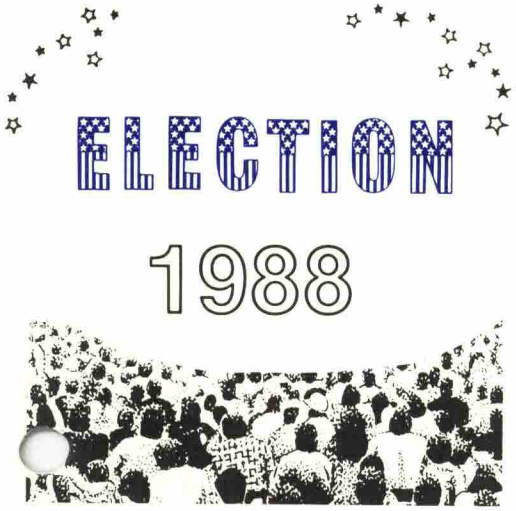
Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link

FOCUS ON TORTS

VOLUME II, NUMBER 2 FALL 1988

Insurers Initiatives Seek Abolition of Victims Rights

General Damages Eliminated—*Royal Globe* Repealed



Voters in the November general election will be asked to approve three initiatives which, if enacted, will result in dramatic restriction of the rights of all Californians. Each of these is tied to national and/or local insurance industry backing.

Proposition 104 is the National Insurance Industry sponsored "No Fault" Initiative. If passed, voters will enact the greatest swindle since Manhattan Island was purchased for a string of beads.

Proposition 104

Among its hundreds of provisions, Proposition 104 eliminates the concept of personal responsibility, treats innocent and guilty alike, classifies injured auto victims differently than others with similar injuries, restricts constitutionally protected rights to trial by jury and emasculates the holding in *Royal Globe v. Superior Court*.

Under its provisions, automobile insurers are required to sell No Fault insurance policies with maximum limits of $10,000 in medical benefits and $15,000 in wage loss benefits. The insurer is the sole and exclusive judge of whether or not medical charges are "reasonable". The insurer is entitled to refuse to pay for any treatment which it does not consider "widely accepted as appropriate and effective by medical practitioners in this state" (§12001). If an insured is hospitalized, the company need only reimburse that portion of the bill which is not in excess of the charge for a "semi-private accommodation" regardless of the actual cost of hospitalization (id.). Claimants must provide carriers with blanket authorizations for access to their lifetime medical records or risk termination of coverage. Cross examination of defense medical examiners is eliminated.

See FAULTY INITIATIVES *on page 2.*

I.C.A.N. Initiative Gains Endorsements

Proposition 100, the I.C.A.N. (Insurance Consumer Action Network) auto insurance reform initiative has now been endorsed by Mothers Against Drunk Driving, The League of California Cities, and the Congress of California Senior Citizens. The only initiative endorsed by Attorney General John Van de Kamp, Proposition 100 promises *true* insurance reform by requiring rates to be based on a person's driving record and not on the geographical location of his or her home. In addition, Proposition 100 repeals the insurance industry's anti-trust exemption and its immunity from state regulation. It requires that all citizens remain responsible for their conduct by answering in damages to their victims. It promotes consumer protection by the establishment of a new regulatory agency and affirms the right of all to contract with counsel unfettered by the limitations contained in Proposition 106. In a word, the I.C.A.N. Initiative is *fair*. Vote "yes" on Proposition 100 and ensure true auto insurance reform.

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Faulty Initiatives *Continued from front page.*

Under the No Fault wage loss provisions an insured may not receive more than $1,000 a month for lost work *regardless* of how much the person actually earns. The maximum allowable benefit under Proposition 104 is $1,000 per month, not to exceed more than $15,000 total, regardless of the period of disability or actual amount of lost wages [§12003(b)]. This artificial ceiling will result in gross hardship to all persons who make more than $1,000 per month.

Insureds who have yet to join the labor market, such as students or job trainees, are presumed not to have any earning capacity and are not entitled to any reimbursement for lost wages under the plan [§12009(b)(3)].

