represented at the time of original sale by the builder or for the purpose for which that land is commonly used.

Civil Code § 896(g) ➡ Other Areas of Construction

Component	R/D Required?	Triggering Language
Exterior pathways, driveways, hardscape, patios 896(g)(1)	No	shall not contain significant cracks or separations
Stucco, exterior siding, and other exterior wall finishes 896(g)(2)	No	shall not cause the structure, in whole or in part, to be structurally unsafe
Irrigation systems and drainage 896(g)(7)	Yes	shall operate properly so as not to damage landscaping or other external improvements

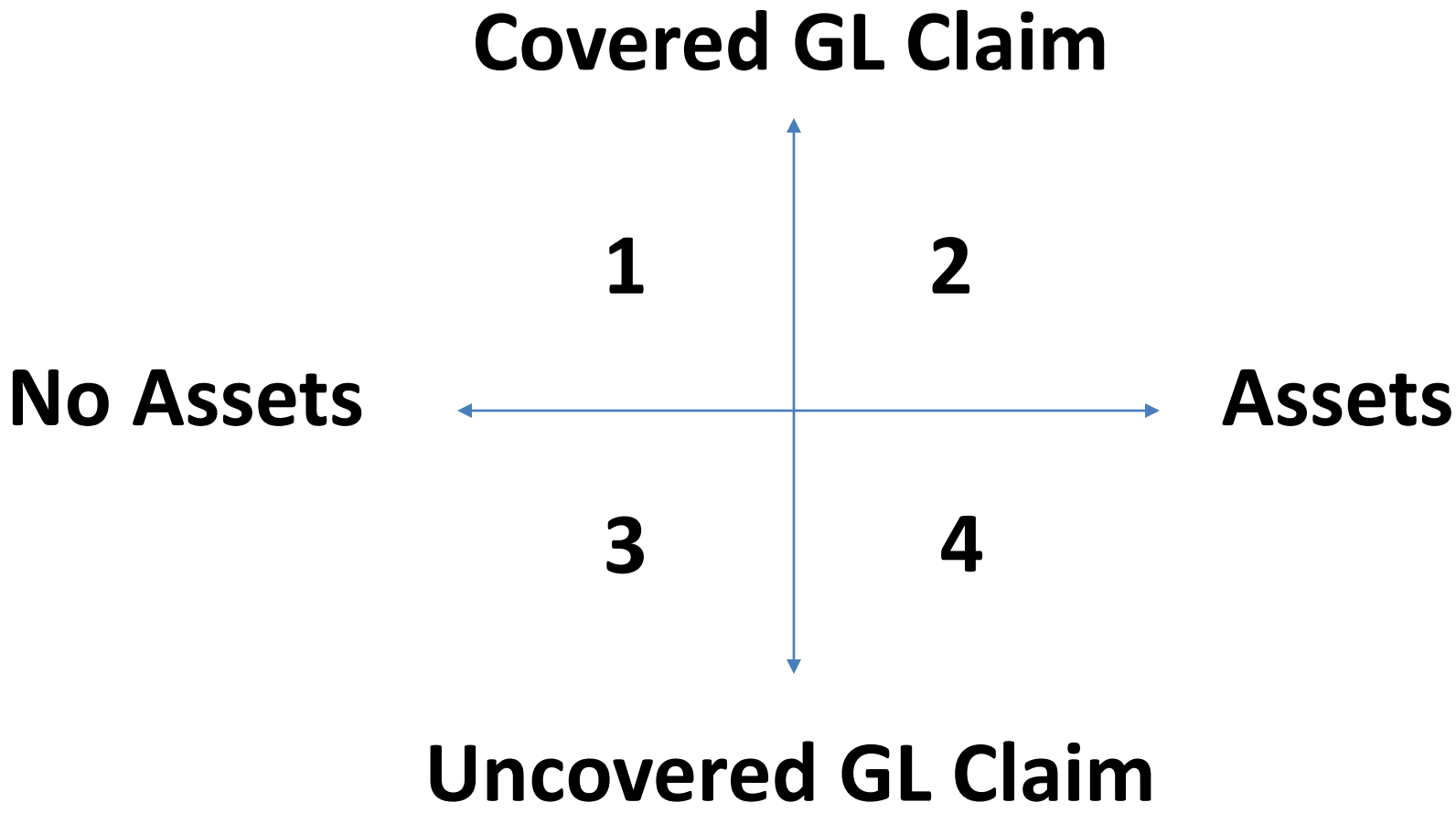
Hypo #1 – Panel Discussion

Commercial Builder with Assets

- Wrap or Separate GL Policies
- No coverage, no problem, if defendant has assets.
- Ex. These are not “property damage” under CGL Policy:
  - Noise attenuation
  - HVAC insufficient
  - Seismic code violations

Hypo #1

Mass Builder with Assets



Jim Kurkhill

Builders Risk: LEG* 1, 2, & 3 Exclusions

- Some Builder's Risk policies provide first-party coverage for damage to insured property arising from an error or defect, if the damage is caused by an insured peril that ensues from the error or defect.
- In the 1990's, LEG developed three exclusions, LEG1, LEG2, and LEG3.
- Though LEG 1,2&3 are properly "exclusions", they actually provide coverage

* *LEG stands for London Engineering Group, a part of the Association of British Insurers. Sometimes referred to as endorsements, LEG 1,2&3 are exclusions.*

Jim Kurkhill

Builders Risk — LEG 1, 2, & 3 Exclusions

Comparison of costs covered by each level of LEG wording

	LEG 1	LEG 2	LEG 3
Costs to remedy defects where no damage has occurred			
Costs to remedy resultant damage due to defects			
Costs to remedy resultant damage to property supported by defective property			
Costs to remedy defective property			
Costs to remedy defective part, portion or item			
Loss, damage or costs incurred to access defective part			
Costs to improve original design, plan, specification, workmanship or material			

	Typically Excluded
	Possible - Depends on Circumstance of Loss
	Typically Covered

Source: IRMI Construction Risk Conference

Policy Types

All policies are
not created equal

Project Type

Commercial Claim Considerations

Project Type

Residential Claim Considerations

Lisa Cappelluti

Developer Considerations

- Type of Project- Residential or Commercial/Industrial
- Progress of Project
  - Status of Completion & Completion Dates (Multiphase Project)
- Insurance - WRAP/GL Applicability & Limits
- Evaluation of Standards/Repairs
- Indemnity & Risk Transfer

Lisa Cappelluti

Developer Considerations

- OCIP/CCIP policy doesn't change coverage if defect hasn't resulted in property damage.
- Some wrap policies remove the "your work/work product" exclusions.
- Some wrap policies remove "ongoing ops" and only leave "completed operations"
- CGL policy not intended to do provide coverage during course of coverage
- Had CGL policy that did not provide for defense obligation but had "ongoing operations" coverage

Larry Kent

Plaintiff's Perspective

- Evaluate ROI on client's lawsuit
- Advise client of impact of lawsuit on property
  - Stigma & Civil Code § 1102
- Pleading considerations in light of covered vs. uncovered claims
  - Fraud claims
- Dealing with defense counsel who focus on the carrier as their "real" client

Jim Kurkhill

Coverage and Express Indemnity

- Don’t forget express indemnity rights are separate from insurance
- **Caveat**: express indemnity void when Wrap coverage applies for residential construction projects
  - Cal. Civil Code § 2782.9 — what are its implications?
  - Ans: no one knows — there is no reported decision interpreting the application of this statute

CIVIL CODE § 2782.9

Construction contracts **on which wrap-up insurance policy applicable**; **Agreements indemnifying another from liability void**; Equitable indemnity; Waiver or modification, Cal Civ Code § 2782.9

Summary

(a) **All contracts**, provisions, clauses, amendments, or agreements contained therein entered into after January 1, 2009, for a residential construction project **on which a wrap-up insurance policy**, as defined in subdivision (b) of Section 11751.82 of the Insurance Code, or other consolidated insurance program, **is applicable**, **that require an enrolled and participating subcontractor or other participant to indemnify, hold harmless, or defend another** for any claim or action covered by that program, arising out of that project **are unenforceable.**

(b) **To the extent any contractual provision is deemed unenforceable** pursuant to this section, **any party may pursue an equitable indemnity claim** against another party for a claim or action unless there is coverage for the claim or action under the wrap-up policy or policies. Nothing in this section shall prohibit a builder or general contractor from requiring a reasonably allocated contribution from a subcontractor or other participant to the SIR or deductible required under the Wrap ...

Matt Argue

Mediator's Perspective

- Understand the coverage positions of the carriers: what is covered, what is not covered
- Is there joint and several liability – focus on covered claims
- Exchange documents, photos, expert investigation reports focusing on covered damages
- Identify the driving issues and parties in the case – parties that must be part of a global resolution
- Focus on non-covered claims such as fraud or breach of contract that may encourage early settlement
- Identify other potential claims, parties or insurance not part of WRAP

Matt Argue

Mediator's Perspective

- Find creative solutions such as assignment of claims, parties, insurance
- Talk to non-parties or parties without insurance/assets to fill in scope of work, sequencing, and other factual support of claims. Exchange of information is the pathway to resolution.
- Narrow focus on parties, claims and damages that are viable; joint and several liability may make these claims uber valuable
- Establish worst case/best case scenarios for cost of defense/prosecution vs. potential verdicts and recoveries (given insurance and collectability limits)
- Determine realistic range of settlement based on all above factors and work hard to achieve optimum result for least cost/time/effort

Todd Schweitzer

Carrier's Perspective

- Importance of carriers to communicate coverage issues (appropriate reservation of rights) early and often to the insured, broker and mediator to allow time for parties to address what funding is available for certain defects and where that funding is coming from.
- If insured insolvent, plaintiff must be aware of coverage issues as it will impact how the plaintiff directs its claims and manages the expectations of its client.
- If appropriate, carrier may need to file a DJ to address the coverage issues. These are typically stayed while the underlying matter is pending so best to defer these to avoid complicating settlement.
- Be sensitive to the total cost of risk which includes defense costs. Even if coverage defenses are strong, if a duty to defend exists you must factor in the impact of this on your settlement analysis. This has greater importance if AI also at issue.
- Be sure to evaluate choice of law if the insured and policy were delivered in a state other than the state where the litigation/project is located.

So Many Defects, So Little Coverage

PowerPoint by
Law Offices of Jim Kurkhill

EXCLUSION CONFUSION?
FINDING YOUR WAY THROUGH THE FOREST DESPITE THE TREES (AND OTHER HAZARDS)

OUTLINE:

I. INTRODUCTION

This panel was intended to a live discussion between active coverage attorneys respecting the legal and practical application of various relatively common coverage limitations, conditions, and exclusions frequently presented in construction defect and related claims and actions. As the name of the panel indicates, we find that often the hurdles presented are or relate to the representatives and/or counsel for carriers and/or parties (and/or their counsel) being able to see the trees but getting a bit lost in the forest of policy provisions and coverage law. Of critical importance is knowing and understanding how the exclusions, conditions, or limitations relate to and impact one another, within a policy and between policies, in light of the nature of the underlying loss, the roles of the parties and carriers, and the applicable state law.

The panel members, in addition to each being excellent and experienced attorneys in their respective and rather broad other areas of expertise, are among the rare that are fluent in the language of coverage. Each panel member is active in connection with insurance coverage issues across several states throughout the country, and policyholder, carrier, counsel, and party perspectives were represented. We all may be coverage geeks, but when it comes to construction defect and related claims, coverage often proves to be paramount.

Although we are disappointed to miss the opportunity to conduct our live panel, we present the following information in an effort to disseminate some information that we hope will prove instructive and useful.

The information contained herein is for information purposes only, and is not intended nor should be construed to be a statement of any legal position or opinion by any panel member with regard to any issue on behalf of any client or party.

II. PANEL MEMBERS

Robert V. Closson
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A former construction laborer, heavy equipment operator, and construction defect insurance adjuster, Mr. Closson has been a coverage attorney representing both insurers and insureds relative to construction defect claims and issues for the past 34 years. Mr. Closson practices primarily in California and lectures both locally and nationally. He was the grateful recipient of West Coast Casualty's 2018, 25th Anniversary "Silver Star" award for best coverage counsel.

Charles H. Numbers
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Mr. Numbers is a partner in the law firm of Weinstein & Numbers, LLP, representing policyholders and claimants in complex insurance coverage disputes nationwide. Mr. Numbers' practice is devoted to resolving high-stakes insurance coverage disputes arising from construction defect, cyber liability, trademark infringement, copyright infringement, misappropriation, and environmental and asbestos claims. Mr. Numbers also has extensive experience with accountant and broker negligence matters as well as Directors & Officers and Errors & Omissions coverage disputes. His primary function is to characterize and develop covered claims and to negotiate with insurance carriers and counsel in order to maximize the funds available for settlement. This includes resolving disputes over defense, indemnity, allocation, and contribution; and increasing participation by carriers providing additional insured and contractual indemnity coverage. Mr. Numbers serves as a mediator and is well respected for his ability to creatively work toward settling difficult matters. Mr. Numbers is a fellow in the American College of Coverage Counsel and frequently lectures on a wide array of insurance issues and is a featured coverage expert for the Edwards Mediation Academy's Advanced Mediation Course. In his thirty-two years of practice, Mr. Numbers has assisted clients in obtaining over $1 billion in insurance recoveries.

Jay Russell Sever
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Jay Russell Sever is a partner in the Insurance and Reinsurance group of Phelps Dunbar. He is also the Regional Practice Coordinator for the Insurance and Reinsurance group and head of the Insurance and Reinsurance practice group in the New Orleans office. He serves as local, regional and national coverage counsel for both foreign and domestic insurance companies. He counsels clients, manages disputes and tries cases involving a wide variety of insurance coverage issues, including matters arising from bad

faith, construction defect claims, third-party liability claims, first-party claims, professional liability claims, crane and rigging claims, racing and competitive sport claims, entertainment claims, transportation claims, environmental claims, general and toxic tort claims, advertising, copyright and trademark claims, media liability claims, multiple-year trigger and allocation issues, marine liability claims, Louisiana direct action claims and numerous others.

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Mr. Bloom is a founding partner of Gartner + Bloom, PC. Ken is a skilled trial attorney, who concentrates his practice in the areas of Casualty/Liability Defense including New York Labor Law (Scaffold Law) matters; Insurance Coverage; Construction Litigation including construction defect, EIFS, apparent microbial growth (AMG), asbestos and lead paint matters, commercial auto, as well as Insurance Fraud Defense and Commercial Litigation.

Ken was admitted to the bar in the District of Columbia in 1981; New York 1982; Pennsylvania 1990; the U.S. District Court, Eastern and Southern District of New York in 1983; U.S. District Court, Northern District of New York in 1990; U.S. Supreme Court in 1985; U.S. District Court, Eastern District of Michigan in 1988; and the U.S. Court of Appeals, Second Circuit 1990. Ken is a graduate of Cornell University (B.S., 1978), where he serves as a guest lecturer for the course, "Managing and Resolving Conflict." He obtained his J.D. from American University in 1981.

Prior to founding Gartner + Bloom, Ken was an Assistant District Attorney, Kings County, New York, 1981-1982; Senior Staff Attorney, New York City Mayor's Strike Force, 1982-1983; Partner, O'Donnell, Fox & Gartner, P.C., New York City, 1983-1990; Resident Senior Partner Cozen and O'Connor, New York City, 1991-1994.

Ken is a member of the New York State Former District Attorneys Association, Brooklyn, New York; Pennsylvania and American Bar Associations-member of the Tort and Insurance Practice Section and Alternate Dispute Resolution Section; Co-chair of the Construction Committee of the ABA Section on Dispute Resolution (2004-2005); District of Columbia Bar and the New York County Lawyers Association. He is a frequent lecturer on construction and coverage related topics, as well as ADR. He has served as both Vice-Chairman and Chairman of the MC Consultant's East Region Construction Defect Conference 2010-2014. He has lectured at the West Coast Casualty Construction Defect Conference and has been selected as a New York Super Lawyer 2007- 2016, as well as one of the Top Attorneys in New York 2013.

Mr. Bloom has recently been appointed to the prestigious Claims and Litigation Alliance (CLM) Construction Defect Board of Directors, an assembly of some of the top construction defect professionals in the country.

John McLeod
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John McLeod is the founder of McLeod Law Group, APC. With offices in San Diego and Denver and attorneys licensed in many of the western United States, his firm exclusively represents policyholders. In the construction industry, the firm's clients range from national homebuilders to regional contractors to subcontractors and design professionals, all on whose behalf Mr. McLeod handles insurance-related disputes and claims with their insurers.

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David Blau is the founding partner of Blau|Keane Law Group P.C., which provides superior transactional and litigation legal counsel to institutional and individual clients primarily in the insurance, construction, and entertainment industries. Mr. Blau has extensive transactional and litigation experience in various areas of law, including insurance coverage, intellectual property, corporate and business formation, development and compliance, construction, employment, and premises liability. He is licensed to practice in the federal and state trial and appellate courts throughout California, federal courts in other jurisdictions, and has engaged in all aspects of litigation, arbitration, mediation and trial.

With regard to construction defect coverage issues, Mr. Blau acts as coverage counsel and provides coverage advice to primary and excess insurance carriers respecting policy drafting, program and claims management, and handles large loss and related recovery tasks and issues, including litigation of declaratory relief, contribution, bad faith, and other coverage actions in various state and federal venues including California, Washington, Texas, Nevada, and Arizona, and has successfully negotiated resolutions of countless coverage disputes to avoid otherwise protracted and costly litigation.

Mr. Blau takes pride in his and his firm's efficient and effective handling of matters, and coordination with carriers, risk managers, claims adjusting firms, and retained defense counsel, to proactively address coverage, contribution, allocation and additional insured issues and disputes.

III. EXCLUSIONS J, K, L AND M - ROBERT CLOSSON

J(2) [property sold or "premises alienated" exclusion]:

This exclusion applies to property damage to premises the named insured sells, gives away or abandons, if the damage arises out of any part of those premises (does not apply if the premises are "your work" and were never occupied, rented or held for rental by the named insured). The definition of "your work" includes both the labor by the named insured or on its behalf by others, and the "materials, parts or equipment" furnished in connection with such work.

You will not see this one at issue often, but when it does apply it can eliminate coverage for an entire project. It typically applies where the insured was the developer, and then either lived there (owner - builder spec home) or rented it (such as apartments) before selling the property. However, if the insured sold the property after completion without occupying it or renting it, the exclusion does not apply. *Maryland v. Reeder* (1990) 221 Cal.App.3d 961.

J(5) [ongoing operations or "particular part" exclusion, often lumped together with J(6) below]

This exclusion applies to the particular part of real property on which you or any contractors or subcontractors working directly or indirectly on the named insured's behalf are performing operations, if the "property damage" arises out of those operations.

J(6) [ongoing operations or "particular part" exclusion, often lumped together with J(5) above]

This exclusion applies to the particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it (does not apply to "property damage" included in the "products-completed operations hazard").

The "ongoing operations" exclusions J(5) and J(6) are often considered together. Previously under California law, there was authority which suggested that if the insured was a general contractor or developer such that the entire project would be considered "your work", then any damage which occurred prior to completion of the project as a whole would be excluded. *Clarendon America v. General Security* (2011) 193 Cal.App.4th 1311; *Baroco West v. Scottsdale* (2003) 110 Cal.App.4th 96. This is in part because these exclusions do not have an exception for work performed by a subcontractor, such as exclusion L below. However, more recent authority suggests that it is not sufficient that the damage merely happened prior to completion, but rather that the exclusions only apply if the property damage occurred while insured or its subcontractors were actually working on the specific, "particular" part of the property which sustained the damage. *Global Modular, Inc. v. Kadena Pacific, Inc.* (2017) 15 Cal.App.5th 127 [rainfall damage through an open roof which occurred when the insured was not physically performing the work was not necessarily excluded].

Despite the *Global Modular* case, the ongoing operations exclusions remain applicable under numerous circumstances. For example, they remain applicable to the defective work of an

insured or the insured's subcontractors, to the extent that work causes property damage to itself. The exclusions are also applicable under appropriate circumstances to other property which satisfies the "particular part" requirement. Consider the following examples:

> Example of where the exclusions do not apply: An insured is renovating a roof. The roof is left open and that night it rains. The rain causes water damage to the interior of the building. The water damage did not occur while the insured was performing the operations, nor was the interior of the building the "particular part" of property on which the roofing operations were being performed. As a result, the interior damage is not excluded (this is *Global Modular*).
>
> Example of where the exclusions do apply: An insured is a painter (or is a general contractor who hires a painting subcontractor). The painter splatters or over-sprays paint onto windows installed by a different subcontractor, and attempts to remove the paint by using a razor blade, thereby scratching the glass. The scratched glass is property damage to the particular part of property on which the painter was working, which occurred while the work was being performed, and is therefore excluded.

Keep in mind this analysis considers the standard ISO policy language. Some insurers may use proprietary policy language which appears similar to J(5) and J(6), but which is more restrictive. For example, such language may indicate that the entire project is deemed to be the "particular part", and/or that any damage which occurs before completion is deemed subject to the exclusion. Such language will be interpreted subject to standard policy interpretation principles, and is not necessarily subject to *Global Modular*.

K. ["your product" exclusion]

This exclusion applies to "property damage" to "your product" arising out of it or any part of it. While frequently cited in relation to construction defect-related damage caused by a subcontractor, it is more appropriately applied to damage to a product provided by a product supplier which did no work at the project. For example, if the insured supplies an oven which overheats and damages itself, the damage is to "your product" within the meaning of the exclusion. In contrast, if the oven overheats and causes a fire which burns the adjacent wall, the damage is not confined to "your product" and the damage to the adjacent wall is not excluded.

L. ["your work" or completed work exclusion]

This exclusion applies to "property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard" (does not apply if the damaged work or the work out of which the damage arises was performed on the named insured's behalf by a subcontractor.) Because the definition of "your work" includes parts, materials or equipment furnished in connection with the insured's work, it applies to both the labor and any physical components installed in relation to that labor. The exclusion only applies if the damage was within the "products-completed operations hazard", which is usually defined to mean completed or abandoned, but the definition can vary from insurer to insurer. In a simple scenario, the exclusion can apply to an entire project (such as damage to a completed home which was built

entirely by one contractor; or damage which is limited to the work of the insured general contractor, and does not involve property damage to or caused by the work of a subcontractor). In more complex scenarios, factual uncertainty regarding integrated work and the extent of the property damage in a multi-party construction defect case, may preclude a denial of the duty to defend based on this exclusion.

M. ["impaired property" exclusion]

This exclusion applies to "property damage" to "impaired property" or property that has not been physically injured, arising out of a defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or a delay or failure by the named insured or anyone acting on its behalf to perform a contract or agreement in accordance with its terms (does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use). Impaired property is tangible property, other than "your product" or "your work", that cannot be used or is less useful because it incorporates defective, deficient, inadequate or dangerous work or products or because the insured has failed to fulfill the terms of a contract or agreement, provided that the property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or by the insured fulfilling the terms of the agreement.

The "impaired property" exclusion has been applied to loss of use claims for property which has not been physically injured where the loss of use is caused by the insured's negligent failure to perform its contractual obligations. *Reg'l Steel Corp. v. Liberty Surplus Ins. Corp.* (2014) 226 Cal.App.4th 1377, 1394 (holding damage caused by installation of defective tie hooks during construction of building which did not otherwise damage the building was excluded under the impaired property exclusion); *All Green Elec., Inc. v. Sec. Nat'l Ins. Co.* (2018) 22 Cal.App.5th 407, 410B11 (failure to tighten bolt resulting in system failure excluded).

The most common recent argument involves a case which did not consider construction defects, *Thee Sombrero, Inc. v. Scottsdale Ins. Co.* (2018) 28 Cal.App.5th 729. In *Thee Sombrero*, the Court of Appeal held that where there was a loss of use of property which was not physically injured, the second part of the definition of property damage for loss of use could apply. In the construction defect context, loss of use which is not caused by physical injury to tangible property may be excluded by the impaired property exclusion.

N. ["recall" or "sistership" exclusion]

This exclusion applies to damages claimed for any loss, cost or expense incurred by the named insured or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "your product", "your work", or "impaired property"; if it is withdrawn or recalled from the market or from use because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it. The exclusion has its origin in the need to "recall" all of a dangerous product pending resolution of a suspected dangerous condition. For example, if a defective airplane part is identified and presents a danger, all of the "sister ships" in the airline fleet may need to be removed from use while the issue is resolved. This exclusion

applies to that scenario. However, while it is frequently cited in construction defect coverage letters, it rarely is applicable.

IV. COVERAGE B - WRONGFUL EVICTION EXCLUSIONS IN GL POLICIES TO PRECLUDE HABITABILITY - CHARLES NUMBERS

Coverage B of several ISO CGL policy forms provide coverage for damages because of enumerated "personal and advertising injury" offenses committed during the policy period.

For example, the 2007 and 2013 ISO forms provide as follows:

> We will pay those sum that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies… This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory during the policy period.

These forms define "personal and advertising injury" as follows:

a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a persons' or organization's goods, products or service;
e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
f. The use of another's advertising idea in your "advertisement"; or
g. Infringing upon another's copyright, trade dress or slogan in your advertisement".

Coverage B is triggered by an allegation of one of the enumerated offenses. In contrast, Coverage A for bodily injury and property damage is triggered by an allegation of an occurrence, which is commonly defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Because Coverage B is triggered by an offense, it is generally easier to establish a duty to defend and/or indemnify than if triggered by an occurrence because an analysis of whether there was an occurrence is not necessary. For example, the mere allegation in a complaint that there was a wrongful eviction should trigger the duty to defend. However, if this coverage were triggered by an occurrence, carriers could more easily argue that the decision and actions to institute an eviction could never be an accident and are therefore not an occurrence.

In order to attempt to eliminate or significantly curtail coverage for wrongful evictions, certain carriers have inserting policy language requiring that the listed coverage B offenses be caused by an occurrence thus significantly reducing coverage in a back-handed way. Such language raises issues such as:

1. Is the change clear and conspicuous? Why not swap out the word "offense" in the insuring agreement and substituting in the word "occurrence?"

2. For the right insured, does the change render key coverage illusory (e.g. landlord)?

3. Pursuant to California Insurance Code § 678 (a), an admitted carrier must give 45 days written notice if a renewal is conditioned on narrowed coverage. If notice is not given, the terms of the prior policy remain in effect until such notice is given.

- COVERAGE B (Wrongful Eviction) CONTINUED - JAY SEVER

A "wrongful eviction" for purposes of the definition typically requires that a person first be in actual possession of the real property and then be removed therefrom. In cases involving new construction, an owner may have never taken possession of the premises and, therefore, could not be removed from the premises. In addition, the wrongful eviction or other invasion of the right of private occupancy must be committed by or on behalf of the premises owner, landlord or lessor. While the general contractor is acting on behalf of the owner of the premises when performing the construction operations, it does not seem plausible that a general contractors' defective construction resulting in a wrongful eviction or other invasion of the right of private occupancy was committed on behalf of the owner - an owner would not want defective work performed on its behalf and, in fact, sues because of alleged defective construction.

In light of the foregoing, insurers have assumed that a claim for defective work should not fall within the scope of Coverage B for Personal and Advertising Injury. The fact that there are no reported cases finding coverage for such claims under Coverage B might suggest that to be a correct assumption. However, there is an unreported decision from the District Court for Todd County, Minnesota wherein the court acknowledged that Coverage B does arguably provide coverage in construction defect cases and triggers the insurer's duty to defend. In *Triad Construction, Inc. v. Grinnell Mutual Reinsurance Company, Todd County, Minnesota*, Case No. 77-CV-19-416, the underlying claim involved alleged construction defects regarding a steel cattle barn structure erected on a concrete foundation system furnished by the owner. The owner of the project commenced an action against the steel structure contractor claiming alleged deficiencies, which the contractor denied. The owner of the building included claims for "loss of use and enjoyment" of the cattle barn in its complaint. The steel contractor tendered to its insurer, who denied coverage citing coverage arguments and exclusions based on Coverage Part A. The steel contractor commenced a declaratory judgment action seeking to establish that the insurer owed a duty to defend both under Coverage Part A and Coverage Part B. With respect to Coverage Part B, the Court stated: "Additionally, the underlying complaint alleges that the

Kraemers were personally injured from the 'loss of use and enjoyment' of the cattle barn. This part of the complaint is not subject to the 'your product' or 'your work' exclusions, and arguably falls within the scope of Coverage B." Whether this case indicates the beginning of a trend is yet to be seen, but suffice it to say that Coverage B claims may have a future in construction defect.

V. CONTINUOUS AND PROGRESSIVE INJURY OR DAMAGE EXCLUSIONS/LIMITATIONS - RECENT CASE ACTIVITY - LIABILITY ARISING FROM WORK PERFORMED PRIOR TO POLICY INCEPTION - CHARLES NUMBERS

a. Continuing and progressive injury or damage exclusions are written to insulate a carrier from covering property damage beginning prior to its policy but which would otherwise trigger the policy pursuant to the continuing and progressive damage trigger.

b. There are countless variations, but over time carriers, particularly surplus line carriers, have interjected exclusions that border on making the coverage illusory.

c. For example, Ironshore Specialty uses an endorsement which states:

> This insurance does not apply to any "bodily injury" or "property damage":
>
> 1. Which first existed, or is alleged to have first existed, prior to the Inception of this policy. "Property damage" from "your work", or the work of any additional insured, performed or prior to policy inception will be deemed to have first existed prior to the policy Inception, unless such "property damage" is sudden and accidental and takes place within the policy period or
>
> 2. Which was, or is alleged to have been, in the process of taking place prior to the Inception date of this policy, even if the such "bodily injury" or "property damage" continued during this policy period; or
>
> 3. Which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in "bodily injury" or "property damage" prior to the Inception date of the policy.

d. This endorsement is at the center of two cases from Nevada and California now pending before the Ninth Circuit, one of which refused to apply and the other which upheld the exclusion. They are:

   i. *Assurance Company of America, et al. v. Ironshore Specialty Insurance*
   REFUSED TO APPLY LANGUAGE - NEVADA
   Ninth Circuit Court of Appeals Docket Number 18-16857
   Nevada U.S. District Court Case No. 2:13-cv-02191-GMN-CWH
   Chief District Judge: Gloria M. Navarro
   02/20/20 - Notice of Oral Argument on Tuesday, April 14, 2020 - 09:30 A.M.
   Courtroom 3 - San Francisco.CA.

ii. *Assurance Company of America, et al. v. Ironshore Specialty Insurance*
UPHELD LANGUAGE - NEVADA
Ninth Circuit Court of Appeals Docket Number 18-16937
Nevada U.S. District Court Case No. 2:15-cv-00460-JAD-PAL
District Judge: Jennifer A. Dorsey
02/20/20 - Notice of Oral Argument on Tuesday, April 14, 2020 - 09:30 A.M.
Courtroom 3 - San Francisco.CA.

e. *American Zurich Insurance Co., et al. v. Ironshore Specialty Insurance* (Ninth Circuit Court of Appeals Docket Number 18-16950) is a third case addressing this exclusion with the District court holding that it applied. Until recently, it seemed likely the Ninth Circuit would address all three cases in the same opinion. However, on April 16, 2020, the Ninth Circuit held that the District Court did not err in concluding there was no duty to defend because: i) there was no dispute that the work was performed prior to the policy period; ii) Zurich failed to raise a disputed issue of any fact regarding the sudden and accidental exception to the exclusion; and iii) the policy language was not ambiguous. The ruling in this case strongly indicates that the Ninth Circuit will also enforce the Ironshore exclusion in the *Assurance v. Ironshore* matters. If the Ninth Circuit rules in favor of Ironshore in these matters will it lead to simple acceptance of Ironshore's exclusion? This is unlikely because none of these three cases actually involved an allegation or factual development that work was done during the Ironshore policy period or that there was any sudden and accidental property damage. The collective result is an invitation to better develop facts to help prove the exception to the exclusion. In any event, the Ironshore exclusion will continue to result in disputes and raise issues such as:

i. If Ironshore defends through carrier retained counsel potential *Cumis*/Civil Code §2860 issues may arise because factual development or lack thereof on the sudden and accidental exception could impact coverage could create a conflict of interest;

ii. Many projects have subcontracts with insurance requirements. These typically require occurrence based, policy forms for 10 years following project completion. The Ironshore endorsement may run afoul of such a requirement and create a potential breach of contract issue between the Owner/General Contractor and the Subcontractor covered by Ironshore for failure to obtain the required scope of coverage;

iii. Denial based on the endorsement leaves the insured bare for that policy years(s) and therefore heightens its personal exposure pursuant to typical defense, indemnity and hold harmless provisions in contracts.