In most cases, there is no compensation to an injured person for pain, suffering, anxiety, stress, inconvenience, or disruption of one's normal life. Proposition 104 provides that only those injuries which are "both serious and permanent" entitle an individual to compensation for pain and suffering [§12007(c)(3)]. An injury is serious only if it has a substantial bearing on an injured person's ability to resume his or her normal activities, and is permanent only if its effects cannot be eliminated by time or further medical treatment. Under these definitions, an individual who breaks both arms and both legs, and recovers within one year, *is not entitled* to any award for general damages because the injuries were not "permanent".

The carrier has no obligation to pay for any medical expenses or lost wages unless and until it "has completed its investigation" [§12005(g)]. Liability for unreasonable delays in payment which presently existed pursuant to Insurance Code §790.03 and *Royal Globe Insurance Company v. Superior Court* (1979) 23 C.3d 880, is eliminated. The initiative adds to the Insurance Code new sections 790.03.1 and 790.03.2. These combine to immunize insurers from judicial review of their conduct whenever the insurance company elects to submit a dispute to binding arbitration. Under this arbitration system, each side is entitled to designate one arbitrator. However, under no circumstances may the *claimant's arbitrator be paid more than $250 regardless of the length of time it takes to hear the matter or the complexity of the issues.* There is no corresponding limitation on the fees or expenses which the insurance carriers may pay their designated arbitrators. This unfair provision makes it economically impractical for the vast majority of non-insurance company related attorneys to act as arbitrators.

Proposition 104 concludes by reenacting over 50 sections of the present Insurance Code, predominantly dealing with the insurance industry's exemption from anti-trust laws. By reenacting these sections through the initiative process, any future change in insurance industry regulation must be made either through the initiative process or by the two-thirds vote of both houses.

No Fault has been an abject failure in all states where it has been enacted. In most states adopting no fault systems, insurance rates have gone *up* rather than down. The insurance industry's own spokespersons have acknowledged, in private meetings, that there will be no overall reduction in rates, although there will be substantial overall reductions in benefits payable to victims.

Proposition 101

Also on the ballot is Proposition 101, the initiative sponsored by Assemblyman Richard Polanco, Coast Insurance Company and Public Insurance Company. It incorporates the worst features of the no-fault system while retaining the requirement that a victim prove fault.

In most cases, Proposition 101 limits general damages to no more than 25% of narrowly defined "economic losses". The net effect is to guarantee that the majority of injured persons are not made whole. By tying compensation for physical pain, suffering and inconvenience to economic earning power, the initiative discriminates against homemakers, students, elderly people, the unemployed and minorities.

"Economic losses" are defined as that amount of medical expense, lost wage, diminution of earning capacity, prescription drug expense, etc., which remains after deducting *all* other available sources of benefits (i.e., private medical insurance, state or federal Medi-Cal or Medicare benefits, accrued sick leave, private disability, state disability benefits, etc.). By forcing the injured person to apply all other insurance before seeking recovery against the wrongdoer, this initiative punishes the victim. It compels the innocent party to exhaust insurance protection which he or she purchased in anticipation of illness or injury. The auto insurance companies benefit by shifting the cost of medical treatment and disability to the victim's non-auto insurance providers. While automobile rates under the initiative must be reduced for one year by 50%, there is no limit on the increase that will be made in the rates for personal and group health and disability policies which will be compelled to pay losses for which they did not initially charge a premium. In other words, although auto rates will go down, it is highly likely that all other rates will go up as private, group health and disability carriers compensate for an entirely new area of unanticipated risks.

Under Proposition 101, only persons who have sustained an injury which is *both* "serious and permanent" may attempt to seek compensation for physical pain, suffering and disability in an amount which exceeds 25% of "economic losses". "Serious" and "permanent" are defined within the initiative. The definitions are narrow and artificial. "Serious injuries" are those which "prohibit an injured person from resuming substantially all of his or her normal activities". "Permanent injuries" are those that "cannot be eliminated by future time for recovery, or by future medical

See PROPOSITIONS *on page 3.*

A.H. Robins Files Reorganization Plan

Thousands of Dalkon Shield claims may soon be brought to a resolution. The A.H. Robins Company filed its plan for reorganization in bankruptcy in April. In a hearing before Federal District Court Judge Robert Merhige in Richmond, Virginia on July 18, 1988, it was announced that the plan was approved by an overwhelming majority vote of the Dalkon Shield claimants as well as Robins' creditors and shareholders.

The plan's approval means that, absent an appeal, a trust will be funded immediately to commence evaluation and payment of claims. The trust will be funded with a minimum of $2.2 billion. Additional funding may be provided through settlement of a class action filed against the Aetna Insurance Company, one of Robins' former insurers. In addition, cash payments made by the Robins family and other sources may also be contributed.

Under the terms of the plan, a Claims Resolution Facility will be established. Four options will be available for evaluation and resolution of claims. Two will be "short form" in nature. Under these, claimants will provide medical records, declarations and other documentary evidence to support their claims for purposes of settlement.

A third option provides for binding arbitration after unsuccessful settlement negotiations. The arbitrator will be a neutral party located in the geographical region where the claim is made. Finally, if the foregoing are unsatisfactory and the claimant completes the required administrative steps, a victim may commence a lawsuit, culminating in trial. Under any option, no punitive damages will be awarded.

The Robins' proposal in no way defines or identifies how particular values will be placed on any class or type of injury caused by the Shield. In addition, the defense of the statute of limitations still remains an issue.

It has been nearly three years since Robins declared bankruptcy. The plan of reorganization is the result of lengthy negotiations and significant compromises on all sides. Although it does not provide the claimants with everything which was hoped for, it appears to be a reasonable resolution to a complex and bitter course of litigation.

Propositions

Continued from previous page.

treatment including surgery," whether or not the injured victim wishes to have surgery.

A simple illustration highlights the unfairness of the initiative. Assume that a young homemaker is driving her automibile, and is forced off the road by a drunk driver. Both of her arms are broken, but they are simple fractures which can be treated with casts. Her low back is seriously sprained, but over the course of 12 to 14 months it resolves. Under such circumstances she has not sustained an injury which is either "serious" or "permanent", and is not entitled to collect *any* amount of general damages exceeding 25% of her "economic losses." If we assume that her medical bills were $7,500, and her husband's group health policy covered 80% of the bills, the most this injured person could recover for the stress, anxiety, pain and suffering of her ordeal would be 25% of the uncovered medical bills, or, $625.00. This result is unfair and illustrates how illusory the insurance reform promised by Proposition 101 truly is.

Proposition 106

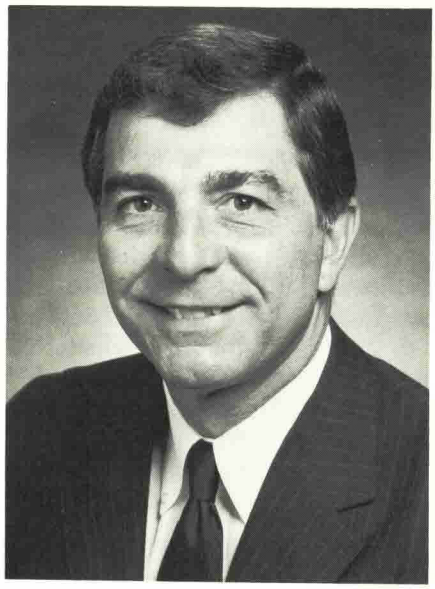
The final prong in the insurance industry's attack on victims' rights is Proposition 106 which establishes across the board attorney fee limitations in all tort cases. Intended to dissuade attorneys from representing injured people in personal injury claims, the statute's language includes within its parameters torts such as unfair competition, fraud, professional negligence, race discrimination, wrongful termination, libel, slander, nuisance and toxic pollution. The artificial limits prescribed by the act (25% of the first $50,000 recovered; 15% of the second $50,000 recovered; 10% of all additional sums) were calculated to make it financially impossible for victims to pursue legitimate claims against wealthy defendants by limiting the victim's ability to obtain counsel without placing any restraints on the wrongdoers ability to finance his or her defense.

This initiative is only the first in a series of measures intended to regulate the ability of attorneys to contract with their clients.