VI. ADDITIONAL INSURED ENDORSEMENTS - LIMITATIONS - JAY SEVER

The most common language in additional insured endorsements is the standard "caused, in whole or in part by," granting language added to additional insured endorsements by ISO in 2004. Most courts that have interpreted this language to find that it requires only minimal negligence on the part of the

named insured for the contractor whom the named insured agreed to provide additional insured coverage to be an additional insured. *See e.g., Gilbane Bldg. Co. v. Admiral Ins. Co.,* 664 F.3d 589, 601 (5th Cir. 2011). However, the named insured's acts must have been at least a partial cause. *Am. Guarantee & Liab. Ins. Co. v. Norfolk S. Ry. Co.,* 278 F. Supp. 3d 1025, 1042 (E.D. Tenn. 2017). But the "caused in whole or in part by" language generally does not exclude coverage for an additional insured's own negligence, or limit coverage to vicarious liability. *Id.*

Some additional insured endorsements limit coverage by extending additional insured status "but excluding any negligent acts committed by such additional insured". In a case interpreting this language, the Sixth Circuit held such language does not provided coverage for the putative additional insured's own negligence. *BP Chems., Inc. v. First State Ins. Co.,* 226 F.3d 420, 425 (6th Cir. 2000) (applying Texas law). However, a Texas appeals court found a duty to defend an additional insured under the same language where the petition contained sole negligence claims along with claims of a vicarious nature. *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co.,* 394 S.W.3d 228, 233-34 (Tex. App.—El Paso 2012, pet. denied). Thus, in states like Texas, where the duty to defend is determined under the complaint allegation rule, and where there is a complete duty to defend if there is even one covered claim, such language may not affect a duty to defend such additional insured.

Some additional insured endorsements limit the coverage to be no broader than the indemnity agreement contained within the contract. Such language typically provides that the insurance afforded to such additional insured "will not be broader than that which the Named Insured is required by the contract or agreement to provide for such Additional Insured." Under this language, the scope of the indemnity agreement governs the scope of the duty to provide additional insured coverage. *See Miramar Petroleum, Inc. v. First Liberty Ins. Corp.,* 2015 WL 7301096, at *3 (S.D. Tex. Nov. 18, 2015). Such language was specifically drafted to limit additional insured coverage to the extent of the named insured's indemnity obligations. *See Norfolk S. Ry.*, 278 F. Supp. 3d at 1044–45; *Travelers Indem. Co. v. Praetorian Ins. Co.,* 2019 U.S. Dist. LEXIS 170492, at *12 (C.D. Cal. 2019); *Nicholas N. Nierengarten, New Iso Additional Insured Endorsements*, Brief 30, 34 (2014).

Another common limiting provision in some additional insured endorsements is that the additional insured coverage "only applies to the extent permitted by law." Such language is an apparent attempt to incorporate the applicable state's anti-indemnity statutes which extend to additional insured agreements. For instance, the Texas Anti-Indemnity Act disallows indemnification for construction-related claims caused by the party seeking indemnification, and only allows a party to indemnify another in limited circumstances. Tex. Ins. Code § 151.102; *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.,* 392 F. Supp. 3d 731, 739 (S.D. Tex. 2019). But, in addition to limiting indemnity agreements, part of the purpose of the Texas Act is to preclude a contractor requiring subcontractors to name the contractor as an additional insured under the subcontractor's insurance for the contractor's own negligence. *See* Tex. Ins. Code § 151.104. Some state's anti-indemnity acts do not limit additional insured coverage, and thus, the endorsement's limiting language has no application. Fla. Stat. § 725.06. Further still, other states such as Alabama have no statute limiting either indemnification agreements or additional insured requirements in the construction context.

- ADDITIONAL INSURED ENDORSEMENTS (Continued) - KEN BLOOM

In New York, we have seen the scope of additional insured coverage limited through both the Courts, and through manuscript endorsements included in policies.

There have been two relatively recent decisions from the New York Court of Appeals which have an effect on the scope of additional insured coverage under New York law: *Burlington Ins. Co. v. NYC Transit Auth.*, 29 N.Y.3d 313 (2017) and *Gilbane Building Co./TDX Construction Corp., et al. v. St. Paul Fire and Marine Insurance Co., et al,* 31 N.Y.3d 131 (2018).

In *Burlington,* the New York High Court New York Court of Appeals changed the law in New York with respect to endorsements that limit additional insured coverage to liability that is "caused, in whole or in part by" the named insured's acts or omissions. Since 2012, New York courts had held that there was no material difference between the phrases "arising out of" and "caused, in whole or in part by" in additional insured endorsements — neither phrase required negligence on the part of the named insured, only a nexus to the named insured's work. In *Burlington*, the Court of Appeals expressly rejected that reasoning, finding instead that the language "caused, in whole or in part" requires partial proximate causation on the part of the named insured.

New York City Transit Authority (NYCTA) contracted with Breaking Solutions, Inc. (BSI) to perform tunnel excavation work at a New York City subway construction project. BSI purchased a commercial general liability policy from Burlington with an endorsement that listed NYCTA, Metropolitan Transit Authority (MTA), and the City of New York as additional insureds, but "only with respect to liability for 'bodily injury'… caused, in whole or in part, by [BSI's] acts or omissions …" While performing work at the construction site, a BSI machine operated by a BSI employee touched a live electrical cable buried in concrete, causing an NYCTA employee to fall from an elevated platform. The NYCTA employee sued BSI and the City of New York claiming negligence and violations of New York's Labor Law. The city brought a third-party action against NYCTA and MTA for indemnification and contribution.

NYCTA and MTA tendered their defense to Burlington as additional insureds under the Burlington policy. Burlington accepted the defense but specifically reserved the right to deny coverage to the extent that neither entity qualified as an additional insured. Discovery in the underlying action revealed that the NYCTA was entirely at fault for the accident for failing to mark the electric cable or turn off the power. Burlington disclaimed coverage to NYCTA and MTA but settled the lawsuit on behalf of the remaining defendants for $950,000.
Burlington then brought a declaratory judgment action against NYCTA and MTA, seeking a ruling that neither were additional insureds because the loss was not caused by BSI's acts or omissions. The trial court granted Burlington's motion for summary judgment on this ground, but the First Department reversed in 2015, holding that although BSI was not negligent, the act of triggering the explosion was a cause of the injury and therefore MTA and NYCTA satisfied the "caused by" requirement in the additional insured endorsement.

In a 4-2 opinion, the New York Court of Appeals reversed the First Department, agreeing with Burlington that coverage does not apply under this endorsement where the additional insured is

the sole proximate cause of the injury. More broadly, the decision held that the named insured must be at least a partial proximate cause for the endorsement to apply. The Court of Appeals found unpersuasive MTA's and NYCTA's argument that the endorsement required "but for" causation only, and that BSI's machine operation was a sufficient casual nexus to the injury to establish entitlement to coverage.

The majority opinion distinguished between "but for" causation, which refers merely to a link in the chain leading to an outcome and "proximate causation," for which legal liability may be imposed. Because the endorsement states that the injury must be "caused in whole or in part," and "but for" causation cannot be partial, the court found that this endorsement requires legal "proximate causation" to apply. "An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability. Thus, these words — in whole or in part — can only modify 'proximate cause.'" Although the court agreed with NYCTA and MTA that the "caused by" language does not require that the named insured be solely negligent, it held that where, as here, the additional insured was the solely negligent party, it fell outside the scope of the endorsement. Thus, had BSI been even partially legally responsible for the accident, the NYCTA and MTA may have been entitled to coverage. Indeed, the court stated that the policy extends coverage only for "damages resulting from BSI's negligence or some other actionable 'act or omission,'" although it did not elaborate on what those other "actionable acts or omissions" might be.

In *Gilbane*, the New York Court of Appeals interpreted language in an additional insured endorsement to require direct contractual privity for additional insured coverage to be afforded. In doing so, Court of Appeals has made clear that in insurance coverage disputes, the language of the policy takes precedent.

By way of background, Plaintiffs, Gilbane Building Co./TDX Construction Corp., a joint venture, and its individual members, Gilbane Building Company and TDX Construction Corporation (collectively "Gilbane"), sought a declaration that Liberty Insurance Underwriters is obligated to defend and indemnify Gilbane as an additional insured under a commercial general liability policy issued to a prime contractor, Samson Construction Co. ("Samson").

The underlying action involved a construction project on a property owned by the City of New York that is part of Bellevue Hospital, which was to be financed and managed by the Dormitory Authority of the State of New York ("DASNY"). Gilbane was retained by DASNY to perform construction management services. Under the construction management agreement, any prime contractor on the project was required to name Gilbane as an additional insured under its liability policies.

Separately, DASNY retained Samson to serve as a prime contractor on the project. In the contract, Samson agreed to procure liability insurance with an endorsement naming as additional insureds, *inter alia*, "the Construction Manager (if applicable) and other entities specified on the sample Certificate of Insurance provided by the Owner." The sample Certificate of Insurance stated: "The following are Additional Insureds under General Liability as respects the project … Gilbane/TDX Construction Joint Venture."

Thereafter, Samson obtained a liability policy from Liberty. The additional insured endorsement in the Liberty policy provides that an additional insured is "any person or organization with whom you [the insured] have agreed to add as an additional insured by written contract".

After Samson's excavation work on the project allegedly caused adjacent building sinking, DASNY sued Samson and the project architect, Perkins Eastman Architects, P.C. The architect in turn filed a third-party action against Gilbane. Gilbane then sought coverage as an additional insured under a Liberty policy issued to Samson. When Liberty denied coverage, Gilbane instituted a coverage action.

In determining whether Gilbane qualified as an additional insured under the Liberty policy, the Court of Appeals looked to the plain language of the policy, specifically the wording: "with whom you have agreed to add as an additional insured by written contract." The Court of Appeals held that the plain language required a direct contract between Gilbane and Samson in order for Gilbane to have additional insured status. The court disregarded Gilbane's argument that the policy language was ambiguous, holding that "the endorsement is facially clear and does not provide coverage unless Gilbane is an organization 'with whom' Samson has a written contract."

While many in the construction industry assert that this decision strips coverage to companies that reasonably believe it had additional insured coverage, those in the insurance industry say this is just a matter of straightforward policy interpretation.

We have also seen insurance carriers take steps to limit additional insured coverage through manuscript policy endorsements, often times in construction accident cases. Particularly in construction cases, additional insured coverage is sought by an upstream contractor from an injured employee's employer. We have noticed two manuscript endorsements which attempt to limit coverage in this regard, particularly by extending the scope of the endorsement/exclusion to "any insured."

We have recently seen an endorsement which limits coverage for bodily injury or property damage by any "contractor," defined as essentially any entity that any insured contracts with, unless stringent conditions precedents are met. In this regard, such conditions include (1) certificates of insurance are obtained from every contractor; (2) written indemnity agreements are obtained from every contractor; (3) written agreements from every contractor are obtained to provide additional insured coverage; and (4) every contractors primary insurance agrees to defend and indemnify every insured on a primary basis.

Essentially the effect of this endorsement is to either preclude coverage for both named insureds and additional insureds alike, or pass additional insured coverage to the carrier of downstream contractors.

Another trend in limiting additional insured coverage we have noticed is through manuscript Employee Injury Exclusions. We have begun to notice that an ever increasing number of carriers have broadened the Employee Injury Exclusion to encompass an employee of "any insured,"

which includes parties that would otherwise be afforded additional insured coverage under an additional insured endorsement. The exclusion generally reads along the lines of:

> "[t]his insurance does not apply to . . . 'bodily injury' to[ ] [a]ny 'employee' of any insured or any contractor or subcontractor working directly or indirectly on any insured's behalf arising out of and in the course of: (i) employment by the insured; or (ii) performing duties related to the conduct of the insured's business or the business of any contractor or subcontractor working directly or indirectly on the insured's behalf."

In *Utica Ins. Co. v RJR Maintenance Group, Inc.* 90 AD3d 554, (1st Dep't 2011), the Appellate Division, First Department of New York granted the plaintiff's motion for summary judgment declaring that it was not obligated to defend or indemnify the defendant in an underlying personal injury action where "[t]he employee exclusion in the subject insurance policy unambiguously states that the insurance did not apply to bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured, or to any employee of such contractor sustained during the course of employment" finding that the Employer's Liability provision of the Policy is unambiguous.

VII. NOTICE OF CHANGE IN POLICY TERMS - KEN BLOOM

Generally, a change in policy terms, such as the inclusion of endorsement or policy exclusion must be fairly communicated by the insurer to the insured, sufficiently in advance of renewal or cancellation such that the insured can make a reasoned decision to accept the policy and its new terms, or obtain insurance from another insurer.

For the most part, how the changes must be communicated to the insured are statutory or are set forth in an individual state administrative code. Be forewarned, that if asked, it is highly likely that a Court will strictly construe the statutory language regarding notice of the change to policy terms in favor of the insured and against the insurer.

For instance, New York Insurance Law §3426(e)(B)(3), requires a notice of cancellation, conditional renewal or nonrenewal to be sent at least sixty but not more than one hundred twenty days in advance of the expiration date of the policy. New York Insurance Law §3426(i) **mandates** strict construction of the statute:

> "No cancellation, conditional renewal or nonrenewal notice that fails to include a provision required by this section shall be an effective notice for the purposes of this section."