These insurance industry proposals do not address the true concern of consumers: fair regulation of rates. Instead, temporary and meaningless rate reduction is promised in return for relinquishment of valuable common law legal rights. State supervised insurance regulation as proposed by Proposition 100, the I-CAN Initiative, is the only way to verify that insurers deal fairly with the consuming public. We urge our friends, clients and referring counsel to vote "yes" on Proposition 100, and to vote "no" on Propositions 101, 104 and 106.

$9.5 Million is Largest Pollution Verdict in Nevada History

George J. Shelby and John Echeverria of this firm, in association with Robert E. Lyle of Reno, recently obtained a verdict of $9,500,000, the largest environmental pollution jury verdict in the history of the state of Nevada [*Gunn v. Seeno Construction* (Washoe Co. Action No. 85-4209)].



George J. Shelby

John Echeverria

This class action, brought on behalf of almost 5,000 northwest Reno residents, sought damages for nuisance, disruption of life, annoyance, and inconvenience caused by dust and dirt which was blown into their neighborhood over a 12 month period from 1984 to 1985. The defendants had graded roughly 50 acres of desert land adjacent to the plaintiffs' homes in preparation for construction of residential and commercial buildings. Plaintiffs contended that the defendants were negligent in creating and maintaining this nuisance and in failing to take proper steps to control the blowing dust and dirt. Evidence at trial reflected that the defendants had been warned and fined by county health officials on multiple occasions for failure to take reasonable precautions to control the fugitive dust.

Because of the geographical location of the subdivision, strong westerly winds regularly blew out of the Sierra Nevada Mountains toward the plaintiffs' homes, regularly inundating them with the insidious dust and dirt from the defendants' construction project.

Plaintiffs claimed and were awarded punitive damages based upon the defendants' malicious and oppressive conduct as illustrated by their absolute failure to recognize the seriousness of the problem and to take proper steps to halt or prevent the dust storms.

The verdict returned by the jury on February 18, 1988, included an award of $6,000,000 in compensatory damages and $3,500,000 in punitive damages.

Presently, the trial court has the defendants' new trial and judgment NOV motions under submission, the primary issue being the constitutionality of the Nevada punitive damage law.

Seat Belt Hazards Identified by D.O.T.

Just how safe are the seat belts all Californians are being compelled to wear by virtue of California Vehicle Code §27315? Unfortunately, not as safe as auto manufacturers would have us believe.

Given that many states have now instituted mandatory seat belt use laws, the safety of passenger restraint systems has become a question of major importance in crashworthiness and second impact cases. Indeed, the adequacy of the passenger restraint system should be investigated in all cases where substantial injury has occurred to a passenger.

Recent testing completed by the Department of Transportation (D.O.T.), as well as information generated in passenger restraint litigation across the country, has uncovered information which suggests that under certain circumstances passengers are at higher risk of serious injury when wearing their seat belt than if they were not wearing it.

Passenger restraint defect claims are generally focused in two areas. First are those cases where front seat passengers are killed or paralyzed by virtue of the absence of air bags. Although automobile manufacturers have claimed for many years that it was neither economically nor technologically feasible to include air bags in standard passenger vehicles, internal corporate documents generated in litigation now prove the contrary. Indeed, included within materials generated in cases now pending across the country are transcripts of conversations contained in President Nixon's notorious office tapes. Auto manufacturers who approached him in 1976 are heard to seek a repeal of the Department of Transportation regulations mandating the inclusion of air bags on all 1976 vehicles. While the D.O.T. regulation was ultimately repealed, many Ford fleet vehicles for that year had already been produced by the date of the repeal. Hence, there exists on the road today a number of 1976 Fords which are in fact equipped with air bags. Under such circumstances the auto

See SEAT BELTS *on page 5.*

Seat Belts

Continued from page 4.

manufacturers can hardly claim that air bag inclusion was not feasible over ten years ago.

The second focus of inquiry is the adequacy of the rear seat passenger restraint system. Recent Department of Transportation studies indicate that rear lap belts are responsible for an ever growing number of severe abdominal and spinal injuries. The absence of a shoulder harness causes far too much force to be directed to the abdomen of the passenger. This causes any number of injuries including fracture of the spine, laceration of the spinal cord, tearing of the bowels, and other blunt trauma to internal organs. Of all the vehicles now on the road, the one with a design most likely to injure, kill or p[illegible]yze by virture of its poor rear lap belt design appears to be the 1986 Ford Escort. Because of the unique positioning of the belt anchors, the Escort lap belt is more likely to misdirect loading forces during a front end impact. Lap belts, if they are to be effective at all, should direct force and restrain the body across the hips. The Escort belt, by reason of its design, directs force across the abdomen, thereby risking serious injury to the stomach, organs and spine.

Most automobiles presently being marketed in the United States, injury to the stomoach, organs and spine.

Most automobiles presently being marketed in the United States, domestic and foreign, are not equipped with rear shoulder harnesses. Conversely, all passenger vehicles sold in common market countries have included rear seat shoulder harnesses since 1973. This includes American, Japanese and European made autos. Moreover, since 1976 all vehicles marketed in Japan have required rear seat shoulder harnesses. In other words, while American auto makers are providing only lap belt protection to American consumers, they are providing three point restraint protection to European and Japanese consumers who purchase the very same cars. For this reason, under the *Barker v. Lull* test, manufacturers have a very difficult time arguing that the absence of adequate rear seat shoulder harnesses does not constitute a design defect. This was most recently illustrated in a case against Ford tried in Federal District Court in Washington. There an Escort rear lap belt was found defective for having caused paralyzing injuries to a rear seat passenger. During the course of the trial plaintiff's counsel brought in the jury to see that the 1982 model, manufactured here but distributed in Europe, was equipped with a rear shoulder harness while the 1985 Escort manufactured for U.S. domestic use was equipped with only a lap belt.

Our firm is presently involved in multiple cases involving inadequate passenger restraint systems, and seat belt induced or exacerbated injuries. In any case where severe injuries have occurred to vehicle occupants and the vehicle is less than ten years old, plaintiff's counsel should investigate whether or not the passenger restraint system and seat belt design was in fact adequate. Through our affiliation with our attorneys across the country we are in a position to obtain and sort information being generated in other passenger restraint cases. Because these cases are complex, costly and involve substantial discovery, we encourage our associate counsel to contact us early in the course of these cases if they intend to associate with us in their prosecution.

Pilot Life Continued

In our last issue of this newsletter, we discussed the preemptive effect of ERISA on pending and future bad faith actions. *Pilot Life Insurance Company v. Dedaux*, 107 S.Ct.1549 (1987) held that the Employee Retirement Income Security Act of 1974 (ERISA) precluded state law causes of action against insurers for failure to provide benefits under any employee welfare benefit plan. Whether ERISA preempts all causes of action, including those arising out of state statutes regulating insurance [e.g. Insurance Code §790.03(h)] remains unclear. There is no appellate authority on point. The only Federal Court of Appeal decision on this topic has now been withdrawn with the Ninth Circuit requesting additional briefs on this specific issue. *Kanne v. Connecticut General Life*, 819 F.2d 204 (9th Cir. 1987).

Two federal district trial courts have now held that ERISA does in fact preempt claims alleging §790.03 violations. In *Roberson v. Equitable Life*, 661 F.Supp., 416 (C.D. Cal. 1987) Judge Rymer so held, finding that any other interpretation would infringe on the exclusive remedy provisions of ERISA. Similarly, in *Lee v. Prudential Insurance Company,* 673 F.Supp.988 (N.D. Cal. 1987), Judge Weigel held state claims preempted.

At the state court level, the issue remains pending before our Supreme Court in *Goodrich v. General Telephone* (1987) 195 Cal.App.3d 675, Rev. Granted, 12/23/87.

Announcements . . .

Dan Kelly has been elected a fellow of the International Society of Barristers. The group of 600 trial lawyers has fellows in all 50 states as well as in Canada, Belgium, England, Luxembourg and Sweden. On September 3, Dan will be at Lake Tahoe discussing settlement conference techniques in a program for California Judges put on by the California Center for Judicial Education and Research.

On September 17, **Mary Driscoll** will be a speaker for the CTLA program on "Handling Personal Injury Litigation."