New Jersey has similar strict notice requirements. N.J.A.C. §11:1-20.2 provides in relevant part:

> **Renewal, Nonrenewal and cancellation notice requirements**

(c) Subject to N.J.A.C. 11:1-20.2(m) for medical malpractice liability insurance policies, with respect to payment of the renewal premium, notice of the amount of the renewal premium and **any change in the contract terms** shall be given to the insured in writing not more than 120 days nor less than 30 days prior to the due date of the premium and shall clearly state the effect of nonpayment of the premium by the due date. (Emphasis added)

***

(g) … if an insurer fails to send a notice of nonrenewal as required by this subchapter or fails to issue and deliver a policy replacing at the end of the policy period a policy previously issued and delivered by the insurer, or fails to issue and deliver a certificate or notice extending the term of a policy beyond its policy period or term, or fails to provide notice of renewal as specified at (c) above, the insured shall be entitled to continue the expiring policy at the same terms and premium until such time as the insurer shall send appropriate notice of termination or renewal under this subchapter.
***

Thus, in both New York and New Jersey, coverage will "continue on the same terms and conditions as the expiring policy" should notice of the change in policy terms fail to conform to the statutory requirements.

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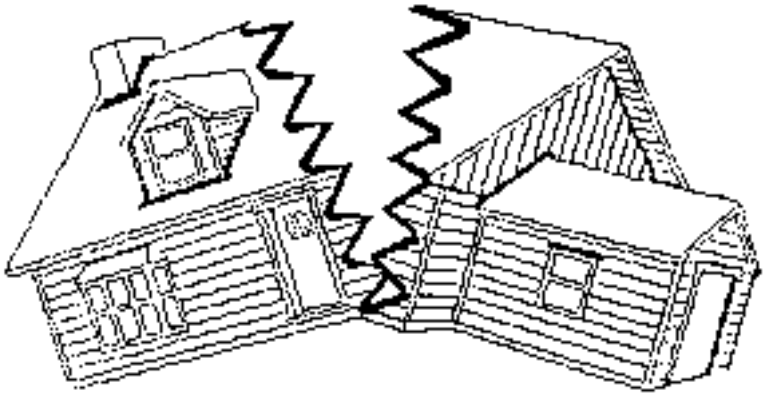
Controlled Insurance Programs: Reflections of the Practitioners and Neutral



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WEST COAST CASUALTY

REFLECTION

From a Plaintiff's Perspective:

Controlled Insurance Programs

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WHAT IS IT?

WRAP
"Wrap-up" Insurance

"Wrap-up" insurance, or what is commonly referred to as a **"WRAP",** is a liability insurance policy that serves as a blanket policy for owners, contractors and subcontractors working on large projects exceeding $10 million dollars. A WRAP provides risk protections and coverage for all participants involved in either very large construction projects or a series of smaller related construction projects. There are two types of WRAP, which are are **owner-controlled** insurance policies **(OCIPs)** and **contractor-controlled** insurance policies **(CCIPs)**.

WRAP vs. Traditional Insurance

TRADITIONAL INSURANCE

- Different Insurers
- Potential Inadequate Limits
- Risk of Gaps in Coverage
- Risk of Uninsured Subcontractors
- Potential Cross Litigation Amongst Contractors
- Indemnity Issues

WRAP

- Establishes Control
- Higher Available Coverage Limits
- Reduction in Cost
- Consistency in Coverage
- Regulated Claims (Mitigates Cross Litigation)
- Access to a Larger Pool of Qualified Contractors

Where do WRAP policies apply?

When it comes to WRAP policies, it is important to note that these policies generally do not apply to custom homes so much as they apply to condominium and track housing projects or large projects (i.e. bridge construction).

Let's review condominium / track housing projects as an example:

- When you purchase a WRAP, it has bells and whistles, which means it supplies additional coverage that you cannot purchase as an individual subcontractor.
- WRAP covers workmanship uniformly for everyone involved, whereas there is a standard exclusion on individual insurance policies.

OCIPs vs. CCIPs

The key difference between OCIPs and CCIPs is that with OCIPs, the owner receives the maximum financial benefit whereas with CCIPs, the general contractor receives the maximum financial benefit.

However, with OCIPs, the owner posts collateral and pays premiums whereas with CCIPs, the contractor posts collateral and pays premiums.

Further distinctions

OCIPs:

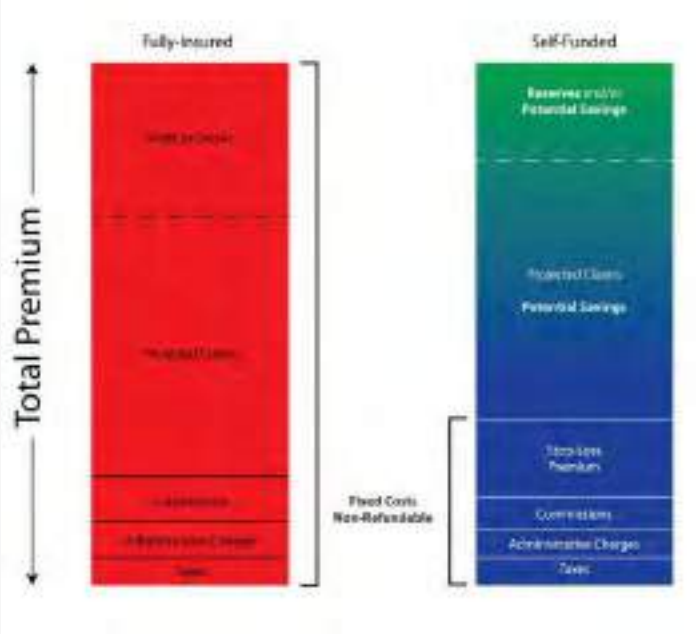
- Same coverage terms
- Limits are dedicated
- Owner controls claims for completed operations period
- Broker provides claims advocacy
- Owner establishes contractor insurance requirements
- Difficulty calculating contractor's cost of risk
- Owner monitors program success
- Broker oversees program
- Owner can include multiple projects
- Start up costs are often high
- Potential difficulty with claim resolution

CCIPs:

- Same coverage terms
- Limits can be dedicated or shared
- GC controls claims for completed operations period
- GC manages contractor insurance requirements and program admin
- Other projects cannot be included in the same program unless using same GC
- Alignment of incentives (loss of control)
- Broker oversees program
- Cheap premiums
- 1 prime contractor

Self-Insured Retention (SIR)

- The cost specified in a liability insurance policy that is to be paid by the insured prior to the policy responding to a claim. Therefore, a policy written with a SIR provision would stipulate that the insured (not the insurer) pay defense and indemnity costs associated with a loss or until the SIR limit was reached.



How does it apply?

SIR & Indemnity:

- INDEMNIFICATION UNIFORM COVERAGE
- NEW INDEMNITY LIMITATIONS APPLY TO "CONSTRUCTION DEFECTS" BUT NOT "DESIGN DEFECTS"
- ONLY A WRAP IS CLEARLY EXCLUDED FROM ALL OF THE INDEMNITY LIMITATIONS
- WRAP PROJECT = CONTRACT ARRANGEMENT BETWEEN HOMEOWNERS AND SUBCONTRACTORS
-
- *WHO PAYS FOR DEDUCTIBLE?*
- SUBCONTRACTOR IS MADE RESPONSIBLE IN PROPORTION TO THEIR LIABILITY TO THE SIR
-
- *CAN ONE PARTY PAY SIR? CAN SUBCONTRACTORS/OWNER CHIP IN TO PAY SIR?*
- YES & YES
  - HOWEVER, IT IS DIFFICULT TO GET A SUBCONTRACTOR TO PAY SIR, SINCE ALL OF THE POLICY RENEWALS WILL BE OUT OF POCKET

INDIVIDUAL INSURANCE POLICIES & WRAPS:

CONSIDERATIONS

WHAT IF INSURANCE POLICY GOES BELLY-UP?

- HOMEOWNER HAS NOTHING, GENERAL CONTRACTOR AND SUBCONTRACTORS HAVE NO FALL BACK.
- INDIVIDUAL POLICIES ARE UNLIKELY TO ALL GO BELLY-UP (NOT ALL EGGS ARE IN ONE BASKET)
- **CALIFORNIA INSURANCE GUARANTEE ASSOCIATION ("CIGA")** FUND OF LAST RESORT

SHOULD YOU PURCHASE A WRAP FOR CUSTOM HOMES?

- WRAPS HAVE MUCH "SMALLER POCKETS" THAN INDIVIDUAL POLICIES. ALTHOUGH SUITABLE FOR TRACK HOMES, BUT NOT NECESSARILY IDEAL FOR CUSTOM HOMES AND PROJECTS WHERE THE OWNER CAN AFFORD TO PURCHASE AN INDIVIDUAL INSURANCE POLICY AND ADVISE ALL SUBCONTRACTORS TO PURCHASE INDIVIDUAL INSURANCE POLICIES WITH AN UMBRELLA POLICY.

REFLECTIONS FROM THE MEDIATOR'S PERSPECTIVE

Background:

Wrap-up insurance is a liability policy that serves as all-encompassing insurance that protects the contractor/s and enrolled subcontractors working on a designated construction project or set of designated projects. The two types of wrap-up insurance are owner-controlled insurance programs (OCIP) and contractor-controlled insurance programs (CCIP). Under an OCIP the owner is the "sponsor" and under the CCIP the builder is the "sponsor". Note that design professionals, product manufacturers and suppliers are typically excluded from coverage under the Wrap.

For smaller projects, ISO form CGL policies are typically issued with General Change Endorsements. The General Change Endorsements typically modify the policy by including tail coverage (10 years) and the "business risk exclusions", j., k. and l. are eliminated. (Attached as Exhibit "A" is a sample Consolidated Insurance Program General Change Endorsement.)

The business risk exclusions generally exclude (1) coverage for property that the insured has management and control over and for which separate first-party property insurance should be obtained; (2) and property damage caused by the insured's faulty workmanship or products, which commercially the insured has to stand behind and warranty. (Attached as an Exhibit "B" is an exemplar of these provisions within ISO form CG 00 01 12 07 is attached.) Without these provisions, WRAP coverage is thereby expanded well beyond the standard commercial general liability coverage.

As mentioned above, the Wrap policy covers both the contractor and enrolled subcontractors. Contractors often utilize bid credits from each subcontractor to help finance the initial purchase of the Wrap and often contractually require the subcontractors to participate in any retention if a claim arises post construction. Consistent with this, the subcontractors' commercial general liability policies will typically contain endorsements that exclude coverage where a Wrap is in place. (Attached as Exhibit "C" is a chart of ISO form WRAP exclusions.)

One additional feature of Consolidated Insurance Programs is that they typically include an endorsement that reduces the applicable limits of the policy by payments of defense costs and supplementary payments. (Attached as Exhibit "D" is an exemplar of the Defense Costs and Supplementary Payments included within limits of insurance endorsement.)

Once construction is complete, it is extremely important that all parties have a salient understanding of the presence and structure of any retention.

Retentions:

Self-Insured Retentions (SIRs) under most Wrap programs can be the most complicating factor impacting the resolution of a claim. The Sponsor of the Wrap is primarily charged with satisfaction of the SIR, however, that obligation is often shared through contractual provisions with down stream contractors.

Subcontractor Contributions: Where the underlying contracts require the subcontractors to contribute to an SIR, the effort and expense to collect those contributions can often exceed the

amount at issue. As such, both the prime contract and subcontracts need to carefully address the payment of contributions in detail before construction commences. For instance, it is common for subcontract agreements to provide different contribution amounts based upon the scope of work of each trade. Sometimes this is done through "tiers", with major subcontractors (framers, roofers, window installers…) paying a much larger contribution number compared with minor subcontractors (landscape, fencing, cabinetry.)

Several consistent problems have surfaced with the collection of subcontractor contributions. The first is the acknowledgment that the subcontractor's contribution is not an accident, but a contractual obligation for which many insurance carriers believe that an insurance policy should not respond. While there are creative ways to attempt to trigger coverage, this can be a costly endeavor. If there is no insurance coverage for the contribution and the obligation falls directly on the subcontractor, collection of the contribution become even more difficult where the subcontractor is insolvent, bankrupt or dissolved.

As a cautionary note, the contract provisions that set out the subcontractor's obligation and associated process by which the builder attempts to collect subcontractor contributions can look very similar to the way in which insurance companies operate. As such, the sponsor of the Wrap should ensure that it is aware of any provisions that require independent licensing (i.e. insurance carrier and/or insurance broker) when the provisions are set up and initiated.

From a neutral's perspective, once a claim is lodged and litigation filed, the above issues need to be addressed prior to commencing a mediation session with the claimant. It is imperative that the sponsor and insurer have a mutual understanding of the retention issues or at least an understanding of their respective positions. Sometimes this can be achieved through pre-session calls, however, an independent mediation between sponsor and insurer may be required where the issues are complex and contentious.

WRAPs for Larger/National Builders

The insurance product becomes increasingly more complex where a single multi-year insurance product is specifically written (aka "manuscript") for a larger builder and/or for a number of projects. Most of these products are highly negotiated and include specific provisions for the handling of completed operation claims. These products typically have a significant SIR and detailed provisions regarding how repair/warranty work is to be addressed and what activities/costs reduce the applicable SIR.

Conceptually, allowing a builder to perform warranty repairs and maintain customer relations, while reducing its SIR, should minimize the risk exposure for both the builder and the Wrap carrier. The balance between reduction in potential future claims and non-damage warranty claims is often heavily negotiated and is dependent upon the sophistication of the parties at the table. For instance, many of these larger products exclude "warranty" work during the first year following construction, but allow SIR reduction where a property damage claims is made during this same time frame. Underlying this treatment is the assumption that a majority of warranty repair requests will occur within the first year following construction, leaving systemic and/or latent deficiencies for later years.

The second through tenth years (2-10) following construction often have their own considerations. For instance, a number of Wrap policies expand the definition of work that reduces the SIR to include "performance failures". A "performance failure" is a broader category of claim that can include property damage, but also includes standards set forth in pertinent building and civil codes. Some Wrap policies go so far as to specifically identify the actual performance standards applicable to the policy, whether it is in the initial stages of SIR satisfaction or once satisfied, how the policy responds (See for example performance standards set forth in California Civil Code Sections 895-945.5.)

While the above seems straight forward, capturing and documenting the financial impact of responding to either a warranty or property damage claim can be exceeding difficult. For instance, does a builder need to have a dedicated employee or employees that do nothing but respond to these issues? If so, payments for salaries/benefits of each have to be allocated. If the builder's warranty employee works on multiple projects that are covered under separate Wraps, there have to be further allocations. What if a warranty claim is initiated in year one, but the claim is not resolved until year 2? What if the WRAP has a separate limit for claims of "performance failure" versus a claim for "property damage"? How is each to be identified and allocated for purposes of SIR satisfaction analysis?

Sufficient Limits?

A significant concern for both claimants and Wrap sponsors is whether there are adequate limits for the project and/or projects should litigation ensue. As noted above, many Wrap limits are eroded by defense fees and costs and supplementary payments (aka burning limits). Defense fees can quickly reduce available limits under an eroding policy thereby exposing contractors to personal liability.

If there is a large loss or there are depletion issues, other funding sources may need to be pursued. For instance, while it is now common place for insurers to include Wrap exclusions on commercial general liability policies, it is not always consistent. Further, product manufacturers and suppliers and design professionals are almost always excluded from the OCIP. As such, it may be necessary to involve those parties, especially if your work involves extensive design issues. Such limits can greatly impact a case and the ability to settle or resolve claims.

Underfunding can also create conflict among sponsor and enrolled parties. A general contractor or developer may seek to assert its contractual indemnity rights against subcontractors to fund a shortfall. Enrollees will typically take issue with how best to allocate the policy limits to avoid individual uninsured exposure. As a cautionary note: counsel representing the sponsor must take these potentially competing interests into account through the handling of a claim. Further, enrolled contractors may take issue with the administration of the insurance program and demand that policy benefits be used to protect them not the sponsor.

Mediation Issues:

Early identification of issues between the sponsor and insurer are critical. Initially, how and if the retention have been satisfied can be a complex task and require significant accounting. Without both entities on the same page, negotiations with the claimant become futile.