The firm's medical-legal consultant, **Dr. Wesley Sokolosky**, will be attending the annual meeting of the American Society of Anesthesiology commencing October 10th here in San Francisco.

Congratulations are in order: **Bruce Walkup** and his grandson, **Bruce Wilson**, won the father-son golf tournament which was held on August 7th at the San Francisco Golf Club.

Are You Ready For Fast Track?

Questions have now started to pour in from our referring counsel regarding how we are handling various aspects of the "fast track" Trial Court Delay Reduction Act. Because our firm has cases pending in all of the counties experimenting with these new procedures, we have had the opportunity to gain insight and experience into the benefits and problems of the new system.

Without a doubt, fast track is *fast*. While this is beneficial in some cases, in others it is a nightmare. In complex cases it is mandatory that a thorough investigation be completed well before the case is filed. Once the complaint is entered into the Superior Court computer, there is not enough time to locate witnesses, review and refine theories of liability, retain consultants, or gather technical data. Therefore, we suggest that referring counsel who wish us to associate in complex cases not wait until the eleventh hour to do so.

The fast-track system ignores an attorney's personal schedule. If he or she cannot appear at an OSC hearing, or other conference, the date will generally not be changed to accommodate his/her schedule. Indeed, some judges have suggested that fast track will ultimately prevent the sole practitioner from litigating.

Attorneys in San Diego who have been subjected to an expedited litigation system since January 1, 1987, report having to hire more staff in order to cope with the new system. This, of course, is not a solution universally available to all firms. Indeed, more and more small firms are being compelled to refer out or associate larger firms on litigation matters.

In addition to being fast, the new system is complicated. Besides the original nine pilot counties (San Francisco, Alameda, Contra Costa, Los Angeles, San Diego, Riverside, Orange, Sacramento and Kern) four more have now joined the fun: Fresno, Yolo, Santa Barbara and Napa. San Mateo, Santa Clara, Sonoma, Humboldt, Ventura and others are considering adoption of some form of fast track program. Statewide extension of the plan is now being recommended by the Judicial Council.

Unfortunately, each county has its own rules, leading to what some commentators call the "Balkanization" of the California court system. Diversity of local rules was initially intended to encourage experimentation. The experiment has gotten out of hand. The multiplicity of conflicting rules is a practitioner's nightmare. The problem has become sufficiently severe that the legislature is now considering a move to require all new counties enacting trial court reduction delay systems to adhere to a uniform set of rules. In the meantime, judges in the thirteen participating counties continue to meet, discuss how their programs are going, adjust their rules, and change their procedures. On August 1, 1988, Alameda Country issued its *fourth* set of rules for its program which began November 1, 1987. One southern California attorney has been quoted as saying that the easiest way to throw opposing counsel off stride is to claim that you have a more up-to-date set of rules than he has!

The most troubling feature of these ever changing local rules is that many directly conflict with the Code of Civil Procedure. For example, all fast track counties have drastically shortened the statutory time within which to serve and return proof of service as provided by CCP §583.210. In nine of the current fast track jurisdictions, the three-year limit has been reduced to 65 days or less. Four counties compel a plaintiff to take a default immediately after a responsive pleading becomes overdue. This requirement overlooks the practical problems of effecting quick personal service of a damages statement on the non-appearing defendant. At present, the legislature is considering various proposals which would make the Code of Civil Procedure subsidiary to local rules, fragmenting a body of law created over decades and upon which attorneys have come to rely statewide. One wonders why it is necessary to have statewide rules of procedure at all if each borough and judicial district is permitted to enact hometown rules which will act as traps for out-of-town counsel.

Within the next two years it is anticipated that the entire fast track system will be computerized, with bar-coded documents provided by each county, computer links between counties and law offices for faster transmission of data and calendar checks, and computer-generated documents via FAX machines. These technological complexities, added to the existing labyrinth of statutes, will be potentially overwhelming, even for those firms with large support staffs.

Inevitably, the system promises to generate a staggering increase in professional negligence claims against smaller firms and solo practitioners who are unable to manage cases in multiple jurisdictions under contradictory sets of inflexible local rules and time limits, all of which conflict with existing statewide time limits and rules of procedure. Moreover, an increasing number of cases will be filed at the eleventh hour in order to avoid early application of fast track principles with a resulting increase in the number of untimely filings and missed statutes of limitation.