Where there are enrolled entities that are required, pursuant to contract, to participate in the retention, separate negotiations are also commonly called for to determine the potential and extent of contribution.

Where a claim may exceed state limits, an understanding of the policy provisions becomes even more critical. In particular, the failure to timely identify a defense within limits endorsement can create potential personal exposure for a sponsor and potential exposure for counsel representing the sponsor.

Where limits become an issue, counsel for the sponsor will have to pursue additional risk transfer mechanisms, including actions against unenrolled entities, actions for retention contributions and tenders to enrolled contractor's commercial general liability carriers.

Finally, where there are a number of claims against a sponsor that all fall within the retention amount, the sponsor will typically have a heightened interest in risk transfer opportunities and protection of its portfolio.

REFLECTIONS FROM THE SUBCONTRACTOR'S PERSPECTIVE

Wrap policies were intended to provide coverage for an entire project. They often include workers compensation, as well as general liability and completed operations, but normally for onsite operations only. The two most common form of wrap policies are the Owner-Controlled Insurance Program (OCIP), where the owner purchases the policy, and the Contractor-Controlled Insurance Program (CCIP), where the general contractor purchases the policy. Many coverage questions can arise starting with the basic question of who is insured and for how much? A wrap policy is often only as good as the wrap administrator. Possible wrap administrators include the insurance broker, an owner's representative or a general contractor's employee. Communication between the parties intended to be covered under the wrap and the wrap administrator are critical but can often look like a game of telephone.

Many of the coverage issues that arise from wrap policies disproportionally affect subcontractors. Subcontractors often have extreme difficulty finding coverage for large residential or mixed-use projects. Most, but not all of the general liability policies issued to subcontractors have exclusions for projects where there is a wrap policy or even excluding all residential or condominium projects. It is therefore crucial for a subcontractor to be properly enrolled in a wrap policy. Some projects have rolling enrollment so some of the houses might be included for a subcontractor and some may not depending on when they enrolled. Many wrap policies are issued to the general contractor who then "covers" their subcontractors through an agreement or an addendum to the subcontract which also includes an allowance for premium. This can leave a subcontractor with little recourse if the wrap carrier has coverage issues as they have not communicated directly with the carrier and may have no direct contractual relationship. Often the subcontractors are not given a copy of the wrap policy but instead are given a "wrap manual". It is important to determine whether, when and for what the subcontractor is insured under the wrap policy.

Another issue that needs to be addressed is coverage under the wrap program for completed operations after the project is completed, as many wrap policies list a coverage period of several years to cover the period of construction. It is common that the wrap-up insurers will provide an "extended completed operations" endorsement for the applicable statute of limitations period.

Wrap policies contemplate a joint defense and response to construction defect claims which usually includes a no cross actions clause and a single counsel clause. The idea is that the wrap coverage will address any construction defects without regard to fault and risk transfer. Problems with this approach often start with the idea that one counsel can represent all parties. While the wrap policy and subcontracts often have a provision that the parties agree to waive any potential conflict with joint representation, as a practical matter, most attorneys cannot ethically represent parties that they are actually adverse. If an experienced general contractor's counsel is retained, they will likely have other cases adverse to some of the subcontractors in the wrap program. The same would go for any experienced subcontractor counsel. So usually at a minimum, different counsel must be retained for the general contractor and the subcontractors. This becomes even more critical if the Plaintiff decides to name the subcontractors even if they are covered under the same policy as the general contractor.

Even though there exists a no cross suits provision, some general contractors or owners choose to sue their subcontractors if they believe they can prove that there is a faulty design performed by the subcontractor because they are hoping to trigger an errors and omission policy that does not contain a wrap exclusion. This happens most often where the wrap policy contains burning limits

that diminish as defense costs mount and/or insufficient limits. If a subcontractor has a general liability policy without a wrap exclusion, they may also become a target of the general contractor in order to increase the potential insurance coverage available to pay for damages. Under California Civil Code section 2782.9, for contracts entered into after January 1, 2009, only equitable indemnity is allowed among wrap participants on a residential wrap project, and only for claims not covered by the wrap insurance program. It is important for subcontractors to negotiate their indemnity obligations and try to limit them to just those claims not covered by the wrap, if any, and ensure that their own general liability policy wrap exclusions apply only when coverage is provided under the wrap. Also, subcontractors will want to ensure that the wrap program waives the carrier's subrogation rights among wrap participants.

Further complicating the wrap coverage picture is the existence of self-insured retentions (SIR) for both the general contractor and/or the subcontractors. Often there will be an SIR for the general contractor which is passed onto the subcontractors through a contractual deductible. For residential projects, California Civil Code section 2782.9(b) provides that a plan sponsor may collect a reasonably allocated contribution to a self-insured retention or deductible under a wrap program, if the contract discloses the maximum contribution amount and the contribution is reasonably limited so that each participant may have some financial obligation in the event of a claim alleged to be caused by that participant's scope of work. California Civil Code section 2782.9(b) also states, "The contribution shall only be collected when and as any such self-insured retention or deductible is incurred by the builder or general contractor and in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim or claims alleged to be caused by the participant's scope of work, when viewed in the context of the entirety of the alleged claim or claims." Whether an SIR has been satisfied can be a tricky question. If the policy requires the SIR to be satisfied by only the general contractor and they are out of business or cannot afford to pay it, the subcontractors may be left without coverage. If it is not clear from the policy language what payments count towards the satisfaction of the SIR, there may be a fight to determine whether it has been paid. Many times, the general contractor's corporate or coverage counsel will apply their fees incurred in reviewing coverage and tendering to the carrier and subcontractors towards the SIR. The wrap carrier will usually require that the attorney fees be "defense fees and costs" and may argue that certain corporate counsel costs should not be counted towards the satisfaction of the SIR. In addition, there may be pre-suit repair costs that the insured will want to apply to the SIR. These issues can be mitigated when the wrap policy clearly defines what can be properly applied to the SIR. In addition, early documentation of expenses and costs is critical. This goes hand in hand with communication with the wrap carrier so these issues and expectations can be discussed and resolved early.

Burning limits and inadequate limits is the issue that creates the most contention in cases where there is a wrap policy. This situation usually triggers a frantic search for other possible funds through unenrolled parties which often include the material suppliers and design professionals. The wrap carrier will have to decide what reservation of rights to issue to the participants and how many attorneys to appoint to defend the insureds. Again, communication in a burning limits situation is key as the participants will have to be informed about how much is left in the policy as the litigation continues. If the claim can be resolved, the carrier must determine whether the policy applies to any other projects (and whether there will be limits left for those) and make sure that all insureds are released.

REFLECTIONS FROM THE GENERAL CONTRACTOR/BUILDER PERSPECTIVE

Introduction

California Insurance Code §11751.82(b) defines a "wrap-up" insurance policy or a series of insurance policies, written to cover risks associated with a work of improvement, and covering two or more of the contractors or subcontractors that work on that improvement.

For all projects, whether public, commercial, or residential, the total amount or method of calculation of any credit or compensation for premium must be disclosed. For public and commercial projects, this information must be in the bid documents. (California Civil Code 2782.96(a).) For private residential projects, it must be in the contract documents. (California Civil Code § 2782.95(a).)

Wrap-Up policies typically have self-insured retention or deductible requirements. Depending on the project(s) insured, these requirements may be significant and exceed $1 million. To distribute the burden of a self-insured retention requirement or deductible, subcontract agreements will have contribution requirements for each subcontractor in the event of a claim on the wrap-up policy.

Residential Projects: California *Civil Code* §2782.9

California Civil Code §2782.9 generally prohibits the enforcement of indemnity contracts between parties enrolled in a Wrap Program (See Appendix for statutory language). Pursuant to sub-section (a), any agreement requiring a subcontractor to indemnify another for a claim covered by a wrap-up policy is unenforceable, provided it is for a residential construction project. However, indemnity agreements between wrap-up policy enrollees on commercial and public construction projects may still be enforceable. Sub-section (b) clarifies sub-section (a) by (1) allowing equitable indemnity claims between parties, to the extent any contractual indemnity provision is deemed unenforceable, and, (2) allowing a builder or general contractor to obtain a "reasonably allocated contribution" from a subcontractor or other participant related to the self-insured retention requirement or deductible of the wrap-up policy. However, under the "reasonably allocated contribution" option, the maximum amount and the method of collecting the participant's contribution are both disclosed in the participant's contract, and the contribution is reasonably limited so that each participant may have some financial obligation in the event of a claim alleged to be caused by that participant's scope of work.

Sub-section (b) provides further requirements for the collection of self-insured retention and deductible contributions from wrap-up policy participants. The contribution can only be collected when the self-insured retention or deductible is incurred by the builder or general contractor, and in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim alleged to be caused by the participant's scope of work, when viewed in the context of the entirety of the alleged claim. This is to prevent general contractors and builders from "profiting" from the collection of self-insured retention or deductible contributions from participants. A contribution can only be collected after the participant is notified in writing of the contribution amount and the basis for contribution. This means some

type of reasonable "allocation" of responsibility must be included in the contribution request. Again, the total amount of contributions collected cannot exceed the amount of self-insured retention or deductible due and payable by the builder or general contractor for the claim.

Commercial and Public Projects

The protections of California Civil Code §2782.9 do not apply to commercial and public projects. Wrap-up policy participants, particularly subcontractors, should include in their bids language to the effect that they will not be bound by their bids unless they approve of the method of allocating contributions and when those contributions must be paid. The anti-indemnity statute (California Civil Code §2782.05) creates an exception for wrap-up policy participants, which means that participants in commercial and public projects may be subject to indemnity obligations for liability arising out of the sole negligence or willful misconduct of the indemnitee.

Subcontractors should negotiate to limit their indemnity obligations to just those claims that fall outside the wrap-up policy coverage. Subcontractors should also ensure that subrogation rights are waived among wrap participants.

Calculation of Self-Insured Retention/Deductible Contribution Amount

Commonly, the subcontract agreement provides the contribution amount is equal to the self-insured retention or deductible amount under the subcontractor's own general liability policy in effect at the time the claim is made, or in effect at the time the subcontract agreement is executed This common contract language creates several issues. First, At the time the subcontract agreement is executed, how does a builder/general contractor know what the self-insured retention or deductible requirement will be on the subcontractor's own policy years later when a claim is made? By the time the claim is made, the subcontractor may no longer be in business or may not have any insurance at all. Second, by pegging the subcontractor's contribution amount to the subcontractor's own general liability policy, the participants may have wildly inconsistent contribution requirements, having no relationship to their relative liabilities, or the allegations implicating their respective scopes of work.

Oftentimes, subcontract agreements will provide that if the subcontractor's own general liability insurance does not have any self-insured retention or deductible requirement, then the subcontractor's contribution will be X amount, or will not exceed Y amount. This language is subject to the same concerns noted above, including that the contribution amount may not have any relationship with the subcontractor's relative liability, or allegations implicating its scope of work.

Subcontract Agreements may require a subcontractor contribution on an "occurrence" basis, meaning one contribution per "occurrence." An "occurrence" is an insurance term of art which may not be defined in the subcontract agreement, leading to uncertainty and contention.

Best Practices

Best practices for the use of Wrap Programs begin from the moment an owner or general contractor speak to an insurance agent about what programs are available. From this moment, careful attention should be given to risk management and transfer in the purchase of a Wrap Program and in the preparation of subcontract agreements. For example, Wrap Programs generally do not provide coverage for liability arising from products manufactured off-site and for professional engineering services. In these cases, an owner or general contractor should ensure that insurance outside the Wrap Program is secured by the off-site manufacturer and professional engineer.

For residential projects, compliance with California Civil Code §2782.9 is critical. See Appendix for sample contract language to consider relating to SIR/deductible contribution requirements.

In the litigation context, Wrap Program carriers may retain a single defense counsel firm to retain all of the enrolled parties. Carriers and counsel should thoughtfully determine the propriety of such arrangements with due respect to the potential for conflicts of interest. A case-by-case approach is ideal for effectively handling such a scenario. Also, consider sharing Wrap Program enrollment information with opposing counsel with the aim of limiting the number of parties who must appear in the litigation.

When a Wrap Program claim has been initiated, counsel for an owner or general contractor must be delicate in seeking SIR/deductible contributions from the appropriate subcontractors, so as not to damage ongoing business relationships. Counsel for an owner or general contractor should issue tenders to all non-enrolled parties whose work is implicated, and to enrolled parties whose work/materials may not be covered by the Wrap Program.

APPENDIX

California Civil Code §2782.9

- (a) All contracts, provisions, clauses, amendments, or agreements contained therein entered into after January 1, 2009, for a residential construction project on which a wrap-up insurance policy, as defined in subdivision (b) of Section 11751.82 of the Insurance Code , or other consolidated insurance program, is applicable, that require an enrolled and participating subcontractor or other participant to indemnify, hold harmless, or defend another for any claim or action covered by that program, arising out of that project are unenforceable.
- (b) To the extent any contractual provision is deemed unenforceable pursuant to this section, any party may pursue an equitable indemnity claim against another party for a claim or action unless there is coverage for the claim or action under the wrap-up policy or policies. **Nothing in this section shall prohibit a builder or general contractor from requiring a reasonably allocated contribution from a subcontractor or other participant to the self-insured retention or deductible required under the wrap-up policy or other consolidated insurance program, if**

the maximum amount and method of collection of the participant's contribution is disclosed in the contract with the participant and the contribution is reasonably limited so that each participant may have some financial obligation in the event of a claim alleged to be caused by that participant's scope of work. The contribution shall only be collected when and as any such self-insured retention or deductible is incurred by the builder or general contractor and in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim or claims alleged to be caused by the participant's scope of work, when viewed in the context of the entirety of the alleged claim or claims. Any contribution shall only be collected from a participant after written notice to the participant of the amount of and basis for the contribution. In no event shall the total amount of contributions collected from participants exceed the amount of any self-insured retention or deductible due and payable by the builder or general contractor for the claim or claims. However, this requirement does not prohibit any legally permissible recovery of costs and legal fees to collect a participant's contribution if the contribution satisfies the requirements of this subdivision and is not paid by the participant when due.

- (c) This section shall not be waived or modified by contractual agreement, act, or omission of the parties.

Sample Contract Language To Consider:

"In event of an occurrence which requires Owner/Contractor to satisfy any portion of SIR or deductible of WRAP, and which arises out of or is connected with subcontractor's work, subcontractor shall pay owner/contractor a contribution toward such SIR. Owner and Contractor shall, consistent with Civil Code § 2782.9 provide written notice to each subcontractor of the amount of its share of the SIR and the basis for contribution. The maximum amount of the subcontractor's SIR contribution shall either be an amount equal to the SIR or deductible of the subcontractor's conventional CGL policy in effect at the time of execution of this addendum (or subcontract agreement) or a maximum of $25,000.00."

"Any subcontractor SIR contribution shall only be collected when and as incurred by owner/contractor and shall be in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim or claims alleged to be caused by subcontractor's scope of work. In no event shall the total amount of SIR contributions exceed the amount of any SIR or deductible due by owner/contractor."

"An occurrence is defined in the primary policy as an accident, including continuous or repeated exposure to substantially the same harmful conditions."

EXHIBIT "A"

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

CONSOLIDATED INSURANCE PROGRAM

GENERAL CHANGE ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SCHEDULE

Project Name: [redacted]
Project Address: [redacted]
Project Sponsor: [redacted]
Project Description: [redacted]

Enrolled Professionals: NONE

A. As respects COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, the Named Insured section of the Declarations is amended to include all "enrolled contractors."

B. SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 1. Insuring Agreement, paragraph b. (1) is deleted and replaced by the following:

(1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place at the "covered project;"

C. SECTION I – COVERAGES, COVERAGE A BODILY INJURY OR PROPERTY DAMAGE LIABILITY, 1. Insuring Agreement, paragraph e. is deleted and replaced by the following:

e. When included within the "products-completed operations hazard," "bodily injury" or "property damage" which arises out of defective construction and takes place after the end of the policy period will be deemed to have occurred on the last day of the policy period provided that:

(1) the policy period was not shortened by any cancellation;

(2) you have paid all premiums, including any audit premiums billed after the expiration date; and

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

(3) the "bodily injury" or "property damage" occurs and a claim for such "bodily injury" or "property damage" is made or a "suit" is filed:

a. within 10 years of the expiration date of the policy; or

b. during any applicable statute of limitations or repose;

whichever is less.

D. The following is added to SECTION I – COVERAGES, COVERAGE A BODILY INJURY OR PROPERTY DAMAGE LIABILITY, 1. Insuring agreement:

f. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

E. SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, paragraphs j., k. and l. are deleted;

F. The following are added to SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions:

1. "property damage" to the "covered project." However, this exclusion does not apply to "property damage" included within the "products-completed operations hazard;"

2. "property damage" to personal property in the care, custody or control of any insured.

G. SECTION I – COVERAGES, COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, Paragraph b. is deleted and replaced by the following:

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed at the "covered project" during the policy period.

H. The final paragraph of SECTION III –LIMITS OF INSURANCE is deleted and replaced by the following:

The Limits of Insurance of this Coverage Part apply to the entire policy period and will not reinstate.

I. The following is added to SECTION V – DEFINITIONS:

"Covered Project" means the project described in the Schedule of this endorsement.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

"Enrolled Contractors" mean those licensed contractors who, prior to the commencement of their work on the "covered project," have completed the Enrollment Document for the "covered project." However, "enrolled contractors" do not include any manufacturers or suppliers of materials or contractors or subcontractors engaged in environmental work or any professionals, including but not limited to, architects, engineers, geologists or soil professionals, or surveyors unless shown in the Schedule of this endorsement.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

EXHIBIT "B"

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Distribution Of Material In Violation Of Statutes

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

EXHIBIT "C"

CG 21 31	CG 21 54	CG 21 53
LIMITED EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART **SCHEDULE** The following exclusion is added to Paragraph **2. Exclusions** of Section I – **Coverage A – Bodily Injury And Property Damage Liability:** This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved. This exclusion applies whether or not the consolidated (wrap-up) insurance program:	**EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM** This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART **SCHEDULE** The following exclusion is added to paragraph **2.**, Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages) : This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved. This exclusion applies whether or not the consolidated (wrap-up) insurance program:	**EXCLUSION – DESIGNATED ONGOING OPERATIONS** This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART **SCHEDULE** **Description of Designated Ongoing Operation(s) :** **Specified Location (If Applicable) :** The following exclusion is added to paragraph **2.**, Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages) : This insurance does not apply to "bodily injury" or "property damage" arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others. Unless a "location" is specified in the Schedule, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific "location" is designated in the Schedule of this endorsement, this exclusion applies only to

(1) Provides coverage identical to that provided by this Coverage Part; or (2) Has limits adequate to cover all claims. This exclusion does not apply if the consolidated (wrap-up) insurance program covering your operations described in the Schedule has been cancelled, non-renewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis. You must advise us of such cancellation, nonrenewal or termination as soon as practicable.	(1) Provides coverage identical to that provided by this Coverage Part; (2) Has limits adequate to cover all claims; or (3) Remains in effect.	the described ongoing operations conducted at that "location". For the purpose of this endorsement, "location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

EXHIBIT "D"

DEFENSE COSTS AND SUPPLEMENTARY PAYMENTS INCLUDED WITHIN THE LIMITS OF INSURANCE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

I. Sub-paragraph **a. (2)** in **SECTION I – COVERAGES, COVERAGE A, 1. Insuring Agreement** is deleted and replaced by the following:

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments, settlements or Supplementary Payments under Coverages **A** or **B.**

II. **SECTION I – COVERAGES, SUPPLEMENTARY PAYMENTS – COVERAGES A AND B**, part **1.** is deleted and replaced by the following:

1. We will pay the following amounts, which shall reduce the Limits of Insurance, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
   a. All expenses we incur, including "defense costs".
   b. Up to $250 for the cost of bail bonds required because of accidents or traffic law violations arising out of use of any vehicle to which the Bodily Injury Coverage applies. We do not have to furnish these bonds.
   c. The cost of bonds to release attachments, but only for bond amounts within the applicable Limit of Insurance. We do not have to furnish these bonds.
   d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.
   e. All costs taxed against the insured in the "suit."
   f. Pre-judgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable Limit of Insurance, we will not pay any prejudgment interest based on that period of time after the offer.
   g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable Limit of Insurance.

"Defense costs" mean all expenses incurred in the investigation, defense, and settlement of any claim or "suit" under this policy, including attorney's fees, court reporter fees, charges for independent medical examinations, and expert witnesses, provided such claim expenses are incurred by us or with our prior written permission. "Defense costs" will not include salaried employees, counsel on retainer and office expenses of either the insured or us.

III. **SECTION III – LIMITS OF INSURANCE** is deleted and replaced by the following:

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
   a. Medical expenses under Coverage C;

b. Damages and Supplementary Payments under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages and Supplementary Payments under Coverage **B**.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages and Supplementary Payments because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to **2.** above, the Personal and Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages and Supplementary Payments because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

   a. Damages and Supplementary Payments under Coverage **A**; and

   b. Medical expenses under Coverage **C**

   because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages and Supplementary Payments because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED

WEST COAST CASUALTY

CONSTRUCTION DEFECT SEMINAR 2020

2019 CHANGES TO CH. 40 OF NEVADA REVISED STATUTES PURSUANT TO ASSEMBLY BILL (AB) 421

Presented By: DUANE E. SHINNICK, ESQ.

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SHINNICK & RYAN NV P.C.

CHANGES TO CH. 40 OF NEVADA REVISED STATUTES PURSUANT TO AB 421

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Assembly Bill (AB) 421 was signed into law on June 3, 2019. The majority of the statutory provisions in AB 421 reverse or modify some of the wide-ranging changes made to Nevada construction defect law by virtue of the enactment of AB 125 in February of 2015.

STATUTE SECTION AND DESCRIPTION	CURRENT (AB 421) VERSION	PRIOR (AB 125) VERSION
	New language/additions in blue.	**AB 125 was enacted on February 24, 2015**
STATUTE OF REPOSE **Sec. 7 of AB 421:** **NRS 11.202** – Statute of Repose extended from 6 years to 10 years from date of substantial completion. ******Retroactively applied to all homes substantially completed prior to 10/1/2019.****** Sec. 7 also added language that there is *no statute of repose or limitation for actions to recover damages for construction defects caused by an act of fraud*. This subsection **does not apply** to lower-tiered subcontractors (NRS 624.608) who perform work that covers up a defect in another contractor's work unless the subcontractor knew, or reasonably should have known, of the defect at the time the work was performed.	**11.202** 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 10 years after the substantial completion of such an improvement, for the recovery of damages for: (a) Except as otherwise provided in subsection 2, any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; (b) Injury to real or personal property caused by any such deficiency; or (c) Injury to or the wrongful death of a person caused by any such deficiency. 2. Except as otherwise provided in this subsection, an action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement.	11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 6 years after the substantial completion of such an improvement, for the recovery of damages for: (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; (b) Injury to real or personal property caused by any such deficiency; or (c) Injury to or the wrongful death of a person caused by any such deficiency. 2. The provisions of this section do not apply: (a) To a claim for indemnity or contribution.

Retroactively applied to all homes substantially completed prior to 10/1/2019.	The provisions of this subsection do not apply to any lower-tiered subcontractor who performs work that covers up a defect or deficiency in another contractor's trade if the lower-tiered subcontractor does not know, and should not reasonably know, of the existence of the alleged defect or deficiency at the time of performing such work. As used in this subsection, "lower-tiered subcontractor" has the meaning ascribed to it in NRS 624.608. 3. The provisions of this section do not apply: (a) To a claim for indemnity or contribution.	
RECOVERABLE DAMAGES **Section 5 of AB 421: 40.655(e)** – This section removes the requirement that a claimant prove the existence of a constructional defect in order to recover "any additional costs reasonably incurred by the claimant…" ***Applicable to any claim for which a Notice of Claim is served on or after 10/1/2019.***	40.655 (e) Any additional costs reasonably incurred by the claimant including, but not limited to, any costs and fees incurred for the retention of experts to: (1) Ascertain the nature and extent of the constructional defects; (2) Evaluate appropriate corrective measures to estimate the value of loss of use; and (3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence	40.655 (e) Any additional costs reasonably incurred by the claimant **for constructional defects proven by the claimant** including, but not limited to, any costs and fees incurred for the retention of experts to: (1) Ascertain the nature and extent of the constructional defects; (2) Evaluate appropriate corrective measures to estimate the value of loss of use; and (3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence
BUILDER'S WARRANTIES **Section 1.5 of AB 421: 40.625** – Definition of "Builder's Warranty" clarified. ***See also Section 4*** ***Applies to any Notice of Claim served on or after 10/1/2019.***	Builder's warranty means a warranty issued or purchased by or on behalf of a contractor for the protection of a claimant. The term: **1. Includes** a warranty contract issued by or on behalf of a contractor whose liability pursuant to the warranty contract is subsequently insured by a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence. 2. **Does not include** a policy of insurance for home protection as	Homeowner's warranty means a warranty or policy of insurance : 1. Issued or purchased by or on behalf of a contractor for the protection of a claimant; or 2. Purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive. The term includes a warranty contract issued by a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence.

	defined in NRS 690B.100 or a service contract as defined in NRS 690C.080	
Section 4 of AB 421: 40.650(3) – Claimant is no longer required to submit a claim to a homeowner's warranty prior to serving a Ch. 40 Notice. Instead, a Claimant shall ***diligently pursue a claim under a "Builder's Warranty"*** as described in Section 1.5 above. Additionally, Sec. 4 removes the tolling of the statute of repose from the time a claim is submitted under the homeowner's warranty until 30 days after the claim is rejected. ***Applies to any Notice of Claim served on or after 10/1/2019.***	If a residence or appurtenance that is the subject of the claim is covered by a builder's warranty, a claimant shall diligently pursue a claim under the builder's warranty.	If a residence or appurtenance that is the subject of the claim is covered by a homeowner's warranty that is purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive: (a) A claimant may not send a notice pursuant to NRS 40.645 or pursue a claim pursuant to NRS 40.600 to 40.695, inclusive, unless the claimant has first submitted a claim under the homeowner's warranty and the insurer has denied the claim. (b) A claimant may include in a notice given pursuant to NRS 40.645 only claims for the constructional defects that were denied by the insurer.
NOTICE OF CLAIM **Section 2 of AB 421: 40.645** – A claimant is no longer required to identify every defect in specific detail and the exact location of each defect. The new law requires that the Notice of Claim must "**specify in reasonable detail the defects or any damages or injuries**…" The AB 125 changes required a claimant to "Identify in specific detail each defect, damage and injury…including, without limitation, the exact location of each such defect, damage and injury."	40.645(2)(b): Specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim; (c) Describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects.	40.645(2)(b): Identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury; (c) Describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects

Applies to any Notice of Claim served on or after 10/1/2019.		
INSPECTIONS **Section 3 of AB 421: 40.647(1)(b)** – Removed the requirement for the claimant to have the expert, or a representative of the expert, present at the inspection if the Notice of Claim includes an expert opinion. Added the option for the claimant to have a representative present at the inspection in place of the claimant. Reduced the level of specificity required of the claimant when identifying the location of defects from "the exact location of each alleged constructional defect" to the **"proximate location of the defects, damages or injuries**." **Applies to any *inspection* conducted on or after 10/1/2019.**	40.647(1)(b): Be present or have a representative of the claimant present at an inspection conducted pursuant to NRS 40.6462 and, to the extent possible, reasonably identify the proximate locations of the defects, damages or injuries specified in the notice	40.647(1)(b): Be present at an inspection conducted pursuant to NRS 40.6462 and identify the exact location of each alleged constructional defect specified in the notice and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion
HOA CLAIMS **Section 8 of AB421: NRS 116.3102** -- AB 421 enlarged the ability of an HOA to bring a construction defect claim to include not just the common elements of the community, but also any portion of the community owned by the HOA, and any areas not owned by the HOA but for which the HOA has a duty to	116.3102(1)(d): [The Association] may institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to	116.3102(1)(d): [The Association] may institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an

maintain, insure, repair or replace per the governing documents.	NRS 40.600 to 40.695, inclusive, unless the action pertains to: (1) Common elements; (2) Any portion of the common-interest community that the association owns; or (3) Any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association	action for a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, unless the action pertains exclusively to common elements
<u>When does a claim "arise?"</u> **AB 125, Section 21, Sub. 2** The provisions of NRS 40.615 and 40.655, as amended by sections 6 and 15 of this act, apply to any claim that arises on or after the effective date of this act. **Defining when a claim "arises" will be necessary in determining which version of NRS 40.615 and 40.655 will apply to the claim(s).** Does a claim "arise": - at the time of original construction? - when the claim was discovered or reasonably could have been discovered?	***NRS 40.615 was left unchanged by the enactment of AB 421.*** NRS 40.615 – "Constructional Defect" defined: "Constructional defect" means a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance: 1. Which presents an unreasonable risk of injury to a person or property; or 2. Which is not completed in a good and workmanlike manner and proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed The changes to NRS 40.655 are outlined above.	***The definition of "constructional defect" was significantly narrowed in AB 125.*** NRS 40.615 – "Constructional Defect" defined: "Constructional defect" means a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance: 1. Which presents an unreasonable risk of injury to a person or property; or 2. Which is not completed in a good and workmanlike manner and proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed **The broader, pre-AB 125 definition of "constructional defect" will apply to any claims that "arise" prior to February 24, 2015.**

CHANGES TO ARIZONA REVISED STATUTE SECTION 12-1361, ET SEQ. ("PURCHASER DWELLING ACT") PURSUANT TO SB 1271

SHINNICK & RYAN LLP

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Senate Bill (SB) 1271 has an Effective Date of August 27, 2019. Among other things, the statutory provisions of SB 1271 modify Arizona's pre-litigation procedures, the ability of the parties to collect attorneys' fees, and the scope of contractual indemnity for third-party subcontractors.