Because fast track is fast, it is more difficult than ever to associate on a case late in its prosecution. For those associate counsel who often initiate early action on cases they intend to subsequently refer to our firm, we urge you to associate with us prior to filing. Given the accelerated rate at which fast track litigation must proceed, early association is key if we are to have sufficient time to properly prepare cases in advance of trial.

Recent Cases

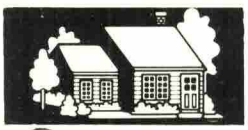
TOXIC TORTS

Sullivan v. Pest Control

Jeff Holl recently settled *Sullivan v. Pest Control* (C-87-1522 JPV, USDC ND Cal.) for $356,000. The Sullivan family had their Vacaville home sprayed for termites with chlordane. The EPA allows limited use of this chemical only by licensed pest control applicators as it is considered a potential carcinogen. After the application, family members noted chemical odors, puddling of the termiticide on floors and vague flu-like symptoms. The Sullivans were able to remain in the home only sporadically for four months after the application, and, on the advice of a family physician, ultimately evacuated the home and rented a substitute residence.

Plaintiffs contended that the termiticide had been misapplied so as to contaminate the home's solar rockbed heating system causing abnormal air levels of the chemical in the house. Defendants denied misapplication and contended that human contact with chlordane posed no hazard.

After resolving a first party contamination claim with the plaintiffs' homeowner's insurance carrier the defendants paid plaintiffs a total of $356,000 in exchange for a deed to the contaminated home, which was appraised at $181,000.



PREMISES LIABILITY

McWalters v. Cardinale

In *McWalters v. Cardinale* (Co.Co.County No. 295061) **Kevin L. Domecus** received a $103,500 arbitration award on behalf of a 66-year-old retired man who tripped over a drainage pipe in the driveway abutting his mother-in-law's home.

At the time of the accident the plaintiff was carrying several glass bottles which shattered and lacerated his hand. Three weeks later he noticed discomfort in his right knee, ultimately diagnosed as torn cartilage and repaired by arthroscopic surgery. Ten days after arthroscopy, the knee buckled and caused the plaintiff to fall and fracture his right hip. Ultimately, the hip and hand injuries healed, however, pain and stiffness in the knee remained.

At arbitration the defendant claimed that the pipe was clearly visible and that neither the knee injury or the fractured hip were related to the accident given the late onset of symptoms.

Medical bills totalled $22,000. Prior to the hearing a policy limits demand in the amount of $100,000 had been submitted. Defendant's offer was $50,000.

GOVERNMENT LIABILITY

Kelly v. City of San Jose and George Graham

In *Kelly v. City of San Jose and George Graham,* (USDC No. C 86 20526 RPA) **Kevin L. Domecus** and **Richard H. Schoenberger** obtained a $212,500 verdict in a police brutality case.

On March 30, 1986, the plaintiff, a 36-year-old unemployed cement mixer driver, was stopped by San Jose Police Officer George Graham for driving with a bald tire and expired plates. Having left his wallet and driver's license at home, Kelly was unable to produce identification satisfactory to Graham. After several minutes of argument, Graham arrested him. During the course of the arrest, Graham shattered Kelly's left kneecap with his police baton.

Plaintiff contended that the defendant officer unreasonably refused to accept his explanation of his lack of identification and assaulted him for no reason. Defendant contended that the plaintiff's belligerent and argumentative attitude and failure to cooperate justified the use of physical force.

The injury required two surgeries with a third still necessary to break adhesions in the knee. Past medical expenses totalled $10,500, and future medical expenses were estimated at $10,000. No wage loss claim was asserted.

After one day of deliberation, the jury returned a verdict of $197,500 in compensatory damages and $15,000 in punitive damages against Officer Graham.

VEHICULAR NEGLIGENCE

Hickey v. Prudential Insurance Company

In *Hickey v. Prudential Insurance Company,* **Michael A. Kelly** obtained a net $108,000 verdict ($270,000 less 60% comparative fault) for the wrongful death of a 21-year-old carpenter in an uninsured motorist abitration. The decedent was survived by his parents, who have been separated since he was a young boy.