DESCRIPTION OF AMENDMENT	CURRENT VERSION OF PURCHASER DWELLING ACT	PRIOR VERSION OF PURCHASER DWELLING ACT
	New language/additions in blue.	
Bifurcated Litigation: Revisions to the PDA now provide for a bifurcated trial. First, the finder of fact determines what defects exist, the responsible parties, and the amount of damages. Second, the finder of fact determines percentages of fault for each defect among the various defendants and third-party defendants. (A.R.S. § 12-1362(D)-(E))	**A.R.S. section 12-1362** **B.** A seller and the seller's construction professional who receive a written notice of claim pursuant to section 12-1363 have a right pursuant to section 12-1363 to repair or replace any alleged construction defects after sending or delivering to the purchaser a written notice of intent to repair or replace the alleged construction defects. The seller and the seller's construction professional do not need to repair or replace all of the alleged construction defects. A purchaser may not file a dwelling action until the seller and the seller's construction professional have completed all intended repairs and replacements of the alleged construction defects. **C.** If a seller or a seller's construction professional presents a notice received pursuant to section 12-1363 to an insurer that has issued an insurance policy to the seller or the seller's construction professional that covers the seller's or the seller's construction professional's liability arising out of a construction defect or the design, construction or sale of the property that is the subject of the notice, the insurer must treat the notice as a notice of a claim subject to the terms and conditions of the policy of insurance. An insurer must work cooperatively and in good faith with the insured seller or the seller's construction professional within the time frames specified in this article to effectuate the purpose of this article. This subsection does not affect the coverage available under the policy of insurance or create a cause of action against an insurer whose actions were reasonable under the circumstances,	**A.R.S. section 12-1362** **B.** A seller who receives a written notice of claim pursuant to § 12-1363 has a right pursuant to § 12-1363 to repair or replace any alleged construction defects after sending or delivering to the purchaser a written notice of intent to repair or replace the alleged construction defects. The seller does not need to repair or replace all of the alleged construction defects. A purchaser may not file a dwelling action until the seller has completed all intended repairs and replacements of the alleged construction defects. C. If a seller presents a notice received pursuant to §12-1363 to an insurer that has issued an insurance policy to the seller that covers the seller's liability arising out of a construction defect or the design, construction or sale of the property that is the subject of the notice, the insurer must treat the notice as a notice of a claim subject to the terms and conditions of the policy of insurance. An insurer is obliged to work cooperatively and in good faith with the insured seller within the time frames specified in this article to effectuate the purpose of this article. Nothing in this subsection otherwise affects the coverage available under the policy of insurance or creates a cause of action against an insurer whose actions were reasonable under the

	notwithstanding its inability to comply with the time frames specified in section 12-1363. **D.** Subject to Arizona rules of court, the identified construction professionals shall be joined as third-party defendants, if feasible. Subject to Arizona rules of court, for each construction defect found to exist, the trier of fact in any dwelling action filed pursuant to this article shall first determine if a construction defect exists and the amount of damages caused by the defect and identify each seller or construction professional whose conduct, whether by action or omission, may have caused, in whole or in part, any construction defect. The purchaser has the burden of proof to demonstrate the existence of a construction defect and the amount of the damages caused by the construction defect. The trier of fact shall thereafter determine the relative degree of fault of any defendant or third-party defendant. The trier of fact shall allocate the pro rata share of liability based on relative degree of fault. The seller has the burden to prove the pro rata share of liability of any third-party defendant. The determination of whether a construction defect exists, the amount of damages caused by the construction defect and who may have caused, in whole or in part, the construction defect shall be bifurcated from and take place in a separate phase of the trial or alternative dispute resolution process from the determination of the relative degree of fault of any defendant or third-party defendant, unless the court finds that bifurcation is not appropriate. **E.** The legislature finds and determines that given the complexity and multiparty nature of dwelling actions, it is important to provide a streamlined process for the resolution of construction defect claims and indemnification claims between the seller and the construction professionals that is efficient, economical and convenient for the parties involved. The legislature further finds and determines that for the majority of dwelling actions, bifurcation of the issues of the existence of a defect and causation from the issue of apportionment of fault is more efficient, fair and convenient for the parties. It is the legislature's intent that the bifurcation process prescribed in subsection D of this section does not alter the seller's liability under the seller's implied warranty to the purchaser. It is the legislature's intent that the bifurcation process prescribed in subsection D of this section be used and that the issues of existence of a construction	circumstances, notwithstanding its inability to comply with the time frames specified in §12-1363.

	defect, damages, causation and apportionment of fault be tried in one trial unless the court finds that the circumstances of the particular case at issue render bifurcation inappropriate.	
Expanded Right of Repair: Extends the same right of repair previously afforded to the "seller" of the home to the subcontractors and design consultants, who may also be responsible for the defects. While the homeowners are still only required to provide notice to the home seller, the seller must now forward the claimant's notice of claim to the last known address of the other potentially responsible parties. **(A.R.S.** § 12-1363(A))	**Section 12-1363** **A.** Before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action. A seller who receives notice under this subsection shall promptly forward a copy of the notice to the last known address of each construction professional who the seller reasonably believes is responsible for an alleged defect that is specified in the notice. The seller's notice to each construction professional may be delivered by electronic means.	**A.R.S. section 12-1363** **A.** Before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action.
Extended Tolling for Seller's Third Party Claims: The eight (8) year statute of repose under A.R.S. section 12-552, as it applies to indemnity or contribution claims against subcontractor parties, is tolled from the date the seller receives the claim notice until one year after the homeowner serves the complaint or demand for arbitration on the seller. (A.R.S. § 12-1363(G))	**Section 12-1363** **G.** The statute of limitations and statute of repose, including section 12-552, that apply to the seller's claim for indemnity or contribution against any construction professional is tolled from the date the seller receives the notice required by this section until nine months after the purchaser's service of the civil complaint or arbitration demand on the seller.	No corresponding section in prior version of Purchaser Dwelling Act.
Homeowner Affidavits: In conjunction with the filing of the complaint, a homeowner must now also file an affidavit, signed under penalty of perjury, attesting that the homeowner: 1. Has read the entire complaint; 2. Agrees with all of the allegations and facts contained in the complaint; and 3. Unless authorized by statute or rule, is not receiving and has not been promised anything of value in exchange for	**Section 12-1363** **N.** A purchaser who files a contested dwelling action under this article must file an affidavit with the purchaser's complaint, under penalty of perjury, that the purchaser has read the entire complaint, agrees with all of the allegations and facts contained in the complaint and, unless authorized by statute or rule, is not receiving and has not been promised anything of value in exchange for filing the dwelling action.	No corresponding section in prior version of Purchaser Dwelling Act.

filing the dwelling action. (A.R.S. § 12-1363(N))		
Attorney's Fees & Costs: Pursuant to the new statutory scheme, the court may now award reasonable attorneys' fees and taxable costs to the prevailing party. However, these fees and costs are awarded based on each "contested issue" in the claim. Prevailing party status for a particular issue is determined based on whether, exclusive of any fees and taxable costs, the relief obtained is more or less favorable than the repairs, replacements and offers made by the seller during pre-litigation. Interestingly, where the claims involve a "single purchaser" the new law also provides for prevailing party expert witness fees for contested issues – this is not available for claims involving multiple homeowners. The statute also provides the following guidelines to use in determining whether the fees incurred with respect to a contested issue are "reasonable": 1. The repairs, replacements or offers made by the seller, if any; 2. The purchaser's response to the seller's repairs, replacements or offers made or proposed, if any; 3. The relation between the fees incurred over the duration of the dwelling action and the value of the relief obtained with respect to the contested issue, 4. The amount of fees incurred in responding to any unsuccessful motions, claims and defenses	**Section 12-1364** **A.** In a contested dwelling action, the court or tribunal may award the prevailing party with respect to a contested issue reasonable attorney fees and taxable costs. A purchaser is deemed the prevailing party with respect to a contested issue if the relief obtained by the purchaser for that contested issue, exclusive of any fees and taxable costs, is more favorable than the repairs or replacements and offers made by the seller before the purchaser filed a dwelling action pursuant to section 12-1363. The seller is deemed the prevailing party with respect to a contested issue if the relief obtained by the purchaser for that contested issue, exclusive of any fees and taxable costs, is not more favorable than the repairs or replacements and offers made by the seller before the purchaser filed a dwelling action pursuant to section 12-1363. **B.** An award of attorney fees pursuant to this section is limited to the amount of fees actually and reasonably incurred with respect to the contested issue for which the party has been deemed the prevailing party. In determining whether the fees actually incurred with respect to a contested issue are reasonable, the court or tribunal shall consider all of the following: **1.** The repairs, replacements or offers made by the seller, if any, before the purchaser filed the dwelling action pursuant to section 12-1363. **2.** The purchaser's response to the seller's repairs, replacements or offers made or proposed, if any, before the purchaser filed the dwelling action pursuant to section 12-1363. **3.** The relation between the fees incurred over the duration of the dwelling action and the value of the relief obtained with respect to the contested issue. **4.** The amount of fees incurred in responding to any unsuccessful motions, claims and defenses during the duration of the dwelling action. **C.** This section does not alter, prohibit or restrict present or future contracts that may provide for attorney fees or expert witness fees. **D.** Notwithstanding any other law, in a contested dwelling action that involves a	No corresponding section in prior version of Purchaser Dwelling Act.

5. Notwithstanding, however, these amendments do not alter or restrict language in contract documents which address fee awards. (A.R.S. § 12-1364)	single purchaser, the court or tribunal may award the prevailing party with respect to the contested issue reasonable expert witness fees. The determination of the prevailing party and the reasonableness of the expert witness fees shall be made using the same criteria used in determining the award of attorney fees pursuant to subsections A and B of this section. This subsection does not apply to a dwelling action that involves more than one purchaser or an action that is consolidated with any other dwelling action. The expert witness fees prescribed in this subsection are in addition to the taxable costs authorized by section 12-332. **E.** For the purposes of this section: **1.** "Contested issue" means an issue that relates to an alleged construction defect and that is contested by a purchaser following the conclusion of the repair and replacement procedures prescribed in section 12-1363. **2.** "Purchaser" means any person or entity, including the current owner of the dwelling, who files a dwelling action during the time period described in section 12-552.	
Indemnity Clauses: Contractual indemnity is now limited to the scope of the individual subcontractor or design professional's own negligence. Broader indemnity provisions are not allowed, as the revisions make any such terms void and unenforceable. Significantly, however, this is <u>not</u> retroactive and does not apply to contracts executed prior to August 27, 2019. (A.R.S. § 32 – 1159.01)	**Section 32-1159.01** **A.** Notwithstanding section 32-1159, a covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract involving a dwelling that purports to insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage is against the public policy of this state and is void only to the extent that it purports to insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage resulting from the negligence of the promisee or the promisee's indemnitees, employees, subcontractors, consultants or agents other than the promisor. **B.** Notwithstanding subsection A of this section, a contractor who is responsible for the performance of a construction contract may fully indemnify a person for whose account the construction contract is not being performed and who, as an accommodation, enters into an agreement with the contractor that allows the contractor to enter on or adjacent to its property to perform the construction contract for others. **C.** Any additional insured endorsement furnished pursuant to an agreement or collateral to a construction contract involving a dwelling does not obligate the insurer to	No corresponding sections in prior version of statute.

	indemnify the additional insured for the percentage of fault that is allocated to the additional insured. This subsection does not limit an insurer's duty to defend an additional insured pursuant to the terms and conditions of an additional insured endorsement. **D.** A covenant, clause or understanding in, collateral to or affecting a construction contract or architect-engineer professional service contract that requires the promisor to defend the promisee is limited to defending claims arising out of or related to the promisor's work or operations. **E.** This section applies to all construction contracts and architect-engineer professional service contracts involving a dwelling entered into between private parties. **F.** This section does not apply to: **1.** An agreement to which this state or a political subdivision of this state is a party, including an intergovernmental agreement and an agreement governed by sections 34-226 and 41-2586. **2.** Agreements entered into by agricultural improvement districts under title 48, chapter 17. **3.** An agreement for indemnification of a surety on a payment or performance bond by its principal or indemnitors. **4.** An agreement between an insurer under an insurance policy or contract and its named insureds. **5.** An agreement between an insurer under an insurance policy or contract and its additional insureds, except that this type of agreement is subject to the limitations of subsections A, B and C of this section. **6.** An agreement between an insurer and its insureds under a single insurance policy or contract for a defined project or workplace, except that such agreement may not require or allow one or more insureds under the agreement to indemnify, to hold harmless or to defend any other insured under the agreement beyond the limitations of subsections A, B and C of this section. **7.** A public service corporation's rules, regulations or tariffs that are approved by the corporation commission. **G.** For the purposes of this section: **1.** "Architect-engineer professional service contract" means a written or oral agreement relating to the survey, design, design-build, construction administration, study, evaluation or other professional services furnished in connection with any actual or proposed	

	construction, alteration, repair, maintenance, moving, demolition or excavation of any structure, street or roadway, appurtenance or other development or improvement to land. **2.** "Construction contract" means a written or oral agreement relating to the actual or proposed construction, alteration, repair, maintenance, moving, demolition or excavation of any structure, street or roadway, appurtenance or other development or improvement to land. **3.** "Dwelling" has the same meaning prescribed in section 12-1361.	

Are COVID-19 Claims Covered by Builders Risk Insurance Policies?

By: Jason M. Adams, Esq. of Gibbs Giden Locher Turner Senet & Wittbrodt LLP
and Cheryl Kozdrey, Esq. of Saxe Doernberger & Vita, P.C.

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If you are an attorney, insurance broker, or other professional representing developers and contractors, then your clients have likely reached out with concerns about losses related to COVID-19. One common question is whether there is potential coverage under builders risk insurance policies.

The short answer is: It depends. As with most questions pertaining to insurance coverage, the answers depend on the policy language and underlying facts required to trigger coverage. Builders risk policies are even more fact due to the lack of uniformity of base policy forms and endorsements between insurance carriers.

The step in any analysis is to gather facts and carefully document any impending and potential damages or delays. The facts are crucial because the coverage analysis may vary depending on the reason the project was shut down. For example, the analysis would be if the project was shut down as a result of an express government order, such as those in Northern California and Washington, versus the project shutting down as a result of workers testing positive for COVID-19. Properly analyzing builders risk coverage involves a granular account of the facts and damages, and can require a great deal of hair splitting with respect to policy language.

Regardless of the strength of the insured's facts and damages, or the breadth of its policy language, the policyholder still likely faces an uphill battle related claims. The unfortunate reality of most builders risk policies is that they are property policies that require some evidence of physical loss or damage to trigger coverage. Whether or not COVID-19 claims constitute property damage will be the subject of great debate and litigation over the coming months and years. The outcome will likely depend on how the insured's jurisdiction ultimately rules on the litany of COVID-19 cases that have already been – , how broadly each court interprets the meaning of "physical loss or damage."

Although these key issues have yet to be clearly by the courts, some policies are better than others and there are variables that could the likelihood of coverage. For example, some of the more policyholder-friendly insurance programs may contain coverage extensions for delay in completion, business interruption, loss of rental income, or civil authority that may not be tied to the property damage requirement, and which would tend to support coverage for COVID-19 claims.

Even if the insured crosses the initial threshold and can demonstrate a covered claim, the following common endorsements and exclusions may require additional analysis depending on the facts.

- **Virus or Pandemic Exclusions:** Virus or pandemic exclusions are not as common on builders risk policies as they may be on other forms of coverage. However, they do exist and, if present, result in a barrier to coverage. As with the policy itself, every endorsement is and should be analyzed in terms of the express language contained in the endorsement and the facts.

- **Abandonment or Cessation of Work:** Most builders risk policies include provisions that preclude coverage in the event of the abandonment of the project or a lengthy cessation of work. As a result, the insured should take steps to articulate to the carrier that the project has not been abandoned, and that there exists an intent to return as soon as possible. The insured should also maintain a record of ongoing project oversight

- **Security and Safety Requirements:** Many builders risk policies contain provisions requiring the insured to maintain protective safeguards and security protocols throughout the pendency of the project. Safety fencing, lighting and security guards are common examples. The policy should be analyzed to ensure that the policyholder can meet any such requirements during a COVID-19 related shutdown. For example, can the insured continue to a security guard? If not, arrangements will likely need to be made with the carrier depending on the language of the policy.

- **Insurable Limits:** Builders risk policies are typically underwritten based upon the total completed value of the structure, including materials and labor. The insured will need to analyze the policy to consider whether increased material or labor costs as a result of COVID-19 will alter the terms of coverage, trigger any escalation clauses, or result in an increase in premium due. If increased cost projections become apparent, the insured should report these changes to the carrier immediately.