The decedent had just left a Burlingame tavern and was in the process of crossing California Drive when he was struck by the uninsured driver of a 1982 Honda. The impact resulted in severe head injuries which caused his death two days later. Because the deceased was legally intoxicated, Prudential contended that the accident was entirely his fault. Two independent witnesses disagreed as to whether or not the uninsured driver had her lights on.

At the time of his death the decedent lived at home with his mother and sister. He was not contributing financial support to his mother or father.

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Recent Cases

Continued from previous page.

MEDICAL MALPRACTICE

Honnert v. Doe, M.D.

In *Honnert v. Doe, M.D.* (San Mateo County Sup.Ct. No. 313652) **John D. Link** negotiated a $375,000 settlement for the widow and adult heirs of decedent Donald Honnert, age 61 at the time of his death. Plaintiffs claimed that the defendant physicians failed to timely diagnose and treat acute bacterial endocarditis during the one month prior to his death.

Rather, decedent's physicians undertook to diagnose his complaints of fatigue but neglected to obtain a chest X-ray prior to administering Heparin to treat an incorrect diagnosis of pulmonary embolism. The Heparin caused cerebral hemorhage and death.

Wheatley v. U.S.A.

In *Wheatley v. U.S.A.* (USDC E.D. CA No. S-85-1300-RAR), **Daniel J. Kelly** negotiated a settlement on behalf of a 3-year-old girl who sustained burn injuries on the first day of her life due to a power outage at the Mather Air Force Base Hospital.

Plaintiffs alleged that in an attempt to keep the child warm following the power outage, a nurse applied chemical packs to the child. These chemical packs were unfortunately placed on her unwrapped, causing severe burn injuries to the child. Her face was fortunately not burned.

The government contended that the $250,000 general damage limitation of California Civil Code §3333.2 was applicable to such actions against the Federal Government (*Taylor v. United States*, 821 F.2d 1428).

The Court-approved settlement was for a combination of cash payment and annuity payments as well. The total cost of the settlement was $608,151.

Ayanian v. Children's Hospital Health Plan

In *Ayanian v. Children's Hospital Health Plan* (S.F. Sup.Ct. No. 868010), **Paul Melodia** and **Mary E. Driscoll** negotiated a $290,000 settlement on behalf of a 33-year-old woman who developed metastatic colon cancer as a result of claimed negligence by the staff of Children's Hospital Health Plan.

Plaintiff contended that the lack of continuity of care intrinsic to a clinic setting contributed to an eighteen month delay in the diagnosis of colon cancer, and further, that a diagnosis of irritable bowel syndrome mandated comprehensive diagnostic work-up to exclude potentially fatal gastrointestinal problems, including cancer.

Defendants contended that plaintiff's failure to get routine gynecological examinations was the sole cause of her disease progressing to a metastatic level.

Reid v. U.S.A.

Ralph Bastian recently concluded *Reid v. U.S.A.*, a medical negligence action which involved brain damage to a 34-year-old nurse. The plaintiff, wife of an Air Force Major, entered Keesler Air Force Base on August 29, 1984, complaining of severe headaches. She was discharged with a diagnosis of tension headache. She returned to Keesler Emergency Room on November 13, 1984, with a recurrence of severe headaches associated with dizziness, nausea and vomiting. She was treated with Demerol and released. On November 27, 1984, she sustained a severe subarachnoid hemorrhage and lapsed into a coma.

Plaintiffs contended that on August 29, 1984, her complaints were consistent with a small subarachnoid hemorrhage and that there was a failure to perform an arteriogram which would have disclosed a leaking aneurysm which ruptured on November 27, 1984. Mrs. Reid is in a complete vegetative state with a seven year life expectancy.

The settlement consisted of a payment of $120,000 cash, annuity payment of $3,500 per month increasing at five percent per year, and an irrevocable intervivos trust funded by the Air Force with initial seed money of $200,000.

Compromise of any future wrongful death settlement was also arrived at on behalf of Mrs. Reid's heirs. The present cash value of this component of the settlement, also an annuity, was $310,743.