- **Extensions of Coverage:** The insurance industry was facing a hard market even before the COVID-19 pandemic, which resulted in higher premiums and limited coverage options. The COVID-19 pandemic has only exacerbated these issues and it may be to obtain coverage extensions on projects that have been shut down. The insured should work with its risk management team (risk manager, insurance broker and lawyer) to engage the carriers to negotiate any necessary coverage extensions resulting from COVID-19 related project delays.

To summarize, builders risk coverage for COVID-19 claims is far from certain, but not impossible. Insureds should provide notice of a claim to all potentially applicable carriers in order to preserve their rights. The insured should also report increased construction cost and articulate its intent to return to the project to preserve their escalation clause and avoid arguments that they have abandoned the project. The insured should continue to document its claims and damages, and be ready to substantiate its claims and push back on any coverage denial. Throughout the entirety of this process, the insured should work with its risk management team to get out in front of any extensions it may need to complete the project. In a climate where insurance carriers are receiving an insurmountable number of claims, the insured should be prepared to for coverage and not simply throw up its hands in the face of a denial. Given the intense social, legislative and executive pressure to cover COVID-19 claims, there may be a tendency for the courts to coverage in gray areas, particularly if the insured was fortunate enough to have purchased one of the broader coverage forms referenced above.

About the Authors

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Real Estate Flippers: Defects, Coverage and Disclosure Quagmires

Materials by Ronald Hartmann, Esq.; Richard Buck, Esq.; Robert Closson, Esq.

Liability Issues – Ronald Hartmann and Richard Buck

1) SUMMARY - A Brief Highlight of Liability Issues That Real Estate Flippers May Encounter

Generally speaking, Real Estate Flippers tend to fall into a combination of three types of businesses to find and acquire properties, rehabilitate the properties, and quickly sell the properties for a profit.

1. Real estate investor with no relevant license;
2. Licensed construction contractor often looking to use construction skills and laborers as sweat equity in a flip; and
3. Licensed real estate broker or agent looking to use their access to and knowledge of the real estate market to find viable flip opportunities.

For Flippers, the business entity of choice seems to be an LLC.

For Flippers, the construction permit of choice is often an "Owner-Builder" permit.

If there is a problem with the flipped home after re-sale, several areas of law come into play, including:

1. Construction Defect Law;
2. Real Estate Disclosure Law;
3. Owner-Builder Law; and
4. Personal Liability, Alter Ego Liability, etc.

2) CHOICE OF ENTITY – LLC

The first matter a Flipper must consider is choice of entity – corporation, partnership, LLC, etc. Many flippers choose to form a single asset LLC – the single asset being the home to be flipped. The managing members are few, and for the most part are hands-on in running the operation – acquiring the home, dressing up the home, and selling the home. As summarized in the last section of this memorandum, the choice of using an LLC for a flipped property is fraught with risk.

3) BUILDING PERMIT – THE OWNER-BUILDER PERMIT AND ACCOMPANYING LAND MINES

The next issue is the building permit(s). Many flippers chose to have the LLC build the improvement via an Owner-Builder permit. An Owner-Builder permit is fraught with several

potential risks, and needs to be very carefully considered. The following laws among others, apply to an Owner-Builder permit, and are often overlooked:

- Business and Professions Code section 7044;
- Health & Safety Code section 19825;
- Health & Safety Code section 19826.

Following is a quick highlight of some potential liability issues regarding the above statutes.

- B&P section 7044 – When a Contractor License is not Needed to Build an Improvement

B&P section 7044 allows a person or entity to build an improvement without a contractor license if the person or entity meets the requirements of B&P section 7044. B&P 7044(a)(2) often applies to flipping homes as Owner-Builder, and states when a contractor license is not required:

> (2) An owner who builds or improves a structure on his or her property, provided that both of the following conditions are met:
>
> > (A) The owner directly contracts with licensees who are duly licensed to contract for the work of the respective trades involved in completing the project.
> >
> > (B) For projects involving single-family residential structures, no more than four of these structures are intended or offered for sale in a calendar year. This subparagraph shall not apply if the owner contracts with a general contractor for the construction.

If the Flipper on an Owner-Builder permit has built an improvement without a contractor license and did not contract directly with licensees for the improvement, the Flipper has violated the contractor license law.

4) HEALTH & SAFETY CODE SECTION 19825 - HIDDEN LANDMINES

H&S Code section 19825 is full of landmines for an Owner-Builder. Section 19825 requires the Owner-Builder (the Flipper) to acknowledge several items that can lead to unexpected, and perhaps uninsured, liability.

The Owner-Builder permit requires the Flipper to affirm the following, among other matters:

If the Owner-Builder builds an entire structure, it must be entirely built with licensed contractors:

> ". . . I acknowledge that, except for my personal residence in which I must have resided for at least one year prior to completion of the improvements covered by this permit, I

cannot legally sell a structure that I have built as an owner-builder if it has not been constructed in its entirety by licensed contractors. . . ."

The permit requires the Owner-Builder to acknowledge that the Owner-Builder is "willfully acting as an Owner-Builder and am aware of the limits of my insurance coverage for injuries to workers on my property."

The Owner-Builder must acknowledge that "I am the responsible party of record on the permit. I understand that I may protect myself from potential financial risk by hiring a licensed Contractor and having the permit filed in his or her name instead of my own."

The Owner-Builder must acknowledge that he/she/it is responsible for latent construction defects:

> **"I understand as an Owner-Builder if I sell the property for which this permit is issued, I may be held liable for any financial or personal injuries sustained by any subsequent owner(s) that result from any latent construction defects in the workmanship or materials."** [Emphasis added].

The Owner-Builder must acknowledge that he/she/it is legally and financially responsible for the construction activity:

> "I am aware of and consent to an Owner-Builder building permit applied for in my name, and understand that I am the party legally and financially responsible for proposed construction activity at the following address:"

5) IMPROVING THE HOME

After the business entity formation and permit issues have been resolved, it's time to improve the subject home. Flipping homes is a profit making business enterprise that frequently involves construction activities to improve the subject home to generate a quick and profitable sale. The concept of "flipping as a business" distinguishes the Flipper from an ordinary homeowner selling a personal residence, and Flippers need to be aware of the potential liability for construction defect issues regarding the improvements. A Flipper should have some understanding that the construction defect laws may apply to the improvements, especially if the Flipper is an Owner-Builder, is one of the LLC's Managing Members, is a licensed contractor, and/or is a licensed real estate professional. Construction defect theories related to the improvements include negligence/negligence per se, express warranty, implied warranty, and breach of contract. Flippers generally want quick turnaround sales, but as for-profit enterprises, they should take extra care not to cut corners – financial, management, quality of contractor, and quality of construction. The Flipper cannot simply claim that he or she is just an innocent homeowner. A Flipper to consult with an insurance attorney and insurance professional regarding insurance coverage for construction defects, with an

understanding of what engineering, construction, and real estate licenses, if any, the Managing Members hold.

6) SELLING THE PROPERTY - REAL ESTATE DISCLOSURE ISSUES

The Flipper has to consider the real estate disclosure laws, which is especially important if the Flipper is an Owner-Builder and holds an engineering, construction, and/or real estate license. The Flipper as seller must disclose all material facts that effect the value or desirability of the home. See, for example, Civil Code sections 2079, et seq., and 1102, et seq. 1102.6 and the Transfer Disclosure form, the Cal. Association of Realtors Seller Property Questionnaire form, and the California common law of disclosure (Easton v Strassburger, for example, 152 Cal.App.3d 90 (1984). "As is" sales do not provide effective cover for disclosure issues. It can be very difficult to distinguish the Flipper as Seller, from the Flipper as Owner-Builder, from the Flipper as a Managing Member, and from the Flipper as some other relevant licensed professional. The various roles may easily blur together. The Flipper Entity typically has one asset – the house. The Flipper is running a business, and is not merely a homeowner looking to sell his or her personal residence.

Interesting issues arise when a 'Flipper' acquires residential property over 50 years old, spends a few months 'rehabbing' the property and then sells the property that may have unknown or latent defects. Is the Flipper responsible for failing to disclose said defects? Can a Flipper protect itself by recommending in the Disclosure Statement that Buyer should retain a licensed contractor to inspect the residence during escrow? Is a Flipper required to disclose that there may be asbestos in the residence due to its age?

7) POTENTIAL PERSONAL LIABILITY

Finally, there is the element of personal liability of the members of the Flipper involved with the transaction. This especially an issue if the Flipper is a single asset LLC, if the Flipper works with an Owner-Builder Permit, if the Flipper is managed by its members, and/or if the Flippers Managing Members have relevant professional licenses.

The roles involved in a Flip can blur. For example, a Managing Member manages the LLC's activities. Those activities may involve designing and building improvements, and preparing real estate transfer disclosures. The Managing Members' various roles in the flipping process makes it difficult to claim ignorance of design and construction issues, and real estate disclosure issues.

Several legal theories may apply to hold Managing Members personally liable for design, construction, and disclosure issues. For example, Managing Members are generally personally liable for their own torts, and if they managed the LLC's activities, they can be held responsible for their negligence (design, construction, disclosures). See, for example, Civil Code sections 1708, 1714, 2338 and 2343. If the LLC is a single asset entity, the asset is gone when it is sold, the money is distributed to the members, and there is nothing left in the LLC. No assets and no

insurance coverage, with lingering liability for latent defects, inadequate disclosures, warranty claims, etc., may trigger alter ego liability. Legal and insurance professionals should be consulted.

8) COMMENTARY

Before anyone starts a "Flipping" business, that person should attend a West Coast Casualty Construction Defect Seminar and meet any of the hundreds of highly skilled and experienced construction attorneys, insurance attorneys, insurance professionals, and mediators to understand, evaluate, and insure the risks.

<u>Coverage Issues – Bob Closson</u>

1) SUMMARY

While all three categories may involve similar defect damages and repair issues, the "flipper" scenario differs in many respects from new construction or a remodel. The issues of occupancy during improvement, and subsequent sale, create a number of unique coverage issues. For insurers which do not identify and specifically craft a policy oriented towards those unique issues, flippers create a particularly troublesome risk. They are often owner-builders, essentially unlicensed contractors; and the unwary insurer which issues a bare-bones CGL policy oriented towards a standard real estate risk may be getting more than it bargained for.

The flipper scenario is also problematic for contractors who perform limited work on the project for the "flipper." The contractors may provide additional insurance; however, even if they do not, they are likely to be the target of more than their share of liability by virtue of being the only, or one of a few, professional contractors on the project.

In evaluating coverage for a flipper scenario, it is advisable to go through the analytical process to identify all potentially applicable coverage terms, just as you would for any new construction or remodel claim. For example, if there are asbestos removal allegations, one would obviously determine whether there is an asbestos exclusion. If there are mold allegations, look for a mold exclusion. That said, there are a few subject areas that are likely to arise more frequently in the flipper context than in other contexts.

2) Under the Flipper's CGL Policy:

Joint Venture / Partnership / LLC exclusion:

Flippers will often be either a closely held corporation or an individual. However, they may place title of the property and/or enter into relationships with other persons or entities in order to finance the project or perform improvements thereon. The standard form policy indicates that "No person or organization is an insured with respect to the conduct of any

current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations." This is sometimes referred to by California Courts as a partnership or joint venture exclusion. If the insured's liability arises from involvement in one of the listed entities and such entity is not identified in the Declarations, the exclusion may impact coverage. Compare the entities involved, the entities sued, and the named insured(s) to determine applicability.

The standard policy form exclusions:

While the standard exclusions will apply as usual to "your work", if the insured was the owner of the property when the damage allegedly occurred, the damage may be excluded by exclusion J(1) for damage to property the named insured owns, rents or occupies. Also, if the named insured is sued by a subsequent owner, exclusion J(2) for damage to premises the insured sells, gives away or abandons may be applicable, so long as the premises are "your work" and were never occupied, rented or held for rental. Many owner-builders live at the premises before they are sold and therefore, the applicability of that exclusion to a flipper may pose an issue.

Occurrence / accident requirement:

Flippers are frequently sued for misrepresentation or fraud by the purchaser of the property, as well as for negligence and other theories. In California, misrepresentation, whether negligent or intentional, is not an "accident" as required by the standard occurrence definition. See *Safeco Ins. Co. of America v. Andrews* (9th Cir. 1990) 915 F.2d 500.

Underwriting issues / application:

The unusual nature of the flipper's business and their sometimes casual approach to risk management and insurance, provide an increased likelihood that there may have been concealment of material information in an application for insurance pursuant to Insurance Code Section 330 *et seq*. If so, there may be grounds for denial of coverage or rescission. Insurers may wish to review the application in such circumstances to confirm that the policy was procured without concealment.

3) Under the Flipper's Homeowner's Policy:

Sometimes a flipper will procure a personal liability or homeowners liability policy while performing the improvements and prior to sale, rather than a CGL policy. It is not an adequate substitute. While direct writers of personal lines may have proprietary forms rather than standardized forms, almost all such policies expressly exclude such cases as negligent design or construction, mold, etc. Further, the policies exclude damage to the property itself and do not cover misrepresentation. To the extent that a claim is made under a subsequent policy procured by the flipper for a later project, that policy will also

not apply based on typical exclusions and California authority such as *Preston v. Goldman* (1986) 42 Cal.3d 108.

4) Under the Flipper's Real Estate Agent's E&O Policy*:*

A flipper who is also a real estate agent may have a real estate agent's errors and omissions or professional liability policy. However, in the decades since the Court of Appeal's decision in *Easton v. Strassburger* (1984) 152 Cal.App.3d 90 [agents have a duty to disclose facts, which includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal], there have been legislative and policy changes which effectively negate coverage for a typical flipper's failure to disclose defects. Such coverage should be investigated as a matter of due diligence, but is an unlikely source of recovery.

5) Under a Contractor's or Subcontractor's (non-owner) Policy:

As noted above, the flipper may have little or no coverage of its own. If it contracts with an insured contractor to perform some or all of the improvements, it may be relying on the contractor's insurance to provide coverage. Here also, the relationship between the contractor and the flipper may impact the coverage available under the contractor's policy.

Joint Venture / Partnership / LLC exclusion:

As discussed above in the context of the flipper's own CGL coverage, a relationship between the flipper and the contractor which falls within the language of this exclusion can trigger its application. That issue should be reviewed under a contractor's policy as well as the flipper's CGL policy.

Additional Insured Issues:

A flipper may qualify as an additional insured, triggering the need to consider typical "ongoing" vs. completed operations endorsement language in the context of the facts of the case. Even if such coverage is triggered, there is an increased likelihood that to the extent a complete defense is provided to an additional insured flipper who has no insurance of its own, the additional insurer may be able to seek recovery of defense costs which are not even potentially covered.

Underwriting issues / application:

As was the case above, a review of the application to confirm there was no concealment in the application may be advisable. It is particularly advisable where there is a relationship between the flipper and the contractor which was not necessarily disclosed in the

application for the contractor's policy. For example, the flipper may own, or be related to, the contractor.

6) COVERAGE CONCLUSION

In an ideal world, flippers would fully disclose their risks, and insurers would sell them an appropriate policy where the premium charged contemplates the unique risks and liabilities associated therewith. All work would be done by appropriately licensed or qualified individuals or entities, and also insured under CGL policies which provide coverage for the disclosed operations. However, unless and until that occurs, flippers will continue to represent a unique category of insurance risk which will often require careful consideration of, among other things, the policy provisions and issues discussed above.